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# THE FEDERAL ROLE IN UNIVERSAL PRE-K

*Brian McWalters*\*

## I. INTRODUCTION

In his 2013 State of the Union address, President Barack Obama proposed that the federal government work with states to make “high quality preschool available to every single child in America.”<sup>1</sup> In the following days and years, the Obama administration, seeking to garner support for its Preschool for All proposal, echoed the arguments that have long been made in favor of preschool.<sup>2</sup> Neuroscience research shows that the human brain at three and four years-old, the age at which children attend preschool, is in a “sensitive period” and is optimally receptive to intellectual stimulation.<sup>3</sup> Social science likewise suggests there is a unique window of opportunity at preschool age to positively impact a child’s life.<sup>4</sup> Numerous studies show that

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1. President Barack Obama, State of the Union Address (Feb. 12, 2013).

2. See OFF. OF THE PRESS SECRETARY, THE WHITE HOUSE, FACT SHEET: HELPING ALL WORKING FAMILIES WITH YOUNG CHILDREN AFFORD CHILD CARE (Jan. 21, 2015), 2015 WL 269545, at \*1 (pointing to the body of evidence showing the positive impact preschool has on numerous life outcomes); OFF. OF THE PRESS SECRETARY, THE WHITE HOUSE, PRESS BRIEFING BY PRESS SECRETARY JOSH EARNEST AND SECRETARY OF EDUCATION KING (Sept. 29, 2016), 2016 WL 5540012, at \*3 (noting the high returns of preschool as a societal investment); OFF. OF THE PRESS SECRETARY, THE WHITE HOUSE, FACT SHEET PRESIDENT OBAMA’S PLAN FOR EARLY EDUCATION FOR ALL AMERICANS (Feb. 13, 2013), 2013 WL 543888, at \*1 (advocating for preschool as a tool for reducing inequality and leveling the playing field for children from low-income families).

3. Pat Levitt, *Building Brain Architecture and Chemistry: A Primer for Policymakers*, in INVESTING IN EARLY CHILDHOOD DEVELOPMENT 3, 16 (Alvin R. Tarlov & Michelle Pre-court Debbink eds., 2008).

4. See James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49, 50

attending preschool can have a positive impact on a wide range of life outcomes, including increased performance in later schooling, fewer interactions with the criminal justice system, and higher earnings as adults.<sup>5</sup>

While not impossible to effect these positive outcomes with educational interventions later in life, preschool presents an optimal opportunity to make a substantial impact at relatively minimal cost.<sup>6</sup> Indeed, the evident economic benefits of preschool is one of its major selling points.<sup>7</sup> Most cost-benefit analyses suggest that investment in preschool produces economic gains, resulting from lower special education placement rates, reduced grade repetition, decreased welfare dependency, and fewer costs for the criminal justice system, that significantly outweigh the costs.<sup>8</sup>

Education experts rightly caution that preschool is not a panacea for all societal ills and that it should not be hailed as such at the expense of other education reforms.<sup>9</sup> However, preschool is worth prioritizing. Whereas the efficacy of many education policies is a matter of contentious socio-scientific debate, a significant majority of the large body of empirical evidence assessing preschool points towards its efficacy as a tool for meaningful impact.<sup>10</sup>

Preschool reform is also thought to be less inert than other education policy areas and, therefore, more responsive to

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(2006).

5. *Id.* at 57.

6. DAVID L. KIRP, THE SANDBOX INVESTMENT 110 (2007); Levitt, *supra* note 3, at 16.

7. Ryan, *supra* note 4, at 92.

8. *Id.* at 66-67 (cavassing research that shows return-on-investment ratios ranging from two-to-one to over seven-to-one); KIRP, *supra* note 6, at 82, 160-61 (citing a study estimating a 3 to 1 return on a state's investment in UPK).

9. Ryan, *supra* note 4, at 63; KIRP, *supra* note 6, at 8; ELIZABETH ROSE, THE PROMISE OF PRESCHOOL: FROM HEAD START TO UNIVERSAL PRE-KINDERGARTEN 226 (2010).

10. Ryan, *supra* note 4, at 50, 68-69, 88; KIRP, *supra* note 6, at 78.

advocacy efforts.<sup>11</sup> Compared to K-12 education, preschool is a relatively new issue with fewer entrenched special interest groups to resist reform.<sup>12</sup> The preschool issue may be particularly hot right now; there is broad public support from a wide range of entities, including teachers unions, business leaders, economists, and philanthropists, for increasing access to preschool.<sup>13</sup> It is unclear whether any type of early childhood education (ECE) reform is likely to be acted upon by the current administration; the first budget summary released by President Donald Trump proposed a significant reduction to the Department of Education's budget.<sup>14</sup> The administration's support for school-choice initiatives,<sup>15</sup> and the First Daughter's focus on child care,<sup>16</sup> suggest that a program like the Child Care and Development Block Grant, which "promote[s] parental choice to empower working parents to make their own decisions regarding the child care services,"<sup>17</sup> may be the only new early childhood expenditure palatable to the new administration. However, the overall trend for preschool reform has been rising bipartisan support.<sup>18</sup> The conventional conservative argu-

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11. Ryan, *supra* note 4, at 51; BRENDA K. BUSHOUSE, UNIVERSAL PRESCHOOL: POLICY CHANGE, STABILITY, AND THE PEW CHARITABLE TRUSTS 109 (2009); ROSE, *supra* note 9, at 137-38.

12. BUSHOUSE, *supra* note 11, at 109.

13. Ryan, *supra* note 4, at 49-50.

14. Emma Brown & Danielle Douglas-Gabriel, *Trump Seeks to Slash Education Department but Make Big Push for School Choice*, WASH. POST, Mar. 16, 2017, [https://www.washingtonpost.com/local/education/trump-seeks-to-slash-education-department-but-make-big-push-for-school-choice/2017/03/15/63b8b6f8-09a1-11e7-b77c-0047d15a24e0\\_story.html](https://www.washingtonpost.com/local/education/trump-seeks-to-slash-education-department-but-make-big-push-for-school-choice/2017/03/15/63b8b6f8-09a1-11e7-b77c-0047d15a24e0_story.html).

15. *Id.*

16. Sahil Kapur et al., *Inside Ivanka Trump's Campaign for a \$500 Billion Child-Care Plan*, BLOOMBERG (Feb. 23, 2017), <https://www.bloomberg.com/politics/articles/2017-02-23/ivanka-trump-is-pushing-her-500-billion-child-care-plan-on-hill>. Child care and preschool are sometimes treated as analytical distinct, with the former focused on empowering mothers to pursue economic opportunities and the latter focused on the education of children. The First Daughter's conception of child care seems to embody this divide. *Id.*

17. 42 U.S.C. § 9857(b)(2) (2012).

18. DAVID L. KIRP, THE SANDBOX INVESTMENT 160 (2007) (quoting Republican pollster Frank Luntz as saying "Republicans favor these programs at a much higher rate than we expected.").

ment that the government should have no role in ECE has lost ground to the growing public sentiment that preschool is a wise societal investment, and many politicians on the right have modified their stance accordingly.<sup>19</sup> The enactment of new preschool programs as recently as 2015 by a Republican-controlled Congress<sup>20</sup> suggests that such initiatives could again be politically viable in the near future.

Public support is high, not only for preschool generally, but specifically for the federal government taking a prominent role in expanding access to preschool.<sup>21</sup> An issue with national implications, including the health of the nation's democratic institutions and economy, a prominent federal role in ECE is warranted.<sup>22</sup> Furthermore, the federal government, while not without its own fiscal constraints, can nonetheless use its considerable resources to assist states that have the will but lack the capacity to expand preschool on their own.<sup>23</sup> Lastly, there is more historical justification for a strong federal role in ECE. Though education has long been considered a central responsibility of state and local governments, a common argument made against federal intervention,<sup>24</sup> ECE is actually one area where the federal government has traditionally had a leading role.<sup>25</sup> The federal government created and administered the

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19. James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49, 93 (2006) (noting that such conservative arguments are particularly unavailing when preschool is voluntary, *see infra* n.28); BUSHOUSE, *supra* note 11, at 160; KIRP, *supra* note 18, at 166-67.

20. Every Student Succeeds Act, Pub. L. No. 114-95, § 9212(d)(5), 129 Stat. 1802, 2154 (2015).

21. 2015: *Another Momentous Year for Early Childhood Education*, FIRST FIVE YEARS FUND (Dec. 30, 2015), <http://ffyf.org/2015-another-momentous-year-for-early-childhood-education/> ("An overwhelming majority of the voting public ranked early childhood development as one of the most important federal issues.").

22. Shannon K. McGovern, Note, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1543-46 (2011) (discussing the need for a federal role in education generally); *See infra* notes 32-39 and accompanying text, noting how these arguments extend logically to preschool.

23. McGovern, *supra* note 22, at 1546-47.

24. *Id.* at 1525, 1529.

25. Ryan, *supra* note 19, at 54.

national Head Start program, which funds a range of early childhood developmental programs that serve children from low-income families,<sup>26</sup> decades before most states took up the preschool mantle.<sup>27</sup>

While the efficacy of preschool may enjoy a general consensus, there is disagreement among advocates about whether efforts should be focused on creating targeted preschool programs (TPK), in which education services are made available specifically for low-income children, or establishing universal preschool (UPK),<sup>28</sup> in which all children, regardless of socio-economic status, are afforded the opportunity to attend free preschool.<sup>29</sup> Indeed, Obama's proposed initiative embodied this divide. Notwithstanding its titular objective, Preschool for All would have only required states to extend publicly-funded preschool to four-year-olds from families at or below 200% of the poverty line.<sup>30</sup> However, with additional features incentivizing states to extend access even further,<sup>31</sup> UPK may have been the ultimate goal.

This paper argues that the federal government should promote UPK reform and that it can best accomplish this through a competitive grant program that cognizes the state-level conditions most conducive to UPK implementation. Part

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26. 42 U.S.C. § 9831 et seq. (2012).

27. Ryan, *supra* note 19, at 54.

28. UPK usually connotes a voluntary program in which parents are given the option, rather than required, to enroll their children. Aryn M. Dotterer et al., *Comparing Universal and Targeted Prekindergarten Programs*, in *THE PROMISE OF PRE-K* 65, 66 (Robert C. Pianta & Carollee Howes eds., 2009). This paper uses UPK in this prevailing sense and will not discuss this policy design choice, except to say, briefly, that pursuing a mandatory system of UPK would, at this time, be politically infeasible. Ryan, *supra* note 19, at 92-93.

29. Grover J. Whitehurst, *Can We Be Hard-Headed About Preschool? A Look at Universal and Targeted Pre-K*, BROOKINGS INSTITUTION (Jan. 23, 2013), <https://www.brookings.edu/research/can-we-be-hard-headed-about-preschool-a-look-at-universal-and-targeted-pre-k/>.

30. OFF. OF THE PRESS SECRETARY, THE WHITE HOUSE, FACT SHEET: HELPING ALL WORKING FAMILIES WITH YOUNG CHILDREN AFFORD CHILD CARE (Jan. 21, 2015), 2015 WL 269545, at \*3.

31. *Id.*

II will posit that UPK is a worthwhile goal, both because of the impact it stands to make for all children and because UPK systems may ultimately produce better results for low-income children than TPK. Part III will show that a competitive grant program, rather than a cost-sharing initiative or formula grant program, is the most practical paradigm for effectuating meaningful UPK reform, and that such a program should award funds to states, rather than more local government entities. Part IV will examine the state-level process of UPK implementation in three pioneering states. Part V will then turn back to program design, this time abstracting from the state-level examination the crucial factors to successful UPK implementation and recommending how a competitive grant program can best leverage these factors.

## II. UNIVERSAL VS. TARGETED PRESCHOOL

### *a. Differing Aims of Universal and Targeted Preschool*

Proponents of UPK and TPK often focus on distinct normative considerations. UPK advocates note that many of the reasons for why Americans value universal access to a free K-12 education apply with equal force to preschool.<sup>32</sup> Education is often exalted for its role in molding conscientious citizens and participants in our democratic system.<sup>33</sup> Education reformers have, since this country's infancy, emphasized its role in cultivating an informed and capable citizenry, and this function is responsible, in part, for the adoption of a universally-free

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32. ELIZABETH ROSE, *THE PROMISE OF PRESCHOOL: FROM HEAD START TO UNIVERSAL PRE-KINDERGARTEN* 146 (2010).

33. Susan H. Bitensky, *Theoretical Foundations for A Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 550-51 (1992); Richard L. Wobbekind, *On the Importance of Education*, 47 BUS. ECON. 90, 91 (2012).

K-12 education system in every state.<sup>34</sup> Given the body of evidence suggesting that early childhood education makes participants more amenable to later schooling,<sup>35</sup> this rationale for universal education extends logically to preschool.<sup>36</sup>

Universal education also has important implications for the national economy, dictating the strength of the national workforce and portending the economy's ability to grow.<sup>37</sup> Some economists have concluded that preschool is, in the long run, significantly more effective at boosting economic productivity than K-12 reform initiatives or even job training programs.<sup>38</sup> This helps explain why the UPK movement has found some of its most ardent supporters in the business community.<sup>39</sup>

Advocates of TPK focus on preschool as a tool for narrowing the achievement gap that exists between children from low-income backgrounds and those from wealthier households. Low-income children often enter kindergarten significantly behind their peers in academic capabilities, and this initial gap often expands as their schooling progresses.<sup>40</sup> Because a government has limited resources with which to make preschool freely accessible, TPK advocates argue that those resources should be focused on those children who would not otherwise have access.<sup>41</sup>

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34. Bitensky, *supra* note 33, at 551.

35. James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49, 57 (2006).

36. *See id.* at 51; ROSE, *supra* note 32, at 146.

37. Shannon K. McGovern, Note, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1543-44 (2011).

38. DAVID L. KIRP, *THE SANDBOX INVESTMENT* 78 (2007).

39. KIRP, *supra* note 38, at 76; ROSE, *supra* note 32, at 135; *see infra* note 164 and accompanying text.

40. Ryan, *supra* note 35, at 56.

41. *Id.* at 68; ROSE, *supra* note 32, at 131; Grover J. Whitehurst, *Can We Be Hard-Headed About Preschool? A Look at Universal and Targeted Pre-K*, BROOKINGS INSTITUTION (Jan. 23, 2013), <https://www.brookings.edu/research/can-we-be-hard-headed-about-preschool-a-look-at-universal-and-targeted-pre-k/>.

Though low-income children would have access to preschool under a UPK system, TPK advocates worry that UPK spreads finite public resources too thin, diluting the quality of education received by low-income children for the benefit of families that ostensibly have other means to provide for their young children's education.<sup>42</sup> Furthermore, UPK systems could, TPK advocates fear, fall into the same funding paradox that has bedeviled K-12 funding, in which schools serving children from wealthier localities frequently receive *more* resources than the schools serving low-income children that are more in need of resources.<sup>43</sup>

*b. Overlapping Impact: Equality*

The intuitive appeal of preschool as a means to level the playing field for disadvantaged children bolsters the TPK paradigm's claim to primacy in the preschool debate. However, there are reasons to believe that UPK systems can also advance these interests for low-income children. First, there is reason to believe that legislators seeking to design equitable UPK systems will not face the same obstacles that have impeded the progress of K-12 finance reform. The entrenched and unwieldy bureaucracies that have accumulated over the long history of K-12 education are rare in the realm of ECE,<sup>44</sup> and policymakers have proven adept at integrating those ECE entities that are pre-existing into mixed-delivery systems. Recently, states have indeed been successful in designing systems that provide universal access while prioritizing the interests of low-income children.<sup>45</sup>

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42. Natalie Gomez-Velez, *Can Universal Pre-K Overcome Extreme Race and Income Segregation to Reach New York's Neediest Children? The Importance of Legal Infrastructure and the Limits of the Law*, 63 CLEV. ST. L. REV. 319, 340, 351 (2015).

43. *Id.* at 340.

44. *See supra* notes 11-12 and accompanying text.

45. Gomez-Velez, *supra* note 42, at 336 (noting that, although budgetary problems have impeded its implementation, New York State's UPK law is well-designed to "serve the interests

More importantly, political realities bring into question whether TPK programs are actually more effective than UPK in ensuring the quality of the preschool for low-income children. TPK programs are often marginalized in public discourse as welfare programs and subjected to proposed budget cuts, especially in fiscally conservative states.<sup>46</sup> TPK programs that struggle to maintain funding must choose between making cuts that hurt quality<sup>47</sup> or further limiting eligibility to only the most impoverished children.<sup>48</sup> Many TPK programs are, as a result of dwindling funding, unable to serve all of the low-income children in their ambit,<sup>49</sup> a shortcoming made all the more glaring by the fact that many families not considered low-income nonetheless struggle with ECE costs.<sup>50</sup>

UPK tends to garner wide public support, making it less likely to end up on a legislature's proverbial chopping block.<sup>51</sup> In Georgia and Oklahoma, two model UPK states discussed below, commentators suggest that the universality of their preschool programs has lifted them above the partisan fray and ensured their longevity.<sup>52</sup> For two decades now, these states have

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in reaching vulnerable children, ensuring high quality programs, and addressing issues necessary to close achievement gaps.”).

46. BRENDA K. BUSHOUSE, *UNIVERSAL PRESCHOOL: POLICY CHANGE, STABILITY, AND THE PEW CHARITABLE TRUSTS* 60-61 (2009); KIRP, *supra* note 6, at 89.

47. DAVID L. KIRP, *THE SANDBOX INVESTMENT* 39, 45, 67 (2007) (noting that while quality, not money, is the end sought, funding a vital means to that end).

48. See Sara Dorn, *Ohio Preschool Funding Policy Cuts Millions from Schools Serving Poorest Kids*, CLEVELAND.COM (Aug. 9, 2016), [http://www.cleveland.com/metro/index.ssf/2016/08/ohio\\_preschool\\_funding\\_policy.html](http://www.cleveland.com/metro/index.ssf/2016/08/ohio_preschool_funding_policy.html).

49. ELIZABETH ROSE, *THE PROMISE OF PRESCHOOL: FROM HEAD START TO UNIVERSAL PRE-KINDERGARTEN* 132 (2010).

50. Wilson Greene, *Universal Preschool: A Costly but Worthy Goal*, 35 J.L. & EDUC. 555, 555 (2006); ROSE, *supra* note 49, at 109, 113, 136; see Ethan Wolff-Mann, *Is Your State One of 23 Where Pre-K Costs More Than College?*, TIME, April 11, 2016, <http://time.com/money/4289032/pre-k-costs-more-than-college-in-23-states/>.

51. Gomez-Velez, *supra* note 42, at 351; Fawn Johnson, *How Georgia Got Republicans and Democrats to Embrace Universal Pre-K*, THE ATLANTIC, May 7, 2014, <https://www.theatlantic.com/politics/archive/2014/05/how-georgia-got-republicans-and-democrats-to-embrace-universal-pre-k/430899/>.

52. See *infra* notes 117-118, 149-150 and accompanying text.

been able to offer access to high quality preschool to all families struggling with ECE costs, as well as to children from wealthier families.<sup>53</sup>

In addition to its ability to secure stable funding, UPK systems also tend to have other unique characteristics that are conducive to producing high quality programs for low-income children. UPK systems are more likely than TPK to produce preschool classrooms that are socio-economically diverse,<sup>54</sup> a condition that studies suggest can significantly enhance outcomes for low-income children.<sup>55</sup> It is possible for TPK programs to utilize design mechanisms, such as subsidized spots for low-income children in private preschools, to produce diversity, and UPK systems will not always produce diversity in localities fraught with socio-economic isolation.<sup>56</sup> However, empirical evidence from the current ECE landscape suggests that socio-economic diversity is more easily accomplished through UPK.<sup>57</sup>

UPK programs can also be more easily incorporated into existing public elementary school infrastructures, providing access to valuable commodities such as facilities and professional development resources.<sup>58</sup> Assimilation with public elementary schools also fosters the proper alignment of curricula and learning goals, helping to ensure that the academic gains produced by preschool are built upon.<sup>59</sup> Though TPK programs can also

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53. See *infra* notes 124-125, 156-157 and accompanying text.

54. Aryn M. Dotterer et al., *Comparing Universal and Targeted Prekindergarten Programs*, in THE PROMISE OF PRE-K 65, 67 (Robert C. Pianta & Carollee Howes eds., 2009).

55. DAVID L. KIRP, THE SANDBOX INVESTMENT 89-90 (2007); ROSE, *supra* note 49, at 148; CLIO CHANG, THE CENTURY FOUNDATION, WHY INTEGRATED PRESCHOOLS HELP EVERY STUDENT (2015).

56. Aryn M. Dotterer et al., *Comparing Universal and Targeted Prekindergarten Programs*, in THE PROMISE OF PRE-K 69, 74 (Robert C. Pianta & Carollee Howes eds., 2009); KIRP, *supra* note 49, at 89-90.

57. Aryn M. Dotterer et al., *Comparing Universal and Targeted Prekindergarten Programs*, in THE PROMISE OF PRE-K 70 (Robert C. Pianta & Carollee Howes eds., 2009); KIRP, *supra* note 49, at 89-90.

58. ROSE, *supra* note 49, at 175, 177.

59. *Id.* at 177; Kristie Kauerz, *Learning from Others: State Efforts to Expand Services*

be designed to mesh with a public elementary school system, UPK presents a unique opportunity to do so uniformly and avoid the variability that results from a patchwork of separate ECE programs.<sup>60</sup>

Implementing a UPK system can even have a reciprocal positive effect on public elementary schools.<sup>61</sup> In some states, pursuit of UPK has put a renewed focus on ensuring quality kindergarten, a development that could further boost the quality of education received by public school children.<sup>62</sup> Some advocates go so far as to theorize that creating UPK could be the first step in recalibrating early elementary school education to be more age-appropriate in light of our evolving understanding of adolescent development, though this dynamic has yet to materialize in practice.<sup>63</sup>

Studies comparing the quality of current universal and targeted preschool programs suggest neither paradigm has a clear advantage in terms of producing a quality experience for low-income children.<sup>64</sup> UPK programs tend to have longer class days and more experienced teachers while TPK programs tend to produce smaller child-teacher ratios and score better on observational assessments of quality.<sup>65</sup> Measures of academic

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*and Build Systems of Early Care and Education*, in *INVESTING IN EARLY CHILDHOOD DEVELOPMENT*, *supra* note 3, at 85, 102.

60. See ELIZABETH ROSE, *THE PROMISE OF PRESCHOOL: FROM HEAD START TO UNIVERSAL PRE-KINDERGARTEN* 96 (2010).

61. *Id.* at 227-28.

62. Natalie Gomez-Velez, *Can Universal Pre-K Overcome Extreme Race and Income Segregation to Reach New York's Neediest Children? The Importance of Legal Infrastructure and the Limits of the Law*, 63 *CLEV. ST. L. REV.* 319, 334 (2015); Kauerz, *supra* note 59, at 102-03.

63. ROSE, *supra* note 60, at 227.

64. Aryn M. Dotterer et al., *Comparing Universal and Targeted Prekindergarten Programs*, in *THE PROMISE OF PRE-K* 65, 71-74 (Robert C. Pianta & Carollee Howes eds., 2009). Other studies have found the public schools generally provided higher quality preschool than do private providers, ROSE, *supra* note 9, at 177, which suggests UPK should be prioritized over some TPK programs, like CCDB, that provide vouchers to low-income families to be spent on private ECE providers.

65. Dotterer et al., *supra* note 64, at 71-72.

gains are likewise unable to definitively resolve the debate, with some metrics suggesting a narrow advantage for UPK and others a narrow advantage for TPK.<sup>66</sup> These conclusions should, however, ease fears that pursuing UPK implementation will significantly dilute the quality of preschool available to low-income children. UPK's ability to serve national interests<sup>67</sup> and ensure access for moderate-income children<sup>68</sup> should therefore dictate its primacy as a matter of federal policy.

### III. MACRO-DESIGN CHOICES: CHOOSING THE MODEL FOR FEDERAL INTERVENTION

#### *a. Choosing a Federal Intervention Paradigm*

Obama's Preschool for All (PSA) proposal contemplated a federal-state partnership in which the federal government and each of the 50 states shared the costs of implementing and operating state-wide preschool.<sup>69</sup> The federal government would assume a significant share of the costs at first, with states gradually assuming more of the costs over time.<sup>70</sup> The appeal of such a proposal is the sweeping impact it promises: almost instantaneous access to preschool for every preschool-aged child in the nation, regardless of the state in which he or she resides. However, had the Obama administration fleshed out the details of its fledgling initiative, it would have uncovered some formidable legal and political obstacles to such a federal endeavor.

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66. *Id.* at 72-73.

67. See *supra* notes 33-39 and accompanying text.

68. See *supra* notes 51-63 and accompanying text.

69. OFF. OF THE PRESS SECRETARY, THE WHITE HOUSE, FACT SHEET PRESIDENT OBAMA'S PLAN FOR EARLY EDUCATION FOR ALL AMERICANS (Feb. 13, 2013), 2013 WL 543888, at \*1.

70. BUDGET OFFICE, U.S. DEP'T OF EDUC., FISCAL YEAR 2015 BUDGET SUMMARY AND BACKGROUND INFORMATION 13 (2015) [hereinafter BUDGET SUMMARY].

The federal government's legal ability, never mind its political ability, to *mandate* the implementation of UPK in every state is dubious.<sup>71</sup> It is unclear whether Congress's Commerce Clause power, which the Supreme Court has narrowed in recent decades, would enable it to mandate such an education policy.<sup>72</sup> Even with a constitutional basis for such a policy, the federal government would, in order to avoid violating the anti-commandeering principle of the Tenth Amendment, seemingly have to implement and operate a UPK system without requiring any assistance from state or local governments,<sup>73</sup> a costly expansion of the federal bureaucracy that is presumably a political nonstarter.

Any federal UPK policy would therefore likely have to be accomplished using Congress's Spending Clause powers, the means through which almost all of the federal government's education policy has been enacted.<sup>74</sup> Implementing UPK in all 50 states is seemingly possible through use of a formula grant program, in which every state is offered a sum of funding determined algorithmically using criteria such as population.<sup>75</sup> This is the paradigm utilized by Elementary and Secondary Education Act (ESEA), which has provided substantial educational funds to every state for decades.<sup>76</sup>

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71. James E. Ryan, *The Tenth Amendment and Other Paper Tigers: The Legal Boundaries of Education Governance*, in WHO'S IN CHARGE HERE? THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY 42, 47 (Noel Epstein ed., 2004).

72. *Id.* (noting that in *United States v. Lopez*, 514 U.S. 549 (1995), "the Court emphasized that education was an area in which states 'historically have been sovereign' and suggested that public schools might simply be beyond the scope of Congress's regulatory authority.")

73. *See id.* (discussing *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997)).

74. *See* Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 581 (2013).

75. Paul Manna & Laura L. Ryan, *Competitive Grants and Education Federalism: President Obama's Race to the Top Program in Theory and Practice*, 41 PUBLIUS 522, 531-32 (2011).

76. 20 U.S.C. § 6332 (2012).

However, formula grants under the Spending Clause power are also subject to legal constraints. A new UPK grant program cannot attempt to coerce involvement of every state by, for instance, conditioning future ESEA funds on participation in the UPK program.<sup>77</sup> A new formula grant program also likely entails an expensive, long-term federal investment. In his proposed budget, Obama requested from Congress \$75 billion over 10 years to fund PSA.<sup>78</sup> Though support in general is high for a federal role in preschool reform,<sup>79</sup> the political feasibility of a new ECE expenditure as large as Head Start, which is the frequent target of proposed budget cuts by prominent fiscal conservatives,<sup>80</sup> is questionable.

Formula grants are also of limited utility where the goal is to implement specific reforms.<sup>81</sup> Though the federal government can attach conditions to an offer of a formula grant, requiring states that accept to comply with certain policy directives, these conditions tend to be general, leaving states ample leeway to use funds in ways that diverge from the federal government's priorities.<sup>82</sup> Though the federal government could theoretically attach more stringent conditions, flexibility for formula grantees seems especially important given the current

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77. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2603–04 (2012). *But see* Pasachoff, *supra* note 74, at 617, which argues that ESEA reauthorizations are distinguishable from the legislation at issue in *NFIB* and thereby suggests a possibly permissible means to coax states into implementing a new policy initiative.

78. BUDGET SUMMARY, *supra* note 70, at 13.

79. See 2015: Another Momentous Year for Early Childhood Education, FIRST FIVE YEARS FUND (Dec. 30, 2015), <http://fyf.org/2015-another-momentous-year-for-early-childhood-education/>.

80. See Robert Costa, *House GOP Poverty Report Focuses on Reforming Welfare, Overhauling Social Programs*, WASH. POST, Mar. 2, 2014, [https://www.washingtonpost.com/politics/house-gop-budget-will-focus-on-reforming-welfare-overhauling-social-programs/2014/03/02/26b17b78-a23e-11e3-84d4-e59b1709222c\\_story.html](https://www.washingtonpost.com/politics/house-gop-budget-will-focus-on-reforming-welfare-overhauling-social-programs/2014/03/02/26b17b78-a23e-11e3-84d4-e59b1709222c_story.html).

81. Benjamin Michael Superfine, *Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education*, 76 Mo. L. Rev. 81, 107 (2011).

82. ROBERT JAY DILGER & EUGENE BOYD, CONGRESSIONAL RESEARCH SERVICE, BLOCK GRANTS: PERSPECTIVES AND CONTROVERSIES 2, 9-10 (2014).

political climate. In recent years, there has been unprecedented instances of states turning down significant formula funds because of the conditions attached.<sup>83</sup> With flexibility something of a political prerequisite, a UPK formula grant program might actually result in little UPK reform. If, for instance, political realities necessitate minimal matching and maintenance of effort requirements, a grantee could use formula funds to merely supplant pre-existing ECE funds and use these newly freed-up funds for any number of purposes with little relation to UPK.<sup>84</sup>

An alternative to formula grants is competitive grant programs, in which grantees are chosen among a pool of applicants on the basis of some federal-determined set of criteria. Competitive grant programs are typically limited in duration and, consequently, tend to focus on increasing the capacity of grantees so that they can continue progressing toward policy goals after the program ends.<sup>85</sup> That competitive grant programs do not usually entail a perpetual and expensive federal role might explain why Congress has frequently utilized this paradigm for education programs in recent years.<sup>86</sup>

By inviting participation, rather than attempting to coax it from every state, competitive grant programs are more faith-

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83. The most infamous example of this is the Medicaid expansion saga, in which nearly 20 states declined an influx of funding that would have amounted to billions of dollars. This episode may be of limited use as an analogy, given particularly contentious climate surrounding the Affordable Care Act and certain design features like the eventual 10% state match requirement. However, similar threats to refuse substantial federal funds were made about the education funds included in the State Fiscal Stabilization Fund under the American Recovery and Reinvestment Act, *see* Superfine, *supra* note 81, at 107, further suggesting a new willingness among states to reject new formula funding.

84. *See* KENNETH FINEGOLD ET AL., THE URBAN INST., BLOCK GRANTS: DETAILS OF THE BUSH PROPOSALS 7 (2004).

85. The Preschool Development Grant program, discussed *infra* notes 90-91 and accompanying text, requires states to describe plan to sustain grant-related activities after the program ends. Every Student Succeeds Act, Pub. L. No. 114-95, § 9212(d)(5), 129 Stat. 1802, 2154 (2015).

86. *See* Paul Manna & Laura L. Ryan, *Competitive Grants and Education Federalism: President Obama's Race to the Top Program in Theory and Practice*, 41 PUBLIUS 522, 523 (2011).

ful to the spirit of cooperative federalism.<sup>87</sup> The competitive grant paradigm is not completely without detractors who claim they infringe on state autonomy.<sup>88</sup> However, the assertion that states can be compelled into applying to new competitive grant programs has thus far been unavailing, both politically and in court.<sup>89</sup> The political feasibility of the competitive grant model as a means to promote UPK is best evidenced by the recent creation of the Preschool Development Grants program, which was approved as part of the bipartisan Every Student Succeeds Act by a Republican-controlled Congress,<sup>90</sup> and has been described as a precursor to Obama's proposed Preschool for All.<sup>91</sup>

Theoretically, competitive grants have the most limited potential to make a broad impact. Some jurisdictions will choose not to participate in the program, and even many jurisdictions that do apply will not be awarded funds.<sup>92</sup> However, a competitive grant program can have a profound impact for those grantees truly acting as willing partners.<sup>93</sup> By awarding

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87. Omari Scott Simmons, *Lost in Transition: The Implications of Social Capital for Higher Education Access*, 87 NOTRE DAME L. REV. 205, 235-36 (2011).

88. Shannon K. McGovern, Note, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1536-41 (2011).

89. See *Jindal v. United States Dep't of Educ.*, No. CV 14-534-SDD-RLB, 2015 WL 5474290, at \*11 (M.D. La. Sept. 16, 2015) (summarizing one state's arguments against the Race to the Top program before dispensing with them and finding the program a valid exercise of the Spending Clause power).

90. Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

91. OFF. OF THE PRESS SECRETARY, THE WHITE HOUSE, FACT SHEET: THE PRESIDENT'S FISCAL YEAR 2017 BUDGET, 2016 WL 491300, at \*5; OFF. OF THE PRESS SECRETARY, THE WHITE HOUSE, FACT SHEET: OBAMA ADMINISTRATION RECORD FOR WOMEN AND GIRLS (2014), 2014 WL 4198372, at \*3. The Preschool Development Grants awarded funds from a substantially smaller pool of \$250 million to states to be used to bolster the state's education administration capacities. Funds were to be used for conducting assessments of the state's current ECE system, developing plans for coordinating existing programs, disseminating information to parents, and sharing best practices among ECE providers within the state. Pub. L. No. 114-95, § 9212(f), 129 Stat. at 2155-56.

92. How design choices of a competitive grant program might affect both how many states apply and what portion of applicant states are awarded funds is a worthwhile subject that is, regrettably, beyond the scope of this paper.

93. In defending the Race to the Top program, the Obama administration frequently noted that, while the number of states impacted was limited, the program promoted systemic reform in those states awarded funds. OFF. OF THE PRESS SECRETARY, THE WHITE HOUSE,

funds to those jurisdictions where conditions are most favorable to achieving a specific policy goal, competitive grant programs concentrate funding where it is most likely to have type of meaningful impact sought.<sup>94</sup> Formula grant programs, by contrast, can be accused of “throw[ing] good money after bad” in a quixotic attempt to foster reform in states with very different priorities.<sup>95</sup>

A competitive grant program can also have a constructive impact on those jurisdictions that are not awarded funds, as the work done by applicant-jurisdictions to prepare a competitive application can, itself, spur reform.<sup>96</sup> Ultimately, a competitive grant program may even provide a reform impetus to those jurisdictions that initially refrained from applying, as the implementation of UPK in neighboring jurisdictions increases the pressure on policymakers in jurisdictions without UPK.<sup>97</sup> If one competitive grant program is successful in boosting grantee capacity and producing self-sustaining UPK systems in some jurisdictions, subsequent iterations can also be modified to address the conditions that led other jurisdictions to miss out or refrain from applying.<sup>98</sup>

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FACT SHEET: THE RACE TO THE TOP (2009), 2009 WL 3637744, at \*1.

94. See Paul Manna & Laura L. Ryan, *Competitive Grants and Education Federalism: President Obama’s Race to the Top Program in Theory and Practice*, 41 *PUBLIUS* 522, 532 (2011). This contention is also a response, though not a solution, to one of the common critiques of competitive grant programs: that they reward with capacity-enhancing funds those grantees that are able to compete effectively because they already boast high capacity. *Id.* at 533. While the dilemma is vexing, the answer is not to award funds from a limited pool to grantees that are operating at too great a capacity-deficit and cannot plausibly be expected to achieve the impact sought.

95. Joseph P. Viteritti, *The Federal Role in School Reform: Obama’s “Race to the Top”*, 87 *NOTRE DAME L. REV.* 2087, 2106 (2012).

96. See *id.* at 2103; Manna & Ryan, *supra* note 94, at 530, 532; Ruth Marcus, *Civil Rights Groups Are Picking the Wrong Fight with President Obama*, *WASH. POST*, July 30, 2010, at A21.

97. Manna & Ryan, *supra* note 94, at 527.

98. The Race to the Top program had subsequent rounds of awards, and many states were able to capitalize on the work they did in preparation for the first round to secure an award. Viteritti, *supra* note 95, at 2103. The Preschool Development Grant program bifurcated its applicant pool, earmarking a portion of funds for states with “either small or no State Pre-

The competitive grant model cannot achieve nation-wide UPK with one fell swoop. However, many national policy shifts, including ones in education,<sup>99</sup> have occurred when successful reform in a select few states or cities generated a momentum that snowballed as more jurisdictions followed suit.<sup>100</sup> By targeting funds towards those states most likely to achieve UPK reform, a competitive grant program could push UPK towards a tipping point beyond which it becomes a national priority. Considering the legal and political constraints surrounding other models of federal intervention, the opportunity to make such an impact is one UPK advocates should not pass up.

*b. Choosing the Applicant Field: States vs. LEAs*

Opting to pursue UPK reform using a competitive grant model that does not purport to produce nation-wide coverage raises another important design question: whether the program should solicit applications from and award funds to states or individual school districts, also known as local education agencies (LEAs). Recent history demonstrates that both states and LEAs can be effective drivers of UPK reform. Since the 1980s many states have taken the lead in expanding access to preschool,<sup>101</sup> and several states have succeeded in implementing renowned

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school Programs.” Applications for New Awards; Preschool Development Grants – Development Grants, 79 Fed. Reg. 48854, 48854 (Aug. 18, 2014).

99. See NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., OVERVIEW AND INVENTORY OF STATE EDUCATION REFORMS: 1990 TO 2000 2-3 (2003) (summarizing several educational reforms that saw widespread adoption amongst the states).

100. Alex Tribou & Keith Collins, *This is How Fast America Changes Its Mind*, BLOOMBERG (June 26, 2015), <https://www.bloomberg.com/graphics/2015-pace-of-social-change/>.

101. DAVID L. KIRP, *THE SANDBOX INVESTMENT* 219 (2007); Anne W. Mitchell, *Models for Financing State-Supported Prekindergarten Programs*, *THE PROMISE OF PRE-K*, *supra* note 28, 51, 52.

UPK systems.<sup>102</sup> In more recent decades, LEAs in several big cities, some of which serve a population exceeding those of entire states, have successfully implemented comprehensive UPK systems, even as their states drag their legislative feet.<sup>103</sup>

The federal government could conceivably provide both states and LEAs pursuing UPK reform the opportunity to avail themselves of federal funds through complementary programs. The American Recovery and Reinvestment Act, for instance, included two competitive grant programs focused on education.<sup>104</sup> The Race to the Top program awarded funds to states to pursue statewide reform,<sup>105</sup> while the Investing in Innovation program provided an opportunity for ambitious LEAs to secure funds without having to rely on their state's ability to secure a grant.<sup>106</sup> Another possibility is designing a grant program to produce a hybrid applicant pool that includes both states and LEAs of certain sizes. However, opting for a hybrid approach has some potentially serious drawbacks, including the possibility of political strife resulting from the delineation of non-eligible LEAs<sup>107</sup> and friction among LEAs and states over differing application priorities.<sup>108</sup>

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102. See *infra* Part IV.

103. Lillian Mongeau, *What Boston's Preschools Get Right*, THE ATLANTIC, Aug. 2, 2016, <http://www.theatlantic.com/education/archive/2016/08/what-bostons-preschools-get-right/493952/>; Kate Taylor, *New York City Will Offer Free Preschool for All 3-Year-Olds*, N.Y. TIMES, April 24, 2017, <https://www.nytimes.com/2017/04/24/nyregion/de-blasio-pre-k-expansion.html>.

104. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

105. See *id.* §§ 14005(c), 14006.

106. See *id.* § 14007.

107. Eloise Pasachoff, *Block Grants, Early Childhood Education, and the Reauthorization of Head Start: From Positional Conflict to Interest-Based Agreement*, 111 PENN ST. L. REV. 349, 355-56 (2006) (chronicling the demise of the Comprehensive Child Development Act of 1971).

108. The situation is somewhat analogous to the decision of several California LEAs to apply for a No Child Left Behind waiver when the state refused to comply with some of the requirements necessary to receive a waiver. See Michele McNeil & Lesli A. Maxwell, *Critics Blast Away at California Districts' Waiver*, EDUC. WEEK, Aug. 16, 2013, <http://www.edweek.org/ew/articles/2013/08/16/01corewaiver.h33.html>.

If we assume that complementary or hybrid programs are not politically viable, choosing one applicant pool over the other entails tradeoffs that need to be examined. Grants to states neglect those LEAs within states that do not prioritize UPK reform. LEAs seeking to implement district-wide UPK will be precluded from receiving grant funds by a state that submits a weak application or declines to apply at all. Grants to LEAs, on the other hand, put smaller LEAs, which tend to be located outside of major metropolitan areas, at a disadvantage.<sup>109</sup> These smaller LEAs, which would benefit from implementation of statewide UPK, are unlikely to have the capacity to compete effectively with larger LEAs. Though the capacity conundrum, in which entities more in need of capacity-building funds are often less likely to receive them,<sup>110</sup> is an issue for both state and LEA-focused competitive grant programs,<sup>111</sup> the problem is likely more acute when LEAs compete for funds because the difference in capacity is generally more drastic among LEAs than among states.<sup>112</sup>

While LEAs pursuing UPK implementation would be hindered by exclusion from a new federal grant program, they would not be completely without recourse. The recently-enacted Every Student Succeeds Act clarifies that LEAs can use the funds they receive under Title I of ESEA for preschool,<sup>113</sup>

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109. Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273, 323 (2003); Deena Dulgerian, Note, *The Impact of the Every Student Succeeds Act on Rural Schools*, 24 GEO. J. ON POVERTY L. & POL'Y 111, 127–28 (2016).

110. Paul Manna & Laura L. Ryan, *Competitive Grants and Education Federalism: President Obama's Race to the Top Program in Theory and Practice*, 41 PUBLIUS 522, 533 (2011).

111. See *supra* note 94 and accompanying text.

112. LORRAINE M. McDONNELL & MILBREY W. McLAUGHLIN, EDUCATION POLICY AND THE ROLE OF THE STATES 153 (1982) (noting that even the lowest capacity state education agencies are capable of providing significant services to LEAs); James P. Spillane & Charles L. Thompson, *Reconstructing Conceptions of Local Capacity*, 19 EDUCATIONAL EVALUATION AND POLICY ANALYSIS 185 (1997) (describing the significant variability among nine Michigan LEAs chosen for its study).

113. 20 U.S.C. § 7931 (2012); Christina A. Samuels, *Law Adds to Pre-K's Stature as Federal-State Policy*, EDUC. WEEK, Jan. 5, 2016, <http://www.edweek.org/ew/articles/2016/01/06/law-adds-to-pre-ks-stature-as-federal-state.html>.

and state plans are now required to describe how a state will assist LEAs that choose to use their funds for ECE programs.<sup>114</sup> Though it is unclear how these provisions will function in practice, they should, at the very least, provide some measure of accountability for a state's efforts to assist LEA-UPK efforts.

Granting funds to states, ultimately, makes sense as a matter of scale. Considering the nearly insurmountable obstacles that would impede federal implementation of nation-wide UPK,<sup>115</sup> states are the highest level government entity that can implement a UPK system. The federal government can therefore expand access to preschool most efficiently by working with states. With over 13,000 LEAs in the U.S. and only 50 states, single instances of successful UPK implementation on a statewide level would result in district-wide UPK for, on average, over 260 LEAs.

#### IV. THE STATE-LEVEL PROCESS OF CREATING UPK

When designing a competitive grant program that provides funds to states pursuing UPK reform, policymakers should identify those circumstances that are most conducive to successful state-level implementation of UPK. In identifying these conditions, much can be learned by examining the history of UPK's enactment in the first three states to implement it, Georgia, Oklahoma, and Florida.

##### *a. Success Story – Georgia*

In 1995, Georgia became the first state to offer publicly-funded preschool for all four-year-olds.<sup>116</sup> Georgia should be

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114. 20 U.S.C. § 6311(g)(1)(A) (2012).

115. See *supra* notes 71-73 and accompanying text.

116. W. STEVEN BARNETT ET. AL, NAT'L INST. FOR EARLY EDUC. RES., THE STATE OF PRESCHOOL: 2015 69 (2016); GA. COMP. R. & REGS. 591-2-1-.01(1) (West 2017).

looked to as an exemplar because its UPK program has proven to be stable and of high quality. Georgia UPK has endured through more than two decades and partisan shifts in both the Governor's office and the General Assembly.<sup>117</sup> The program is, by all accounts, here to stay, garnering wide support from the public and both political parties in the state.<sup>118</sup> Georgia UPK has many of the characteristics that distinguish an early childhood education program as high quality,<sup>119</sup> including its comprehensive learning standards,<sup>120</sup> rigorous teacher requirements,<sup>121</sup> and small class sizes.<sup>122</sup> Funding for Georgia's UPK has, for the most part, steadily risen.<sup>123</sup> Most importantly, Georgia's UPK has produced good educational outcomes for its young citizens. Research shows that Georgia UPK resulted in significantly better school readiness across a wide variety of skills.<sup>124</sup> These gains were evident among the subset of low-income children, as well as the overall study population.<sup>125</sup>

Georgia UPK can be traced back to a campaign promise made in 1989 by Zell Miller, who was then a Democratic candidate for governor. Miller campaigned on a plan to legalize lottery games within the state and earmark all proceeds for edu-

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117. Fawn Johnson, *How Georgia Got Republicans and Democrats to Embrace Universal Pre-K*, THE ATLANTIC, (May 7, 2014), <https://www.theatlantic.com/politics/archive/2014/05/how-georgia-got-republicans-and-democrats-to-embrace-universal-pre-k/430899/>.

118. *Id.*; see also ELIZABETH ROSE, THE PROMISE OF PRESCHOOL: FROM HEAD START TO UNIVERSAL PRE-KINDERGARTEN 109 (2010) (citing as an example of state pride an Atlanta Journal-Constitution article that states: "For generations, the South followed the lead of Massachusetts and other states in innovative, forward-looking programs. With Pre-K, we're on top.").

119. BARNETT ET. AL., *supra* note 116, at 70.

120. GA. COMP. R. & REGS. 591-1-1.03.

121. *Id.* § 591-1-1-.31.

122. *Id.* § 591-1-1-.32.

123. *Governor's Budget Report Documents*, GOVERNOR'S OFF. OF PLAN. AND BUDGET, <http://opb.georgia.gov/governors-budget-report-documents> (last visited Mar. 31, 2017).

124. ELLEN S. PEISNER-FEINBERG ET AL., FPG CHILD DEV. INST., THE UNIV. OF N.C. AT CHAPEL HILL, EFFECTS OF GA.'S PRE-K PROGRAM ON CHILDREN'S SCH. READINESS SKILLS 12 (2014).

125. *Id.*

cation programs.<sup>126</sup> Miller would later elaborate on these plans by detailing two education programs to be funded by lottery taxes: a scholarship fund for accomplished Georgia high school graduates and a preschool program for low-income children.<sup>127</sup> Though the establishment of a lottery was opposed by politicians and influential religious organizations, the proposal had wide support among the voting public.<sup>128</sup> Miller made the “Lottery for Education” the central platform of his campaign, and it propelled him to easy victories in both the Democratic primary and the general election.<sup>129</sup>

After assuming office in the beginning of 1991, Governor Miller needed to execute some nimble political maneuvering to realize his campaign vision. Establishing the Lottery for Education would require both a legislative act and an amendment to the state constitution, which prohibited lottery games at the time.<sup>130</sup> The constitutional amendment required a referendum vote, in addition to a two-thirds majority in the state legislature.<sup>131</sup> Once again, a coalition of influential entities formed to oppose the lottery.<sup>132</sup> In response, Miller formed a pro-amendment coalition, which was supported by powerful business interests.<sup>133</sup> The narrow margin by which the amendment passed<sup>134</sup> evinces the success the anti-lottery coalition had in undermining what had previously been wide support, and the necessity of forming a pro-lottery coalition.

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126. ANTHONY RADEN, FOUND. FOR CHILD DEV., UNIVERSAL PREKINDERGARTEN IN GEORGIA – A CASE STUDY OF GEORGIA’S LOTTERY-FUNDED PRE-K PROGRAM 58 (1999); ROSE, *supra* note 9, at 105.

127. RADEN, *supra* note 126, at 12.

128. *Id.* at 9.

129. *Id.* at 11-12; BRENDA K. BUSHOUSE, UNIVERSAL PRESCHOOL: POLICY CHANGE, STABILITY, AND THE PEW CHARITABLE TRUSTS 24-25 (2009).

130. RADEN, *supra* note 126, at 12.

131. *Id.*; GA. CONST. art. X, § 1, ¶ II.

132. RADEN, *supra* note 126, at 12.

133. *Id.* at 12-13.

134. *Id.* at 13.

Additional political maneuvering was required even after approval of the constitutional amendment. Miller needed to co-ax into agreement legislators who proposed using the lottery funds for different types of educational expenditures, rather than a new preschool program.<sup>135</sup> Relying on his mandate from the voters, Miller eventually succeeded in enacting a bill that funded the programs he had promised, among them public preschool for low-income children.<sup>136</sup> In June of 1993, almost two and a half years after Miller assumed office, the Lottery for Education finally opened.<sup>137</sup>

In 1994, with the Lottery for Education generating vastly more revenue than expected, Miller decided to expand Georgia's pre-k program to provide universal access.<sup>138</sup> Hearing rumblings from constituents not eligible under Georgia's initial targeted pre-k regime, Miller believed that such a move was necessary to ensure the program's survival.<sup>139</sup> In its first years, Georgia's pre-k was, in fact, assailed by Republican legislators, who were ultimately unable to garner the political capital needed to pass amending legislation,<sup>140</sup> as was necessary to change pre-k's statutorily-embedded funding mechanism.<sup>141</sup> Only after Miller's Executive Secretary for Health and Education staged an extensive public relations campaign to recapture support from a newly-expanded cohort of eligible constituents did recurring attempts to scale back pre-k cease.<sup>142</sup>

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135. *Id.*

136. *Id.*

137. *Id.*

138. RADEN, *supra* note 126, at 25.

139. *Id.*; ELIZABETH ROSE, THE PROMISE OF PRESCHOOL: FROM HEAD START TO UNIVERSAL PRE-KINDERGARTEN 108 (2010).

140. RADEN, *supra* note 126, at 32.

141. See GA. CONST. art. I, § 2, ¶ VIII(c)(2); GA. CODE ANN. § 20-1A-1 (2016); *id.* § 20-1A-4.

142. RADEN, *supra* note 126, at 32, 33; ROSE, *supra* note 139, at 108; BUSHOUSE, *supra* note 11, at 64-65.

In its incipiency, Georgia's pre-k program also faced existential threats from other entities. Before its expansion to universal access, Georgia pre-k had to resolve political tensions with Head Start providers in the state who felt the new program would marginalize Head Start and its historical role as part of the Civil Rights movement.<sup>143</sup> Only after Miller's team remedied the absence of Head Start as a stakeholder in the pre-k coalition, and all parties realized that "there were plenty of at-risk four-year-olds and three-year-olds to go around," did this tension dissipate.<sup>144</sup>

Miller's team also believed the powerful child care industry lobby could have thwarted expansion to universal access if it felt UPK would threaten the viability of private ECE providers.<sup>145</sup> Involving these private providers in a public-private partnership, making them eligible for pre-k grants, turned potentially powerful opponents into partners.<sup>146</sup> This move also alleviated some vexing logistical problems for UPK by vastly expanding the state's access to preexisting facilities.<sup>147</sup>

### *b. Success Story – Oklahoma*

Like UPK in Georgia, Oklahoma's program should be looked to as a model for establishing sustainable and impactful UPK. Oklahoma UPK, created in 1998, has endured almost as long as Georgia's program. Though the partisan make-up of the state legislature has shifted significantly, from a sizeable Democratic majority at the time of the bill's passage to what is currently an overwhelming Republican majority,<sup>148</sup> UPK re-

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143. RADEN, *supra* note 126, at 20.

144. *Id.* at 21.

145. *Id.* at 22-23; ROSE, *supra* note 139, at 107.

146. RADEN, *supra* note 126, at 23; ROSE, *supra* note 139, at 107.

147. RADEN, *supra* note 126, at 22; ROSE, *supra* note 139, at 107.

148. *See State Senate Since Statehood*, OKLA. ST. LEGISLATURE, [http://www.oksenate.gov/senators/historic\\_members/state\\_senate\\_historical.PDF](http://www.oksenate.gov/senators/historic_members/state_senate_historical.PDF) (last visited

mains on solid ground. Preschool in Oklahoma is not a partisan issue over which legislators tussle.<sup>149</sup> Rather, it is a point of pride that transcends state politics.<sup>150</sup>

Oklahoma UPK serves 75% of the state's four-year-olds, trailing only Vermont and Florida among U.S. states.<sup>151</sup> Oklahoma UPK has many of the earmarks of a quality program.<sup>152</sup> Notably, Oklahoma seeks to ensure an adequate supply of qualified preschool teachers, who must hold a bachelor's degree and complete an early childhood certification,<sup>153</sup> by codifying strict salary-schedule parity with K-3 teachers.<sup>154</sup> Funding for pre-k is calculated algorithmically, with a portion of the overall education budget being allotted based on the number of preschool-aged children in each district.<sup>155</sup> Consequently, UPK cannot be separated from other items in the education budget and disproportionately reduced through the appropriations process. A study of the state's largest school district found that participating four year-olds, particularly those from disadvantaged backgrounds, were months ahead, in terms of school readiness, than those who did not participate.<sup>156</sup> Gains were evident not only in reading, writing, and math, but also in measures of attentiveness and other socio-emotional factors.<sup>157</sup>

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Mar. 31, 2017); *House of Representatives: Historic Members*, OKLA. ST. LEGISLATURE, <http://www.okhouse.gov/Members/Historic.aspx> (last visited Mar. 31, 2017).

149. Lillian Mongeau, *Why Oklahoma's public preschools are some of the best in the country*, THE HECHINGER REP., (February 2, 2016), <https://hechingerreport.org/why-oklahomas-public-preschools-are-some-of-the-best-in-the-country/>; Nicholas Kristof, *Oklahoma! Where the Kids Learn Early*, N.Y. TIMES, Nov. 9, 2013, <http://www.nytimes.com/2013/11/10/opinion/sunday/kristof-oklahoma-where-the-kids-learn-early.html>.

150. MONGEAU, *supra* note 149.

151. W. STEVEN BARNETT ET. AL, NAT'L INST. FOR EARLY EDUC. RES., THE STATE OF PRESCHOOL: 2015 133 (2016); GA. COMP. R. & REGS. 591-2-1-.01(1) (West 2017).

152. *Id.* at 134.

153. OKLA. STAT. ANN. tit. 70, § 11-103.7(B) (West 2017).

154. *Id.* § 18-114.14.

155. *Id.* §§ 18-200.1(A), 18-201.1(B)(1).

156. WILLIAM T. GORMELY JR., GEORGETOWN PUBLIC POLICY REVIEW, OKLAHOMA'S UNIVERSAL PRESCHOOL PROGRAM: BETTER THAN OK (2013).

157. *Id.*

To the extent that Oklahoma's UPK was created through "political sleight of hand,"<sup>158</sup> its use as a model for state-level processes is limited. Representative Joe Eddins' ability to shepherd his UPK bill through a less-than-heedful legislature and secure the votes of lawmakers unaware of the bill's impact is not something that can or should be readily replicated in other states.<sup>159</sup> However, the creation of Oklahoma's UPK is also attributable to more exemplary conditions, such as institutional knowledge, expansive networks, and well-managed publicity.

Eddins' early attempts to get education bills passed ended in frustrating failure.<sup>160</sup> As an inexperienced lawmaker, Eddins believed the viability of a bill would depend on its sponsor's ability to articulate its efficacy during floor debates.<sup>161</sup> Instead, he found that legislators needed to garner support through casual advocacy prior to a bill's introduction.<sup>162</sup> The political know-how that Eddins acquired as a result of these experiences proved crucial to his ability to get his UPK bill enacted.<sup>163</sup>

Eddins also knew how to court allies and soften potential opposition. When drafting his UPK bill, Eddins worked with a representative of the Tulsa Chamber of Commerce, who believed that UPK was a means to address workforce development concerns.<sup>164</sup> Eddins also cultivated relationships with Head Start and private daycare providers, which helped to en-

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158. CHRISTIAN M. BELL, *THE CURIOUS CASE OF OKLAHOMA: A HISTORICAL ANALYSIS OF THE PASSAGE OF UNIVERSAL PRE-KINDERGARTEN LEGISLATION IN OKLAHOMA* 60 (May 2013), <https://repositories.lib.utexas.edu/handle/2152/20937>.

159. *Id.*

160. *Id.* at 55; BRENDA K. BUSHOUSE, *UNIVERSAL PRESCHOOL: POLICY CHANGE, STABILITY, AND THE PEW CHARITABLE TRUSTS* 41 (2009).

161. Bell, *supra* note 158, at 60-61.

162. *Id.*

163. *Id.* at 60; BUSHOUSE, *supra* note 160, at 41.

164. Bell, *supra* note 158, at 56-58; BUSHOUSE, *supra* note 160, at 40-41.

sure that his bill provoked minimal external opposition.<sup>165</sup> Lastly, Eddins tailored his pitch for Oklahoma's Republican governor, who signed the bill into law with little fanfare.<sup>166</sup>

Whereas Miller utilized a public relations campaign to ensure continued support for Georgia's UPK, Eddins, also cognizant of a new UPK program's fragility, consciously avoided publicity.<sup>167</sup> At a time when Oklahoma's education budget was growing, the dilution of preexisting education funds did not draw much negative attention.<sup>168</sup> Oklahoma's UPK managed to stay under the radar as a political issue while attendance in the program steadily grew.<sup>169</sup> The program finally came to the forefront of the public's consciousness in 2004, when a major study ranked Oklahoma as the best state in the country in terms of access to state-funded preschool.<sup>170</sup> The sense of pride generated by this recognition solidified the political viability of Oklahoma's UPK program.<sup>171</sup>

### *c. A Cautionary Tale – Florida*

In 2005, Florida became the third state to implement UPK. Florida UPK, known as the Voluntary Prekindergarten Education Program (VPK), currently serves 76% of the state's four year-olds, second only to Vermont among U.S. states.<sup>172</sup>

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165. Bell, *supra* note 158, at 61-62; BUSHOUSE, *supra* note 160, at 43, 45.

166. Bell, *supra* note 158, at 65; BUSHOUSE, *supra* note 160, at 47; *see also* ELIZABETH ROSE, THE PROMISE OF PRESCHOOL: FROM HEAD START TO UNIVERSAL PRE-KINDERGARTEN 112 (2010) (chronicling the governors vetoing of preceding education bills).

167. Bell, *supra* note 158, at 65-66; ROSE, *supra* note 166, at 114.

168. WILLIAM T. GORMELY JR. & DEBORAH PHILLIPS, THE EFFECTS OF UNIVERSAL PRE-K IN OKLAHOMA: RESEARCH HIGHLIGHTS AND POLICY IMPLICATIONS 5 (2003); ROSE, *supra* note 166, at 114.

169. Bell, *supra* note 158, at 67.

170. *Id.*

171. *Id.*; Lillian Mongeau, *Why Oklahoma's public preschools are some of the best in the country*, THE HECHINGER REP., (February 2, 2016), <https://hechingerreport.org/why-oklahomas-public-preschools-are-some-of-the-best-in-the-country/>.

172. W. STEVEN BARNETT ET. AL, NAT'L INST. FOR EARLY EDUC. RES., THE STATE

However, Florida's VPK differs in some important respects from UPK in Georgia and Oklahoma, and these differences militate against using Florida as a model for UPK implementation. Unlike Georgia (with its lottery funding) or Oklahoma (with its statutory algorithm), preschool funding in Florida is determined solely through the annual legislative appropriations process.<sup>173</sup> This likely explains, in part, why preschool funding remains a contentious issue.<sup>174</sup> Despite an all-time high budget in 2016, Florida's preschool spending remained flat,<sup>175</sup> and per-child spending has steadily dropped since the program's third year.<sup>176</sup> The total spending per preschool-enrolled child in Florida is \$2,304, about 60% of what Georgia and Oklahoma spend per child.<sup>177</sup>

Given its relatively low level of funding, it is unsurprising that Florida's VPK is lacking in many of the quality indicators present in Georgia and Oklahoma.<sup>178</sup> Most notably, teachers in the year-long VPK program are not required to hold a bachelor's degree, but rather only a child development associate credential.<sup>179</sup> Florida law also only provides for three-hour days,<sup>180</sup> compared with six or more hours provided by the UPK programs in Georgia and Oklahoma.<sup>181</sup> Public perception of

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OF PRESCHOOL: 2015 9, 67 (2016).

173. *Id.* at 67.

174. See Scott Maxwell, *Florida's Pre-K Cuts Hurt Kids, Ignore Voters' Mandate*, ORLANDO SENTINEL, May 4, 2016, <http://www.orlandosentinel.com/opinion/os-florida-pre-k-scott-maxwell-20160504-column.html>.

175. Leslie Postal, *Flat Funding Frustrates Preschool Advocates*, ORLANDO SENTINEL, April 4, 2016, <http://www.orlandosentinel.com/features/education/os-pre-k-florida-budget-spending-flat-20160404-story.html>.

176. DAPHNA BASSOK ET AL., UNIV. OF VA., EDPOLICYWORKS, FLORIDA'S VOLUNTARY PRE-KINDERGARTEN PROGRAM: AN OVERVIEW OF THE LARGEST STATE PRESCHOOL PROGRAM IN THE NATION 8 (2014).

177. BARNETT ET. AL, *supra* note 172, at 68, 70, 134. Georgia and Oklahoma spend \$3,880 and \$3,709, respectively, per child.

178. *Id.* at 68.

179. FLA. STAT. ANN. §§ 1002.55(3)(c), 1002.63(4) (West 2017).

180. FLA. ADMIN. CODE ANN. r. 6M-8.204(3) (2017).

181. GA. COMP. R. & REGS. 591-2-1-.01(1) (West 2017); OKLA. STAT. ANN. tit. 70, §

Florida VPK's mediocrity is widespread, though not unanimous.<sup>182</sup> However, flawed data-collection mechanisms have limited researchers' ability to study the impact VPK has on participating children,<sup>183</sup> leaving quantifiable inputs as the best available heuristic for assessing the efficacy of VPK.

The impetus for Florida's VPK was provided not by a politician but rather by the state's citizens, who passed, with almost 60% of the vote,<sup>184</sup> a 2002 ballot referendum that mandated the state legislature to provide for universal preschool by 2005.<sup>185</sup> This mandate specified that this program be "established according to high quality standards."<sup>186</sup> What was not specified was how this program would be funded, though the referendum did proscribe diverting existing educational funds.<sup>187</sup>

The ballot initiative was not without politically-savvy advocates; then-Executive Mayor of Miami-Dade County Alex Penelas, as well as former Miami Herald Publisher David Lawrence Jr., played a substantial role in enshrining the UPK mandate in the state's constitution.<sup>188</sup> However, after the ballot initiative passed, both champions found themselves on the outside of the ensuing legislative process. The Florida legislature, which had previously balked at legislation that would have cre-

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11-103.7(B) (West 2017).

182. Denise S. Amos, *Study: Florida's Preschool Funding, Quality are Below National Standards*, FLA. TIMES-UNION, May 11, 2015, <http://jacksonville.com/news/metro/2015-05-11/story/study-floridas-preschool-funding-quality-are-below-national-standards#>.

183. Chester E. Finn Jr., *Voluntary Pre-Kindergarten*, in REFORMING EDUCATION IN FLORIDA 229, 237-38 (Paul E. Peterson ed. 2006).

184. JIM HAMPTON, FOUNDATION FOR CHILD DEVELOPMENT, HOW FLORIDA'S VOTERS ENACTED UPK WHEN THEIR LEGISLATURE WOULDN'T 10 (2004).

185. *Id.* at 8.

186. FLA. CONST. art. IX, § 1(b)

187. *Id.* § 1(c); Linda A. White et al., *Policy Logics, Framing Strategies, and Policy Change: Lessons from Universal Pre-K Policy Debates in California and Florida*, 48 POLICY SCI. 395, 408 (2015).

188. HAMPTON, *supra* note 184, at 3; ROSE, *supra* note 9, at 163.

ated UPK,<sup>189</sup> was slow to act on this mandate. Mired in a budget crisis, the legislature spent little effort contouring a UPK program in 2003.<sup>190</sup> The legislature did commission a Universal Prekindergarten Education Advisory Council to research policy options and make recommendations.<sup>191</sup>

However, in 2004 the legislature, not yet out from under the budget crisis,<sup>192</sup> was more concerned with frugally getting out from under the UPK mandate than incorporating recommendations meant to ensure quality. The first bare-bones UPK bill to pass the legislature generated public criticism for its minimal standards, and was vetoed by the governor in July of 2004.<sup>193</sup> In December, in a special legislative session, lawmakers passed another UPK bill that, while less austere than the previous iteration, was still criticized by Democrats and education advocates for ignoring many of the council's recommendations.<sup>194</sup> However, with the referendum-imposed deadline for implementing UPK fast approaching, the governor signed this bill into law.<sup>195</sup>

## V. DESIGNING A FEDERAL GRANT PROGRAM TO CULTIVATE UPK

While previous federal ECE programs have often waded into the complicated and contentious business of promulgating specific quality standards,<sup>196</sup> the preceding part demonstrates

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189. HAMPTON, *supra* note 184, at 5.

190. *Id.* at 14.

191. White et al., *supra* note 187, at 409.

192. BARBARA A. ORMOND, *THE URBAN INST., STATE RESPONSES TO BUDGET CRISES IN 2004: FLORIDA* (2004).

193. White et al., *supra* note 187, at 409; ROSE, *supra* note 9, at 163.

194. White et al., *supra* note 187, at 409; ROSE, *supra* note 9, at 163.

195. White et al., *supra* note 187, at 409.

196. For instance, while few would question that teacher experience is important to quality, there is a vigorous debate about whether some certification requirements in some jurisdictions are too high and actually create a dearth of eligible teachers, hurting the quality of a

that states are quite capable of making optimal design choices *when certain conditions are present*. The history of UPK's creation in Georgia, Oklahoma, and Florida, and the subsequent trajectory of their respective programs illuminate three circumstances that are crucial to successful implementation of high-quality UPK: a diverse group of stakeholders advocating for UPK, strong grassroots support for UPK, and the availability of a funding mechanism that is not vulnerable to expedient reductions. Any competitive federal grant program should be cognizant of these factors and incorporate them into the application process.

*a. Involving Stakeholders from a Broad Range of Backgrounds*

The stories of UPK's inception in Georgia, Oklahoma, and Florida demonstrate the importance of collaboration among a range of stakeholders. While the state education agencies (SEAs) that complete applications for education grant programs can be presumed to possess expertise on matters of education policy, history suggests that successful implementation of UPK requires additional sorts of expertise usually outside of an SEA's institutional competence. The champions of UPK in Georgia and Oklahoma were both deft politicians first and education advocates second, while in Florida the absence of any such figure, at least after the ballot initiative passed, is conspicuous. Collaboration with individuals or entities possessing expertise in the state's political processes is crucial to putting education policy theory into practice. A federal UPK grant

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preschool system as a whole. Michael Alison Chandler, *D.C. Among First in Nation to Require Child-Care Workers to Get College Degrees*, WASH. POST, Mar. 31, 2017, [https://www.washingtonpost.com/local/social-issues/district-among-the-first-in-nation-to-require-child-care-workers-to-get-college-degrees/2017/03/30/d7d59e18-0fe9-11e7-9d5a-a83e627dc120\\_story.html](https://www.washingtonpost.com/local/social-issues/district-among-the-first-in-nation-to-require-child-care-workers-to-get-college-degrees/2017/03/30/d7d59e18-0fe9-11e7-9d5a-a83e627dc120_story.html).

program should compel SEAs to work with such parties and reward those SEAs that do so.

SEAs involving Head Start administrators, private preschool providers, and other groups that would be affected the implementation of UPK should likewise be encouraged. Cooperating with these parties in Georgia, Oklahoma, and Florida preempted some potentially powerful opposition and ensured fewer obstacles on the path to UPK implementation.

Previous educational grant programs have heeded stakeholder involvement. Applicants for the Preschool Development Grants (PDG) were asked to demonstrate that their plans for preschool expansion were “supported by a broad group of stakeholders”<sup>197</sup> and to point to “enacted and pending legislation, policies, or practices that demonstrate the State’s current and future commitment.”<sup>198</sup> However, support of stakeholders was just one of multiple items to be addressed in the applicant’s Executive Summary, which in total was only worth up to 10 of a possible 230 points.<sup>199</sup> Highlighting legislation and policies that evince a commitment to early childhood education was worth only four points.<sup>200</sup>

These criteria should be given more weight. PDG’s focus on ensuring quality, which constitute the bulk of available points,<sup>201</sup> is commendable. However, articulating a plan for ensuring quality or expanding access is of little use without institutional know-how to get the plan put into action. Furthermore, a broad coalition that includes early childhood education advocates and experts is likely to produce high-quality stand-

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197. Applications for New Awards; Preschool Development Grants – Development Grants, 79 Fed. Reg. 48854, 48863 (Aug. 18, 2014).

198. *Id.* at 48864.

199. *Id.* at 48868.

200. *Id.*

201. *Id.* at 48868-69.

ards even without the specter of federal appraisal, as Georgia and Oklahoma's history demonstrates.

The next federal grant program should also require states to do more than merely summarize the support it purports to have. Bare assertions that a state's stakeholders include "representatives from across the state and from various political parties, as well as various state agencies," as was claimed by one state that was awarded funds,<sup>202</sup> do not provide a basis for distinguishing states on the basis of this factor, nor does it compel further collaboration. PDG's predecessor, the Race to the Top – Early Learning Challenge, asked states to obtain letters of intent or support from early childhood educators, state legislators, school boards, representatives of private and faith-based early learning programs, and many others.<sup>203</sup> Such a criterion is more useful for evaluating and cultivating stakeholder collaboration. It is unclear why the Department of Education did not likewise seek letters of support for PDG.<sup>204</sup>

However, the Department of Education recently created a paradigm of stakeholder involvement that is even more promising. In 2016, the Department promulgated new regulations for the state plans required under the Elementary and Secondary Education Act, which provides substantial block grant funds to states for K-12 education.<sup>205</sup> The regulations ensure "timely and meaningful consultation with stakeholders" by requiring states to solicit and incorporate input from the governor, state legislators, community-based and civil rights organizations, and

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202. ARIZ. DEP'T OF EDUC., ARIZONA APPLICATION FOR FUNDING UNDER PRESCHOOL DEVELOPMENT GRANTS – DEVELOPMENT GRANTS 8 (2014).

203. Applications for New Awards; Race to the Top – Early Learning Challenge, 76 Fed. Reg. 53564, 53574 (Aug. 26, 2011).

204. Notice and comment rulemaking was waived for the promulgation of the PDG application, 79 Fed. Reg. 48854, 48854 (Aug. 18, 2014), and comments otherwise solicited are no longer available on ED's website, <https://www2.ed.gov/programs/preschooldevelopmentgrants/resources.html>.

205. See 20 U.S.C. § 6301 et seq. (2012).

others.<sup>206</sup> These regulations, along with many other, were recently nullified by an exercise of the Congressional Review Act,<sup>207</sup> making such consultation optional for states. It is unclear whether this action is at all indicative of partisan hostility towards such requirements or merely part of zealous effort to peel back much of the previous administration's accomplishments. The consultation regulations specifically garnered "extensive support" during the notice and comment period,<sup>208</sup> and state plans drafted before their repeal demonstrate how such regulations can successfully beget the meaningful consultation sought,<sup>209</sup> offering hope that similar requirements will remain politically viable in the future. Policymakers designing a federal UPK grant program would be wise to replicate this model by awarding substantial points to SEAs that conduct and document consultations with the statesmen, providers, and ECE advocates whose involvement has proven to be essential to successful UPK implementation.

### *b. Assessing Grassroots Support*

A swell of grassroots support in Georgia and Florida were essential to the creation of UPK. Zell Miller's Lottery for Education platform was belittled by opponents and the press, but unyielding support from the general public provided Miller the mandate he needed to push the program through. In Florida, citizens exercised their power of direct democracy to codify a right to UPK after the legislature failed to do so. The resiliency of high-quality UPK in Georgia and Oklahoma is also at-

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206. 34 C.F.R. §§ 299.13(b), 299.15(a) (2016).

207. Pub. L. No 115-13, 131 Stat. 77 (2017).

208. Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act – Accountability and State Plans, 81 Fed. Reg. 86076, 86190 (Nov. 29, 2016).

209. See, e.g., OHIO DEP'T OF EDUC., OHIO DRAFT SUBMISSION FOR PUBLIC COMMENT 16-21 (2017).

tributable in no small part to the pride cultivated among the public after UPK's implementation.

No previous ECE federal grant program has considered public support or grassroots advocacy as a criterion. However, for any future program that contemplates a federal role limited to assisting states create their own UPK program, this factor is critical.

One option for cognizing this factor is requiring states to articulate how they plan to bolster public support for UPK. Such an approach appears to be without precedent among federal grant programs, and it is not difficult to imagine why. Providing federal funds to an SEA to coordinate grassroots lobbying activities meant to influence the state legislature provokes strong federalism concerns and may run afoul federal spending restrictions.<sup>210</sup> Federal funds have been used to free up state resources then used to fund political activity,<sup>211</sup> but for any federal funds that carry with them explicit instructions on how to use state funds, that distinction is illusory. Aside from pushing the legal limits of the federal government's spending power, such an approach may provoke counterproductive political backlash. Notions of federal meddling in state affairs has proven to be an effective arrow in the quiver of opponents seeking to undermine public support for a government spending program.<sup>212</sup>

This conundrum illustrates the inherent limits of the federal government's power to shape a state's political priorities and provides support to this paper's contention that UPK is

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210. Federal regulations generally prohibit federal grantees from using funds for lobbying activities. 2 C.F.R. § 200.450(c) (2016). To what extent grassroots advocacy constitutes lobbying activities and how far removed a grantee must be from said activities is unclear.

211. Susan Rose-Ackerman, *Cooperative Federalism and Co-Optation*, 92 *YALE L.J.* 1344, 1344 (1983).

212. Elizabeth Weeks Leonard, *Crafting a Narrative for the Red State Option*, 102 *KY. L.J.* 381, 408 (2014).

best pursued by adhering to the competitive grant model.<sup>213</sup> While Obama envisioned a program which would result in all 50 states implementing statewide UPK, this goal is at odds with his professed affinity for cooperative federalism. Cooperative federalism implies that the federal government will assist states pursuing some shared goal at the state's own prerogative, and it is unlikely that all 50 states would prioritize UPK.

To this end, a UPK grant program should require states to assess how much public support UPK currently has in the state. Requiring states to point to polls and gauge public support through discussions with advocacy organizations would allow the federal government to direct its funds to those states that are most conducive to producing the desired result of UPK-implementation. These requirements would also have the collateral effect of making SEAs more cognizant of the opportunities or hurdles that public sentiment presents and opening up lines of communication between SEAs and advocacy groups within the state. Requiring state assessment, then, could also encourage states to engage in grassroots advocacy, but in a manner less vulnerable to federalism attacks.<sup>214</sup>

### *c. Exploring Embedded Funding Mechanisms*

In Georgia and Oklahoma, funding mechanisms embedded directly into state law and not subject to the appropriations process have assured that UPK continues to receive the funding necessary to provide a high-quality ECE. Though these embedded mechanisms are subject to their own fluctuations,<sup>215</sup>

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213. See *supra* Section III.a.

214. See *supra* notes 87-89 and accompanying text.

215. See Fawn Johnson, *How Georgia Got Republicans and Democrats to Embrace Universal Pre-K*, THE ATLANTIC, (May 7, 2014), <https://www.theatlantic.com/politics/archive/2014/05/how-georgia-got-republicans-and-democrats-to-embrace-universal-pre-k/430899/> (describing the state lottery's economic downturn in 2014 and the subsequent effect on the UPK program); GENE PERRY, OK. POLICY INST., OKLAHOMA CONTINUES TO LEAD

they have insulated UPK from the more volatile political currents. Though cutting funding to a new expenditure through the appropriations process is normally an expedient means of reeling in spending, legislators in Georgia and Oklahoma would need to go through the much more onerous process of statutory or even constitutional amendment. In contrast, funding for Florida's VPK, which was relatively low to begin with, has been chipped away for years through the appropriations process.

A federal UPK grant program designed to boost state capacity, rather than create on-going cost-sharing arrangements,<sup>216</sup> should put more emphasis on a state's ability to secure sustainable funding than previous programs have. The PDG rubric only awarded a maximum of 10 points, out of a possible 230, for "Budget and Sustainability"<sup>217</sup> and elsewhere up to 12 points for describing how it would sustain high-quality preschool programs once the grant period ended.<sup>218</sup> The minimal weight given to these criteria does not correspond to their demonstrated importance to successful UPK implementation, and SEAs completing these applications were required to do little more than offer conclusory statements about the strong support high-quality preschool enjoys in the legislature and governor's office.<sup>219</sup>

As with stakeholder involvement, sustainability is a criterion that should be afforded more weight, even at the expense of possibly diminishing the relative importance of the criteria regarding quality standards. As Florida's experience shows,<sup>220</sup>

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U.S. FOR DEEPEST CUTS TO EDUCATION (2014).

216. See *supra* Section III.a.

217. Applications for New Awards; Preschool Development Grants – Development Grants, 79 Fed. Reg. 48854, 48866 (Aug. 18, 2014).

218. *Id.* at 48865.

219. ALA. DEP'T OF CHILDREN'S AFFAIRS, ALABAMA PRESCHOOL DEVELOPMENT GRANT PROJECT 42 (2014).

220. See *supra* Section IV.c.

formulating quality standards can be much easier than funding them.

In addition to affording sustainability more weight, a federal UPK grant program should require a more thorough analysis by prompting states to detail possible paths to the creation of embedded funding mechanisms and assess the political feasibility within the state of these various options.<sup>221</sup> Georgia and Oklahoma offer two paradigms for applicant states to explore. As Zell Miller demonstrated, earmarking revenues from a wholly new source of funding can buffer a UPK program from the usual attacks by fiscal conservatives. In recent years, several states have been able to generate substantial revenue through the legalization of marijuana, revenue that is then used to create or bolster state spending programs, including some education programs.<sup>222</sup> In states considering legalization, a federal grant program that prioritizes sustainability could encourage SEAs and their collaborating stakeholders to explore the viability pairing the potential revenues and a new UPK program. While marijuana-funded preschools may induce cognitive dissonance, Georgia's Lottery for Education shows how classical liberalism and education advocacy can make strange and effective bedfellows.

Oklahoma provides another means of embedding funding. Applicant states should be encouraged to explore how the state's existing laws for education funding might be amended to provide for an algorithmic calculation of pre-k funding, as Ok-

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221. Alternatively, a grant program could craft a rubric that rewards points to states for actually having passed such laws. Opting for this approach stands to make a more definitive impact but also imperils a programs political feasibility. See Shannon K. McGovern, Note, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1536-38 (2011).

222. *E.g.*, COLO. REV. STAT. ANN. § 39-28.8-501 (West 2017); see David Gutman, *Is Marijuana Money the Answer to Fund Washington Schools?*, SEATTLE TIMES, Jan. 21, 2017, <http://www.seattletimes.com/seattle-news/politics/state-weighs-using-pot-revenue-to-plug-school-funding-gap/>.

lahoma's law now does. This approach may not be viable in a number of states, and was indeed explicitly rejected by Florida voters, because the notion of diverting existing funds away from other education programs is unpalatable. However, for states considering a substantial infusion of education funds or other major reforms, changes to funding formulas could be on the table.

Applicants may conceive of still other ways to embed funding. Some federal agencies have, for instance, been authorized by statute to generate their own funds by levying fees for certain services or through enforcement actions.<sup>223</sup> A federal UPK grant program should encourage states to think creatively about all possible options for sustainability.

As with prompting states for an assessment of grassroots support, requiring states to explore and document the possible paths to embedded funding serves two important functions. First, it will allow the federal government to funnel funds to those states most able to independently maintain sufficient levels of funding after the federal capacity-building grant is expended. Second, it will make SEAs and collaborating stakeholders cognizant of the opportunities present in their state and could mobilize their collective capabilities towards realizing these opportunities.

## VI. CONCLUSION

“That’s something we should be able to do,” President Obama said of universal preschool in his 2013 speech to the nation.<sup>224</sup> The positive impact preschool can have on numerous life outcomes illustrate why this is a laudable goal. Even with

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223. Christopher DeMuth Sr. & Michael S. Greve, *Agency Finance in the Age of Executive Government*, 24 GEO. MASON L. REV. 555, 560-63, 567-68 (2017).

224. President Barack Obama, State of the Union Address (Feb. 12, 2013).

finite resources, creating universal access to preschool should be prioritized over targeted programs. UPK not only effectuates a number of national interests but may also secure equality benefits more effectively than targeted programs.

However, Obama's optimism about the feasibility of achieving instantaneous nation-wide UPK has been shown to be misplaced. His proposed state-federal cost sharing model gained no traction during his administration and its prospects of success during the current administration are virtually nil. A federal competitive grant program, on the other hand, has proven feasible and stands to make a profound impact in those states that participate.

By emphasizing stakeholder participation, grassroots support, and the availability of embedded funding mechanisms, three conditions that have proven crucial to creating UPK on the state-level, the federal government can identify those states ripe for UPK implementation and provide capacity-bolstering funds to help them achieve it. Facilitating successful UPK reform in a handful of states might even create a ripple effect, spurring more and more states to implement UPK and eventually leading to a nation where preschool is indeed available to all.