

Tax Credit School Scholarship Plans

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I. OVERVIEW: HELPING LOWER INCOME FAMILIES CHOOSE PRIVATE K-12 SCHOOLS FOR THEIR CHILDREN BY GIVING OTHER TAXPAYERS TAX CREDITS

In recent years, a number of cities and states (and even the federal government with respect to the District of Columbia) have embraced new ways of funding the *private* elementary and secondary education of children from low and modest income families.¹ These new mechanisms enable some parents, who would otherwise have their children attend public schools, to send their children to a private school of the family's choosing.² At present, most of the private schools that these families select are religious schools, although that may change if new secular private schools are created in response to these plans, and in any event families participating in these plans are not legally restricted to religious school choices.

Although "school vouchers" are the most widely discussed of these mechanisms, this article focuses on a newer innovative plan that relies on state "tax credits" that fund "scholarships."³ This tax credit approach is most prominently in place in Arizona⁴ which first embraced this strat-

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1. See generally Bruno V. Manno, *School Choice: Today's Scope and Barriers to Growth*, 4 J. SCH. CHOICE 510 (2010); John Merrifield, *The Twelve Policy Approaches to Increased School Choice*, 2 J. SCH. CHOICE 6 (2008).

2. See, e.g., JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978) (advocating in favor of extending private school choice to lower income families through government funding).

3. See generally Stefani Carter, *School Tax Credits*, 39 HARV. J. ON LEGIS. 521 (2002); Nicole Stelle Garnett, *A Winn for Educational Pluralism*, 121 YALE L.J. ONLINE 31 (2011), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/a-winn-for-educational-pluralism/>.

4. ARIZ. REV. STAT. ANN. §§ 43-1089, 43-1089.03 (2012) (establishing an Individual Income School Tuition Organization Tax Credit in 1997 and expanded in 2012); see also ARIZ. REV. STAT. ANN. § 43-1183 (2012) (establishing a Corporate Tax Credit for School Tuition Organizations in 2006); ARIZ. REV. STAT. ANN. § 43-1184 (2012) (establishing in 2009 Lexie's Law Corporate Tax Credits to provide tax credit scholarships for special education or foster care students).

egy in 1997 and in Florida⁵ and Pennsylvania⁶ which later implemented this idea in 2001. Additional versions of it have been adopted, as of this writing, in nine other states as well: Alabama,⁷ Georgia,⁸ Indiana,⁹ Iowa,¹⁰ Louisiana,¹¹ New Hampshire,¹² Oklahoma,¹³ Rhode Island,¹⁴ and Virginia.¹⁵ Many of these state plans were recently enacted and serve a small number of students. However, together the three early-adopting states, Pennsylvania, Florida, and Arizona, provided scholarships to more than 100,000 children in the 2011-2012 school year.¹⁶ In that year, Pennsylvania served 45,000 students,¹⁷ Florida 40,000¹⁸ and Arizona 30,000,¹⁹ respectively. More than 1,200 schools are participating in the Florida plan,²⁰ and more than 300 (perhaps as many as 1,000) in Arizona's.²¹ The plans in Iowa, Georgia and Indiana are mid-sized, each

5. FLA. STAT. §§ 1002.395, 1002.421 (2012) (establishing the Florida Tax Credit Scholarship Program in 2001 and expanded in 2010).

6. 72 PA. STAT. ANN. § 8701-F (West 2012) (establishing an Educational Improvement Tax Credit in 2001); 72 PA. STAT. ANN. § 8701-G.1 (West 2012) (establishing an Educational Opportunity Scholarship Tax Credit in 2012).

7. ALA. CODE § 16-6D-1 et seq. (2013), *available at* http://www.alsde.edu/legislativebills/2013Regular/HB0084_ENACTED.pdf (establishing "The Alabama Accountability Act of 2013" for both individual and corporate taxpayers).

8. GA. CODE ANN. §§ 20-2A, 48-7-29.16 (2012) (establishing a Private School Tax Credit for Donations to Student Scholarship Organizations in 2008).

9. IND. CODE § 6-3.1-30.5 (2012) (establishing a School Scholarship Tax Credit in 2009).

10. IOWA CODE §§ 422.11S, 422.33.28 (2011) (establishing a School Tuition Organization Tax Credit in 2006 and expanded in 2009 and 2011).

11. LA. REV. STAT. ANN. § 47:6301 (2012) (establishing a Tax Credit for Donations to Schools in 2012).

12. N.H. REV. STAT. ANN. § 77-G (2012) (establishing a Corporate Education Tax Credit in 2012).

13. OKLA. STAT. tit. 68, § 2357.206 (2012) (establishing the Oklahoma Equal Opportunity Education Scholarship Act in 2011).

14. R.I. GEN. LAWS § 44-62 (2011) (establishing a Tax Credit for Contributions to Scholarship Organizations in 2006).

15. VA. CODE ANN. §§ 58.1-439.25 to -439.28 (Supp. 2013) (establishing an Education Improvement Scholarships Tax Credit in 2012).

16. *Existing Programs*, AM. FED'N FOR CHILD., <http://www.federationforchildren.org/existing-programs> (last visited Nov. 13, 2013).

17. *Id.*

18. *See also* FLA SCH. CHOICE, FTC SCHOLARSHIP PROGRAM: SEPTEMBER 2012, *available at* http://www.floraschoolchoice.org/Information/CTC/files/FTC_Sept_2012.pdf (last visited Nov. 13, 2013).

19. AM. FED'N FOR CHILD., *supra* note 16.

20. *See also* FLA SCH. CHOICE, *supra* note 18.

21. *Arizona - Personal Tax Credits for School Tuition Organizations*, FRIEDMAN FOUND. FOR EDUC. CHOICE, <http://www.edchoice.org/School-Choice/Programs/Personal-Tax-Credits-for-School-Tuition-Organizations.aspx> (last visited Nov. 13, 2012) (reporting 351 schools participating under the state's individual tax credit plan). *But see* MALCOM GLENN & RANDAN SWINDLER, SCHOOL CHOICE NOW: THE SCHOOL CHOICE YEARBOOK 2012-2013, at 34 (2013), *available at*

serving between 5,000 and 12,000 students during the 2011-2012 school year.²² Nationwide, it now appears that more than 150,000 students in 2012-2013 are receiving scholarships funded by tax credits (including more than 50,000 in Florida), which is substantially more than are participating in all of the publicly-funded school voucher plans.²³

For comparative numbers on school voucher programs (excluding first the special voucher programs aimed exclusively at disabled children with special needs), in 2011-2012 there were about 5,600 children in the Cleveland school voucher program, 23,200 in the Milwaukee program, 1,700 in the Washington D.C. program, 3,900 in the Indiana program, and 1,800 in the Louisiana program, all of which are aimed at low-income families.²⁴ Louisiana's program, in particular, is focused specifically on serving those families escaping from low performing public schools.²⁵ Another 16,000 Ohio children from failing public schools received vouchers to attend private schools.²⁶ Altogether, then, these broader school voucher programs served over 50,000 children (and perhaps 30,000 or more additional students were using vouchers through special needs programs which some states have in place).²⁷ By now the total number of school voucher users is around 100,000.²⁸

To be sure, the number of students in both the tax credit and school voucher programs combined is dwarfed by the nearly 2 million students attending charter schools today, which of course, are public schools, albeit choice schools.²⁹

The most important feature to understand up front about these tax credit plans is that families do not get a tax credit (or tax deduction) for expenditures incurred in educating their *own* children. That sort of tax credit (or deduction) plan, though modest in size, has been in place in a

<http://www.allianceforschoolchoice.org/Yearbook> (reporting 936 schools participating under the state's individual tax credit plan).

22. AM. FED'N FOR CHILD., *supra* note 16.

23. Jason Bedrick, *The Continuing Debate Over Scholarship Tax Credits*, CATO INST. (Mar. 8, 2013, 6:40 PM), <http://www.cato.org/blog/continuing-debate-over-scholarship-tax-credits>; see also AM. FED'N FOR CHILD., *supra* note 16.

24. AM. FED'N FOR CHILD., *supra* note 16.

25. *Id.*

26. *Id.*

27. *Id.*

28. Bedrick, *supra* note 23.

29. *Public Charter School Dashboard: Total Number of Students*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS., <http://dashboard.publiccharters.org/dashboard/students/year/2012> (last visited Nov. 13, 2013).

few states, like Minnesota, Iowa and Illinois for some time.³⁰ Rather, under the new approach, it is a third party (a corporation and/or individual) who receives a tax credit for making a contribution to a non-profit intermediary organization that in turn provides a scholarship to someone else's eligible children.

In this article, this approach is referred to as a *tax credit school scholarship plan*. Designing and implementing such a program requires that a large number of policy choices be made in setting the program's parameters. This article examines many of these design features with reference to the actual choices made by the various jurisdictions that have implemented such plans.³¹

II. THE NATURE OF THE TAX CREDIT

A. Why a Tax Credit?

Tax credits, whether taken against federal, state, or local tax obligations are traditionally viewed as "tax expenditures" on the understanding that the relevant level of government is giving up revenue (or even paying out revenue, if the credit is "refundable" to those who don't actually owe taxes) in return for promoting something thought to be socially desirable. Such a tax credit might reward people who might otherwise be unemployed or subsisting on income from very low-paid jobs, which is how the federal earned income tax credit (EITC) is justified.³² A tax credit might aim to stimulate the purchase of electric or hybrid automobiles, as the federal government has done as a way to reduce our oil dependency and to reduce greenhouse gas emissions.³³ A tax credit might aim to promote fairness by avoiding double taxation, as with the

30. See NINA MANZI & LISA LARSON, INCOME TAX DEDUCTIONS AND CREDITS FOR PUBLIC AND NONPUBLIC EDUCATION IN MINNESOTA (1999), available at <http://www.house.leg.state.mn.us/hrd/pubs/edcred.pdf>.

31. See JOHN E. COONS & STEPHEN D. SUGARMAN, MAKING SCHOOL CHOICE WORK FOR ALL FAMILIES: A TEMPLATE FOR LEGISLATIVE & POLICY REFORM (1999) (showing an analysis of school voucher plan parameters (with special consideration of whether the voucher is limited to low income families or is extended to all families)).

32. *EITC Home Page—It's Easier Than Ever to Find Out if You Qualify for EITC*, INTERNAL REVENUE SERVICE. <http://www.irs.gov/Individuals/EITC-Home-Page—It%E2%80%99s-easier-than-ever-to-find-out-if-you-qualify-for-EITC> (last updated Oct. 24, 2013).

33. I.R.C. § 30D (2006).

federal foreign tax credit.³⁴ The motivation for such tax credits is usually to encourage taxpayers to engage in some sort of behavior they might not otherwise undertake.

From this perspective, a state which enacts a school scholarship tax credit plan offers a *state* tax credit to those who make contributions to organizations (referred collectively here as *scholarship granting organizations* (SGOs)) that in turn use the money to award scholarships to financially needy children attending elementary and secondary schools (K-12). Such a tax credit primarily promotes family choice in schooling by giving options to those families who otherwise would not have the sort of choices that are routinely available to financially well-off families.

By offering a tax credit, rather than, say, simply an appropriation of state funds (as state-funded school voucher plans do), this private school funding mechanism depends upon state taxpayers (individuals and/or corporations) believing in the desirability of promoting school choice of the sort to which the tax credit applies and then acting in a way that triggers the tax credit for themselves. Unlike a tax credit which directly benefits one's own household—for example, a tax credit for installing solar panels—the school scholarship tax credit is perhaps more analogous to a tax-deductible charitable contribution, in which the qualifying donee must be a cause that the taxpayer wants to support. In effect, state legislators are saying that if taxpayers one-by-one support this cause, then the state is willing to give up public tax revenues in support of the plan.

There are a number of reasons why a state might want to structure a school scholarship plan as a tax credit rather than to employ direct state appropriations, say, in the form of school. These reasons—legal, financial, and political—will be addressed later in the article.

B. A Tax Credit of What Percent?

It is important to appreciate that state and federal tax laws already provide tax benefits to individual taxpayers who make contributions that fund scholarships for other people's children by allowing them to take deductions in the amount of those donations against their otherwise taxable income.³⁵ Moreover, corporate taxpayers may already be able to

34. I.R.C. § 901 (2006).

35. *See, e.g.*, I.R.C. § 170 (2006).

deduct from their earnings (subject to state and federal corporate taxes) the money they contribute to provide such scholarships.³⁶

To be sure, these sorts of contributions are traditionally made directly to schools, which in turn use the funds to give financial aid to their own students. From the donor's perspective, existing deductions for charitable contributions are only modestly different from these new tax credit school scholarship plans since in these new plans it is also someone else, not the donor, who actually selects the individual scholarship winners. Indeed, even absent these new plans, a non-profit scholarship granting organization could be created to accept donations and then redirect the funds as school scholarships to children attending more than one school; and donors would be eligible for federal and state tax benefits from contributing to such an organization under federal and many existing state laws.

Therefore, to incentivize donors to participate in the new school scholarship tax credit plans, a contribution to an SGO has to reward them more than the financial incentives already provided by existing state and federal law. A 100% tax credit would surely meet this requirement, and this is what both Florida³⁷ and Arizona³⁸ provide, for example. (To be clear, a 100% tax credit means that for every dollar the taxpayer contributes to the tax credit school scholarship plan, the taxpayer may reduce his tax liability by a dollar.)

However, the tax credit awarded by these new plans need not be equal to 100% of the qualifying expenditure to incentivize donors. Tax credits of, say, 50% or 75% of the amount of donations may well be financially more appealing than existing law for many donors. By contrast, however, a tax credit of, say, only 20% would be financially far less appealing to many individual donors. Notably, then, while the Arizona and Florida plans led the way with 100% tax credit provisions, other states have adopted lesser amounts (e.g., 65% in Iowa³⁹ and 50% in Indiana⁴⁰ and Oklahoma⁴¹), but in all cases the tax credit is at least 50%.⁴²

36. *Id.*

37. FLA. STAT. § 1002.395(5)(b) (2012); *see also* GLENN & SWINDLER, *supra* note 21, at 40.

38. ARIZ. REV. STAT. ANN. §§ 43-1089, 43-1183 (2012); *see also* GLENN & SWINDLER, *supra* note 21, at 34-35.

39. IOWA CODE § 422.11S (2011).

40. IND. CODE § 6-3.1-30.5-8 (2012).

41. OKLA. STAT. tit. 68, § 2357.206 (B)(1) (2012).

42. *See also* GLENN & SWINDLER, *supra* note 21 (for example, under the Pennsylvania and Rhode Island plans, the credit is 75% for a one year donation and 90% for a two year donation).

The analysis here is based on the assumption that *at the state level* the tax credit plan *replaces* what would be a tax deduction with a tax credit, but that at the federal level, the contribution would remain deductible (for those eligible to take deductions) in the way that any other charitable contribution is.

For many taxpayers in 100% credit states like Arizona, for *federal tax purposes* the charitable contribution's tax benefit would be generally offset by a lowered federal tax deduction for state taxes, since the contribution would reduce state taxes by the full amount of the contribution. These taxpayers, therefore, would not get a net federal benefit from the contribution. But, because of the state tax credit, the contribution they make costs them nothing.

In a 50% credit state, the net consequences for individual taxpayers are more complex. Someone giving, say, \$1,000 would get a \$500 state tax credit. In turn, the taxpayer would get a net federal deduction of \$500 (i.e., the \$1,000 charitable contribution deduction but a \$500 smaller state tax deduction). If the taxpayer is in, say, the 30% marginal tax bracket that \$500 net deduction would be worth \$150 in terms of reduced federal taxes. So the net cost of the \$1,000 contribution would be \$350 (\$1,000 minus \$500 state tax credit and minus \$150 lower federal taxes).

This is all somewhat simplified because somewhat different results would follow, for example, for those individuals who normally do not itemize a full range of deductions and for those who pay the Alternative Minimum Tax (AMT).⁴³ For corporate taxpayers a somewhat different analysis may also have to be made. However, the general point is to illustrate the interactions between the state tax credit and federal tax law.

When states are designing a tax credit rate, it is essential to re-emphasize that if the credit is equal to 100%, then (at least as a general approximation) the plan becomes financially costless to the taxpayer, who, in effect, is allowed to spend what otherwise would be state revenue for the qualifying cause. Therefore, a tax credit of this nature creates the strongest incentive for taxpayer participation. Of course, even if costless to the taxpayer, many taxpayers will elect not to participate, perhaps believing that their taxes are put to better use in the general state budget.

43. See *Topic 556 - Alternative Minimum Tax*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/taxtopics/tc556.html> (last updated Feb. 5, 2013).

By contrast, if the tax credit were, say, 50% or 75% of the taxpayer's contribution, then the taxpayer must be willing to contribute his own money in support of the cause. In short, a less than 100% credit generally requires that taxpayers not only believe in school choice for lower income families but also are willing to make a personal financial contribution to support that goal. Nonetheless, as shown above, for many taxpayers, a less than 100% state tax credit will generate at least some additional net federal tax benefit thereby reducing but not eliminating the net cost to them.

As a policy matter, state leaders may have a range of views on whether tax-rewarded donors also should have to contribute to the cause or whether all of the funding should in effect come from lost state revenues.

A further consideration is the "substitution" issue raised by these plans. If you are already making tax-benefited charitable contributions and you like the idea of contributing to the new tax credit school scholarship plan, will this new plan increase your overall giving, merely redirect an equivalent amount of your existing giving, or some of both? The answer to this question is difficult to predict and depends, at least in part, on how calculating donors are and the tax credit rate applied in the plan. Moreover, even once a plan is established, it will be difficult to determine the impact of substitution without careful interviews with donors.

Nonetheless, here are some thoughts about how taxpayers might approach the matter. If the tax credit is less than 100%, coolly rational taxpayers might well conclude that, overall, they can be out of pocket the same amount of money and have their donations go further by both shifting former charitable donations to the scholarship plan as well as adding new contributions to the new plan. For example, suppose a taxpayer previously gave \$5,000 to a combination of her church and alma mater and received \$1,500 in net federal and state tax benefits such that the donations cost the taxpayer \$3,500 net. Now suppose under the tax credit school scholarship plan the tax credit is 50% and with the federal tax benefit the net cost (as illustrated above) is 35%. In that event, \$5,000 could be re-directed to the school scholarship plan and the taxpayer could double his gift to make it \$10,000 yet be out of pocket the same as before (\$3,500). Whether taxpayers would shift any or all of their existing package of contributions could well depend on factors such as whether there is a ceiling on the amount of the new tax credit and how much they care about this cause as compared with others.

If the new plan provides a 100% tax credit, then notice that no shifting is required in order to add donations to the new plan on top of one's existing portfolio of giving. This is probably how drafters of a 100% tax credit plan envisioned it, and it may well be how those seeking donors to the plan promote it. Yet, real fans of the new plan might decide to shift their entire charitable giving to the new plan (at least up to the maximum tax credit allowed). Suppose again, you traditionally give \$5,000 each year (between your church and your alma mater) and the tax benefit from state and federal tax deductions is worth \$1,500 to you. This means you in effect were generating \$5,000 of benefits to your favorite charities at a cost to you of \$3,500. With the new plan and a 100% tax credit, you might just increase your total contributions by adding contributions to the new plan and maintaining existing charitable contributions, which could cost you nothing. Yet, if you switched all of your former giving to the new plan (assuming there is no cap on the state tax credit), you could be just as "charitable" as before, but at a substantially reduced cost to you (i.e., to zero). Of course, many taxpayers might feel warmly towards the new plan but still prefer their existing donees; those taxpayers are unlikely to fully shift their current package of donations to the new plan.

These competing policy considerations suggest that, all other things equal, the higher the tax credit, the more donations the program is likely to attract. However, there is no obviously right tax credit percentage for state governments to embrace. This is perhaps best demonstrated by the fact that, as already noted, the states that have already adopted these tax credit school scholarship plans have opted for differing percentages.⁴⁴

C. Which Taxpayers and Against Which Taxes?

This section considers which taxpayers should be able to participate in a state's tax credit school scholarship plan. In designing a school scholarship tax credit plan, should the tax credit only be available to individuals to claim against their state income taxes, as was initially the case in Arizona?⁴⁵ Or should the tax credit be restricted to corporate donors, as

44. See GLENN & SWINDLER, *supra* note 21.

45. ARIZ. REV. STAT. ANN. § 43-1089.03 (2012).

in Florida,⁴⁶ New Hampshire,⁴⁷ Pennsylvania,⁴⁸ and Rhode Island?⁴⁹ Or should both individual and corporate donors be eligible as is now the case in a number of the states, including Arizona,⁵⁰ Georgia,⁵¹ Indiana,⁵² Iowa,⁵³ Louisiana,⁵⁴ Oklahoma,⁵⁵ and Virginia?⁵⁶ Furthermore, if corporate entities are eligible for the credit, should it be applicable only to corporate income taxes or to other state taxes such corporate entities might also owe as well (such as insurance premium taxes, severance taxes, sales taxes, alcohol taxes and the like, as has been adopted in Florida)?⁵⁷ If a state has no individual state income tax, might the tax credit be used to offset other taxes that individuals pay?

Again, while there is no right answer here, it seems safe to say that states are likely to be influenced in the way they design a scholarship tax credit plan based on the existing taxes they have in place. Some states, after all, have no state individual income tax or no state corporate income tax, for example.⁵⁸

For supporters of expanded school choice, it might initially seem desirable to allow the credit to be claimed by both individuals and corporations against any and all state taxes. However, this approach may not be the best decision for reasons of maintaining a plan's legitimacy. For example, if the plan is sold to the legislature and the public as a way to give greater school choice to "other people's" children (children the

46. FLA. STAT. § 1002.395 (2012); *see also Florida Tax Credit Scholarship Program*, FRIEDMAN FOUND. FOR EDUC. CHOICE, <http://www.edchoice.org/School-Choice/Programs/Forida-Tax-Credit-Scholarship-Program.aspx> (last visited Nov. 13, 2013).

47. N.H. REV. STAT. ANN. § 77:G (2012).

48. 72 PA. STAT. ANN. § 8705-F (West 2012).

49. R.I. GEN. LAWS § 44-62 (2011).

50. ARIZ. REV. STAT. ANN. §§ 43-1089, -1089.03, -1183 (2012).

51. GA. CODE ANN. §§ 20-2A, 48-7-29.16 (2012).

52. IND. CODE § 6-3.1-30.5 (2012).

53. IOWA CODE §§ 422.11S, 422.33.28 (2011); *see also Iowa – School Tuition Organization Tax Credit*, FRIEDMAN FOUND. FOR EDUC. CHOICE, <http://www.edchoice.org/School-Choice/Programs/School-Tuition-Organization-Tax-Credit.aspx> (last visited Nov. 13, 2013).

54. LA. REV. STAT. ANN. § 47: 6301 (2012).

55. Okla. Stat. tit. 68, § 2357.206 (B)(1) (2012).

56. AM. FED'N FOR CHILD., *supra* note 16.

57. FLA. STAT. § 1002.395 (2012).

58. *See Top Marginal State Income Tax Rates, Tax Year 2011*, TAX FOUND. (June 2, 2011), <http://taxfoundation.org/article/map-top-marginal-state-income-tax-rates-tax-year-2011> (reporting that Alaska, Florida, Nevada, South Dakota, Texas and Washington have no state income (wage) tax); *see also State Corporate Tax Rates, 2000-2012*, TAX FOUND. (Mar. 22, 2013), <http://taxfoundation.org/article/state-corporate-income-tax-rates-2000-2012> (finding that as of Jan. 1, 2012, Ohio, Texas and Washington do not have corporate income tax but do have gross receipts tax).

donor does not individually know and who are selected by scholarship granting organizations), it is important to ensure that families and schools do not try to game the system and divert funds to their own children or students.

For example, even if an individual could not get a tax credit for tuition spent on his or her own child, there is a potential risk that families at the same school or families in “sister” schools would make secret deals to contribute donations to a narrowly focused scholarship granting organization that would, in effect, be for each other’s kids with the net economic effect of funding his or her own child. There is some reason to believe that some Arizona families and schools have in effect used the Arizona individual tax credit plan in this way, a risk that is only somewhat reduced by the requirement that SGOs in Arizona award scholarships to children attending at least two different schools and that donors may not designate individual scholarship recipients (although donors may recommend recipients).⁵⁹

Moreover, even if the core purpose of the plan is to facilitate greater choice for low-income families, the political pressure to raise the income eligibility level to financially better off families may be greater if individual families are the donors rather than businesses. These considerations might suggest limiting a tax credit plan to corporate entities.

On the other hand individual family donors may care more about school choice as compared to corporate entities and this concern may be for ideological or religious reasons apart from assisting their own children. This possibility would cut in favor of a tax credit plan focused on an individual taxpayer tax credit.

Yet, investigations of local attitudes might reveal that business leaders actually support the plan more than individuals if, for example, the business community comes to believe that a school choice plan could expand the pool of well-educated youth coming into the local labor force or could boast their image in the community. Businesses may particularly prefer tax credit with a 100% tax credit rate if they believe that government is wasteful of taxpayer dollars.

However, businesses might be vulnerable to political pressures from public school supporters who oppose these tax credit school scholarship

59. Sarah McIntosh, *Arizona Task Force to Review Tax Credit Scholarship Program*, HEARTLANDER MAGAZINE (Oct. 29, 2009), <http://news.heartland.org/newspaper-article/2009/10/29/arizona-task-force-review-tax-credit-scholarship-program>; ARIZ. REV. STAT. ANN. § 43-1602 (2012).

plans (like teachers' unions). Such opponents might press businesses not to participate and thereby reduce corporate participation in such plans. This concern could be a reason to avoid including corporate donors in the plan.

The long run hoped-for size of the plan is also relevant, since allowing a credit against more types of taxes expands the pool of donors and donation amounts. This is perhaps especially so for corporations or other businesses that do not pay corporate income tax but do pay other sorts of state business taxes.

At a minimum, these sorts of concerns show that the plan's design features are important in maintaining both the integrity and financial robustness of the plan.

Again, there is no best answer here, and as noted at the outset of this section, states which have enacted such plans have chosen very different paths. Still, the growing trend is to grant credits to both individual and corporate taxpayers.⁶⁰

D. Should There Be a Cap on the Tax Credit and If So of What Sort?

This section explores whether states should impose a cap on the tax credit and if so whether that cap should be imposed at the taxpayer or program level.

First, at the *taxpayer level* should there be a limit on how large an overall credit any specific taxpayer can claim? And if so, then how should that limit be described and should the state allow unused credits to be carried forward to a subsequent year?

For example, other tax programs have imposed varying limitations on individual contributions. Under federal tax law, deductions for individual charitable donations are generally limited to 50 percent of adjusted gross income (with lower limits applicable to donations of property and

60. See GLENN & SWINDLER, *supra* note 21; see also tit. 68, § 2357.206 (establishing the Oklahoma Equal Opportunity Education Scholarship Act for both individual and corporate taxpayers in 2011); VA. CODE ANN. §§ 58.1-439.25 to -439.28 (Supp. 2013) (establishing an Education Improvement Scholarships Tax Credit plan for both individual and corporate taxpayers in 2012); LA. REV. STAT. ANN. § 47:6301 (2012) (establishing a Tax Credit for Donations to Schools for both individual and corporate taxpayers in 2012); ALA. CODE §§ 16-6D-1 et seq. (2013), available at http://www.alsde.edu/legislativebills/2013Regular/HB0084_ENACTED.pdf (establishing "The Alabama Accountability Act of 2013" for both individual and corporate taxpayers). *But see* N.H. REV. STAT. ANN. § 77:G (2012) (establishing a Corporate Education Tax Credit in 2012).

appreciated assets), but contributions in excess of the limit may be carried over to be claimed on a tax return in a future year.⁶¹ As a sharp contrast, a special federal tax credit for new home buyers was limited to homes bought during a portion of 2008 and was only applicable to tax returns for that year.⁶²

With respect to tax credit school scholarship programs, Arizona, for example, essentially doubled its annual cap on the individual tax credit portion of its program, starting in 2012, to about \$1,000 per taxpayer (\$2,000 per couple) (adjusted annually for inflation) with excess contributions carried forward to future years; it did this by adding a new Plus “Switcher” program for individual donors (described below).⁶³ Arizona, however, does not cap corporate tax credits at the taxpayer level.⁶⁴ Oklahoma caps individual credits at \$100,000 (although its tax credit rate is 50% as compared to Arizona’s 100%).⁶⁵ In 2009, Georgia limited couples to a credit of \$2,500 and corporations to 75% of their total tax liability.⁶⁶ Iowa,⁶⁷ Indiana,⁶⁸ and Florida⁶⁹ do not cap credits at the taxpayer level.

Individual caps, even if they exist, are not always reached and may not even give a clear picture of the scale of the program. For example, in 2011-2012 about 75,000 individual Arizona taxpayers claimed a combined \$51 million in tax credits with the average credit just under \$700.⁷⁰

61. See *Publication 526 – Main Content*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/publications/p526/ar02.html> (last visited Nov. 13, 2013) (outlining limitations on individual charitable contributions).

62. I.R.C. § 36 (Supp. IV 2010).

63. ARIZ. REV. STAT. ANN. §§ 43-1089.3, 43-1603(E) (2012) (expanding the cap available under the individual income tax plan but requiring that students who receive scholarships from “Switcher” credits satisfy one of the following: 1) have attended a governmental school last year and transferred from a government school to a qualified school; 2) have enrolled in a qualified school in a kindergarten or preschool program that offers services for students with disabilities; 3) is the dependent of a member of the U.S. Armed Forces stationed in Arizona pursuant to military orders; or 4) previously received a scholarship under 1, 2, 3, the low-income credit, or the disabled/displaced credit and continues to attend a qualified school in a subsequent year); see also *New ‘Switcher’ AZ Tax Credit May Double Funds for JETCO*, AZ. JEWISH POST (Nov. 15, 2012), www.azjewishpost.com/2012/new-switcher-az-tax-credit-may-double-funds-for-jetco/.

64. ARIZ. REV. STAT. ANN. § 43-1183.

65. tit. 68, § 2357.206 (B)(1).

66. GA. CODE ANN. §§ 48-7-29.16(B)-(C) (2012).

67. IOWA CODE § 422.11S (2011); see also *Iowa – School Tuition Organization Tax Credit*, *supra* note 53.

68. IND. CODE § 6-3.1-30.5 (2012); see also GLENN & SWINDLER, *supra* note 21, at 43.

69. FLA. STAT. § 1002.395 (2012); see also GLENN & SWINDLER, *supra* note 21, at 40.

70. AZ. DEP’T OF REVENUE, PRIVATE SCHOOL TUITION ORGANIZATION INCOME TAX CREDITS IN ARIZONA: A SUMMARY OF ACTIVITY FY 2011, at 5 (2011), available at <http://www.azdor.gov/Portals/0/Reports/2011-Private-School-Tuition-Organization-Individual-and-Corporate-Income-Tax-Credit-Report.pdf>.

In that same year, nearly seventy Arizona corporations claimed a combined \$11 million in corporate tax credits with the average credit just over \$160,000.⁷¹ In the same year just over 100 corporations claimed credits in Florida, averaging about \$1 million each, for a combined corporate tax credit of more than \$100 million.⁷² For the same year, in Georgia, 140 corporations claimed an average credit of just under \$150,000, and just over 10,000 individual Georgia taxpayers claimed an average credit of almost \$600.⁷³ In 2010-2011, just over 1,700 corporations in Pennsylvania claimed a total of approximately \$40 million in corporate tax credits.⁷⁴ This data shows substantial variation from state-to-state quite apart from state caps.

A second, but inter-related, question is whether there should be an *overall statewide cap on the aggregate amount of tax credit allowed under a state's plan*. An aggregate cap allows the state to limit the overall amount of money going into the plan and therefore lost as revenue. Currently, states vary wildly on this criterion. Florida capped its corporate credit at more than \$200 million for 2012-2013.⁷⁵ This limit was reached, however, and as a result 16,000 eligible pupils remained on the waiting list for scholarships (whose financial support could be generated from willing donors were the Florida overall cap increased).⁷⁶ States with smaller programs like Indiana, Iowa and Oklahoma capped their programs at under \$10 million.⁷⁷ A related question is how a statewide cap might be allocated between corporate and individual taxpayers where both may participate in a state's tax credit scholarship program. In Iowa, for example, corporate donors are limited to contributing up to 25% of the overall cap.⁷⁸ In Indiana and Oklahoma also the total cap is

71. *Id.* at 11.

72. Email from Doug Tuthill, *supra* note 72 (noting that a small number of alcohol distributors currently provide a significant portion of the Florida contributions, with two or three in the range of \$20M per year).

73. MANZI & LARSON, *supra* note 30, at 26.

74. MANZI & LARSON, *supra* note 30, at 32.

75. FLA. STAT. § 1002.395(5)(a) (2012).

76. Email from Doug Tuthill, *supra* note 72 (“[W]e currently have 16,000 on a waiting list. We could have raised sufficient money to eliminate the waiting list but we have a legislative cap on the amount of money we can raise yearly.”).

77. IND. CODE § 6-3.1-30.5-13 (2012) (stating that tax credits are limited to \$5 million per state fiscal year); IOWA CODE § 422.11S.7.a.2 (2011) (stating that statewide tax credits under the program are capped at \$8.75 million for tax years beginning on or after Jan. 1, 2012); OKLA. STAT. tit. 68, § 2357.206(B)(2) (2012) (limiting aggregate tax credits to \$3.5 million annually).

78. § 422.33.28.

divided between individual and corporate donors.⁷⁹ Arizona capped its corporate credit at about \$30 million but has not capped its individual credit program.⁸⁰ Louisiana, by contrast, has not imposed an aggregate cap on its plan at all.⁸¹

One perhaps politically savvy reason for an aggregate cap is to allow legislators and the legislative process to place a maximum price tag on the plan. If there is to be such a cap, then clearly its level is critically important in determining not only how large the program can be but also whether the cap winds up being actually binding (since a generous cap may well not be reached).

An additional consideration is how taxpayers respond to an overall plan cap. Taxpayers may be discouraged from making donations if they have no way of knowing whether their donation is under or above the cap when they make it. That problem could be dealt with, however, through a first-come, first-served prior-approval scheme in which taxpayers are pre-approved by an appropriate state agency to ensure that tax credits are available before making a donation. This strategy could also encourage early donations each year. In the past, operating a pre-approval scheme would probably have been very costly unless the plan were restricted to a limited pool of donors. However, today an individual taxpayer first-come, first-served pre-approval scheme might be feasible through low-cost online administration. And with experience and improved technology, states are adopting such regimes.⁸² Another approach to managing a statewide cap could be to allow credits in excess of the cap to be carried forward into future years.⁸³

Another consideration is whether states that adopt an overall cap should build in a mechanism for that cap to automatically increase over time without any new legislative action. Plan supporters would likely

79. § 6-3.1-30.5 (describing that any taxpaying entity (corporate and/or individual) may contribute, in aggregate, up to \$5 million per state fiscal year); § 2357.206 (2012) (describing that individual and corporate taxpayers, in aggregate, may each contribute up to \$1.75 million annually).

80. ARIZ. REV. STAT. ANN. §§ 43-1089, 43-1183 (2012).

81. LA. REV. STAT. ANN. § 47: 6301 (2012).

82. See, e.g., *Single Application*, PA. DEP'T OF COMM. & ECON. DEV. <http://www.newpa.com/find-and-apply-for-funding/apply-for-programs-funding> (last modified Mar. 21, 2013).

83. See, e.g., FLA. STAT. § 1002.395(5)(c) (2012) (noting that unused individual tax credit amounts may be carried forward for up to five years if the aggregate statewide cap is met); GA. CODE ANN. § 48-7-29.16(E) (2012) (describing that a taxpayer's unused tax credit may be carried forward for up to five years); VA. CODE ANN. §§ 58.1-439.26 (B)(2) (Supp. 2013) (describing that a taxpayer's unused tax credit may be carried forward for up to five years).

strongly favor such a mechanism. Of course, even such an automatic increase in the cap could be subsequently overridden by later legislation (assuming that the entire tax credit plan is adopted by an ordinary legislative action and not, say, as a constitutional amendment through the state initiative process). An expanding cap allows the plan to be marketed at the start as an experiment, but would not require constant legislative action to continue if the plan appeared to be both educationally successful and financially manageable over time. Florida has adopted a complex approach which automatically raises the statewide cap each year if donations reach the prior year's cap.⁸⁴ In practice, the Florida cap has increased over time as donations increase and the plan matures.⁸⁵

All of this discussion of caps has implicitly assumed that the tax credit plan will cost the state money. But that need not be the case. The question of whether such a plan costs or saves the state money will be briefly raised here and carefully addressed in Part VIII. Put simply, suppose that the scholarships granted go only (or almost only) to children who would otherwise be attending the state's public schools, and assume that the amount of each child's scholarship was less than the marginal public cost of educating each of these children in public schools. On these assumptions, every time a scholarship is awarded, the state actually saves money under the plan. Indeed, widespread political support of these sorts of plans is likely to be far greater (certainly among Republicans) were the plan to save the state money (or at least break even) rather than costing the state on a net basis. The point here is that if the plan is designed not only to promote family choice but also to save money and is successful in doing that, then imposing an overall cap on the tax credit might be counter-productive.

For reasons that will be explained in Part VIII, the assumption that a tax credit scholarship plan will "of course" save the state money is probably unwise to make. The outcome depends on further plan parameters yet to be discussed. But the point is at least to raise the possibility here that this new school choice strategy could either yield some state savings

84. § 1002.395(5)(a)(2) (stating "In the 2013-2014 state fiscal year and each state fiscal year thereafter, the tax credit cap amount is the tax credit cap amount in the prior state fiscal year. However, in any state fiscal year when the annual tax credit amount for the prior state fiscal year is equal to or greater than 90 percent of the tax credit cap amount applicable to that state fiscal year, the tax credit cap amount shall increase by 25 percent.").

85. *Id.*

or have no net cost to the state or government at all levels (given the role of local taxes in funding public schools today).

III. SCHOLARSHIP GRANTING ORGANIZATIONS: THE CONNECTION BETWEEN TAXPAYER DONORS AND SCHOLARSHIP-RECEIVING FAMILIES

To date, states adopting tax credit school scholarship plans have all called for the creation of *scholarship granting organizations* (SGOs), which serve as intermediaries between the taxpayer and the scholarship-holding student. State refer to these intermediary organizations differently: “school tuition organizations” (STOs) in Arizona⁸⁶ and Iowa,⁸⁷ “scholarship-funding organizations” (SFOs) in Florida,⁸⁸ “student scholarship organizations” (SSOs) in Georgia,⁸⁹ “scholarship organizations” (SOs) in Rhode Island⁹⁰ and Pennsylvania⁹¹ and “scholarship granting organizations” (SGOs) in Indiana⁹²—the term used here.

For a simple example of how this works, in Florida a corporate donor would make a contribution to Step Up For Students, an organization that would aggregate all of its donations and then determine to whom to grant the scholarships and then make the awards from among its applicants.⁹³

It is not essential that SGOs are employed as part of the plan. Donors could instead be allowed to directly award scholarships to eligible families, or, more likely, they could be permitted to make contributions directly to schools which in turn would award the scholarships. After all, as noted already, the latter is generally how charitable tax deduction donations work when given to educational institutions and earmarked to

86. ARIZ. REV. STAT. ANN. § 43-1602 (2012).

87. IOWA CODE § 422.11S.5.c (2011).

88. § 1002.395.

89. GA. CODE ANN. § 20-2A-1(3) (2012).

90. R.I. GEN. LAWS § 44-62-2(6) (2011).

91. 72 PA. STAT. ANN. § 8702-G.1 (West 2012); *see also* GLENN & SWINDLER, *supra* note 21, at 58-59.

92. IND. CODE § 6-3.1-30.5-3 (2012).

93. *See Florida Tax Credit Scholarship Proram*, FLA. DEP'T OF EDUC., <http://www.floridaschoolchoice.org/information/ctc/> (last visited Nov. 13, 2013) (noting that Step Up For Students is currently the only Scholarship Funding Organization (SFO) eligible to participate in the Florida Tax Credit Scholarship Program though other entities could apply to become eligible SFOs).

support financial aid. But there are both ideological and practical arguments in favor of using SGOs as go-betweens.

If the central goal of the tax credit plan is to empower more families to be able to make school choices for their children, then there is something symbolically and practically attractive about a system that puts families on an equal footing—not having to compete for the patronage of individual taxpayer-donors or the support of any specific school that donors (in contrast to parents) might prefer. Moreover, at the practical level, SGOs eliminate the need for donors to create an eligibility-screening and selection mechanism, and this approach creates centralized entities from which to apply for a scholarship. Using SGOs also readily facilitates making the scholarships portable if the participating eligible family decides to move its children from one qualifying private school to another. By contrast, were the scholarships awarded by schools then a family might be locked into the school where it first qualified and chose to participate and, therefore, would have limited future mobility.

In terms of regulating intermediary organizations, states have a number of design choices. A state law could designate one exclusive SGO, and that SGO could be a governmental agency or a private entity, and the latter could be a non-profit organization or not. Alternatively, a mechanism could be created that allows for several SGOs to come into existence to compete with each other to attract donors. For example, although both Arizona and Florida have turned to private non-profit and federally tax-exempt SGOs, Arizona has about sixty SGOs participating in the market,⁹⁴ whereas in Florida the SGO Step Up For Students has performed so well that at present it has captured the entire market.⁹⁵ Iowa currently has about a dozen SGOs,⁹⁶ Indiana has six,⁹⁷ and Georgia nearly forty.⁹⁸

94. AZ. DEP'T OF REVENUE, *supra* note 70, at 1.

95. *Scholarship Funding Organizations 2011-2012*, FLA. DEP'T OF EDUC, <http://www.floridaschoolchoice.org/information/CTC/SFO.asp> (last visited Nov. 13, 2013).

96. *STO Directory*, IOWA ALLIANCE FOR SCH. CHOICE, <http://www.iowaace.org/Stodirectory/WesternIowaSTOs.aspx> (last visited Nov. 13, 2013); see also *Iowa - School Tuition Organization Tax Credit*, *supra* note 53.

97. *Approved Scholarship Granting Organizations as of 3/22/2013*, IND. DEP'T OF EDUC., <http://www.doe.in.gov/sites/default/files/choice/2013-03-18-sgolisting.pdf> (last visited Nov. 13, 2013).

98. 2013 List of Student Scholarship Organizations (SSOs) as of August 21, 2013, GA. DEP'T OF EDUC, <http://www.doe.k12.ga.us/External-Affairs-and-Policy/Policy/Documents/SSO%20List.pdf> (last visited Nov. 13, 2013).

If there is an overall state cap on the tax credit, a SGO could help a prospective donor determine whether the cap has been reached, although this function could also be performed completely by the state tax authorities, which is generally how it has been done so far. A SGO could be rather passive, simply available to receive donations from those who are so motivated, or it could actively recruit donations for the program, which is how Florida's Step Up For Students functions.⁹⁹ Solicitations can be widely directed via the Internet or other media, but they can also be individualized, especially if there is no cap on the amount of the tax credit that any single donor can claim. In this respect, an SGO could function like the development office of other charitable organizations.

In terms of awarding scholarships, SGOs could be given broad discretion as to who should receive a scholarship or the state could specify in advance the criteria by which the scholarships are to be awarded. This topic will be explored in more detail below. For now, simply assume that a general principle of first-come, first-served applies to eligible children, with preference given to those who received a scholarship the prior year and seek to continue in the plan (a provision explicitly included in a number of state programs).¹⁰⁰

While even this preference in favor of someone already in the plan is not essential, its appeal is obvious in circumstances in which demand exceeds supply so that families will know that once their child initially qualifies he or she is likely to remain a scholarship recipient so long as the family qualifies and the child continues to attend a private school. In practice, apart from Louisiana,¹⁰¹ state laws do not generally explicitly require SGOs to provide scholarships on a first-come, first-served basis to new applicants. Florida's law is less clear, but in any event Step Up for Students has elected to follow this policy.¹⁰²

99. STEP UP FOR STUDENTS, <http://www.stepupforstudents.org> (last visited Nov. 13, 2013).

100. See, e.g., LA. REV. STAT. ANN. § 47:6301(c)(iv) (2012) (requiring that STOs give "priority . . . to students who received a scholarship in the previous year"); 72 PA. STAT. ANN. § 8708-G.1(b)(1) (West 2012) (requiring that scholarship organizations under the state's Educational Opportunity Tax Credit Scholarship program give preference for *inter alia* students who received scholarships in the prior year establishing an Educational Opportunity Scholarship Tax Credit in 2012).

101. § 47:6301(c)(iv) (requiring that STOs "[p]rovide scholarships to qualified students on a first-come, first-served basis, with priority given to students who received a scholarship in the previous year").

102. Email from Doug Tuthill, *supra* note 72 (noting that renewal families get priority but otherwise selection is based on a first-come, first-served process).

Perhaps a first-come, first-served rule might be sensibly implemented by setting an initial window of time during which families are to apply and then selecting from among those who meet the deadline by lottery if there is more demand than there is money available. Were all the funds not used up after the initial window closed and awards were made (or if more donations were later received), then later on, a new round of scholarships could be awarded on the same basis.

Potential regulation of SGOs is a rich and complex matter. One must worry about avoiding any conflict of interest or even an appearance of one between a SGO and specific schools. Steps need be taken to prevent discrimination by SGOs, both *de jure* and *de facto*, among families seeking scholarships. This includes giving attention to how the SGO makes its bounty known in the community of eligible families. Most states require that SGOs not restrict their scholarships to students attending a single school.¹⁰³

Moreover, states must address the concern that SGOs use as much of the received donations as possible to fund scholarships rather than fund the administration of the SGO. States could limit the amount that an SGO can spend on its expenses. For example, Florida has required that SGOs limit their administrative expenses to just 3%.¹⁰⁴ Just how little that percentage should be should probably depend on the SGOs tasks. Does it explore the cap issue? Does it have substantial (or indeed any) discretion in making its awards? Assuming it must determine whether applicant families are eligible, what steps are SGOs expected to take in doing so? For example, are SGOs supposed to review tax returns? Does “food stamp” or free school lunch eligibility create automatic eligibility for the scholarship? Should SGOs consider the reality that there are fraud and mistakes in those programs? Furthermore, to what extent, if any, must the SGO investigate the school to which the family wants to send its child using the scholarship? Is it enough that the school meets the minimum state requirements for satisfying the compulsory education

103. *See, e.g.*, IND. CODE § 6-3.1-30.5-3 (2012); FLA. STAT. § 1002.395(6)(h) (2012); GA. CODE ANN. § 20-2A-1(3)(B) (2012); R.I. GEN. LAWS § 44-62-2-7 (2011).

104. § 1002.395(6)(i)(1) (stating that SFOs “May use up to 3 percent of eligible contributions received during the state fiscal year in which such contributions are collected for administrative expenses if the organization has operated under this section for at least 3 state fiscal years and did not have any negative financial findings in its most recent audit under paragraph (l). Such administrative expenses must be reasonable and necessary for the organization’s management and distribution of eligible contributions under this section. No more than one-third of the funds authorized for administrative expenses under this subparagraph may be used for expenses related to the recruitment of contributions from taxpayers.”).

law? Or are additional things required that demand the review of the SGO? For example, whether the school gives its students certain tests and reports the results honestly, or whether any of its instructors has been convicted of certain crimes, or whether the school discriminates in certain forbidden ways in admissions, and so on? Several of these issues will be considered in more detail below, but the point here is that they are relevant to deciding how much a SGO should fairly be able to spend on administration.

Other states have not been as restrictive as has Florida in limiting the share of donations received that may be used for SGO overhead. Most states, including Arizona,¹⁰⁵ Georgia,¹⁰⁶ Indiana,¹⁰⁷ Iowa¹⁰⁸ and Oklahoma¹⁰⁹ restrict SGO expenses to no more than 10% of their donations. Pennsylvania appears to give the greatest leeway to SGOs, requiring that only 80% of donations be spent on scholarships.¹¹⁰

Procedural matters must also be addressed in designing a tax credit school scholarship plan, such as when the SGO must spend the donations it receives. Perhaps a sensible rule is that it must do so no later than the end of the next calendar year *after* it receives the donation. This sort of provision is included in several state plans.¹¹¹ Another timing issue is when the SGO should start receiving applications and making scholarship awards? And are families to first seek a scholarship and then seek admission to the school of its choice or vice versa or are the two to be done simultaneously? Working out those timing issues is essential for the plan to function efficiently.

Furthermore, states must choose how to evaluate the program. Should this be a SGO role or perhaps better the job of an independent third party? Policy makers and the public will understandably want to know who is applying for and receiving the scholarships, what schools they are attending, how much the plan is costing both gross and net, how the children receiving the scholarships are faring, how satisfied are parents with this enhanced choice, etcetera. While any participating SGO would be

105. ARIZ. REV. STAT. ANN. § 43-1602(C)(1) (2012) (applying to donations received by individuals).

106. § 20-2A-1(3)(A).

107. § 20-51-3-3(2).

108. IOWA CODE § 422.11S.5.c.1 (2011).

109. OKLA. STAT. tit. 68, § 2357.206(D) (2012).

110. 72 PA. STAT. ANN. § 8702-F (West 2012).

111. *See, e.g.*, § 20-2A-2(1)(A) (noting that up to 25% of the 90% of contributions that must go to scholarships may be carried into the next fiscal year).

expected to provide data relevant to this evaluation, it might well be preferable to have some other body carry out the evaluation.

IV. WHICH CHILDREN/FAMILIES SHOULD BE ELIGIBLE TO RECEIVE THE TAX CREDIT FUNDED SCHOLARSHIPS?

While a number of important policy issues must be decided in shaping the design of a tax credit scholarship program, perhaps none is more critical than the question of which children are eligible to receive scholarships.

Foremost is the question of whether eligibility should be restricted to low-income families. In debates over school vouchers, this issue looms central. Many advocates support voucher plans on the ground that they can facilitate substantially increased choice by families who now cannot afford private schools.¹¹² Therefore, many of those supporters favor restricting voucher eligibility to families with modest income.¹¹³ This pattern has carried over to the three well-known, city-based, publicly-funded school voucher plans that are in place in Milwaukee, Cleveland, and the District of Columbia.¹¹⁴ These advocates would likely want a tax credit school scholarship plan to be similarly targeted.

There are two core inter-related arguments for such targeting. One is that modest income families are the ones least well served by regular public schools today. Moreover, these families are most likely trapped in their local school district, given their financial inability either to move their residence to a community with better public schools or to pay to send their children to private schools. The second is that if scholarship or vouchers were made available to all families, then many well off families might use the program to exit public schools where their children now attend with children from poorer families, and this outcome seems completely incompatible with the first argument.

On the other hand, there are reasons to favor universal eligibility. First, this avoids having to draw an income level for eligibility and monitor that border. Second, at the same time it avoids the high implicit marginal tax rates that families near the border are likely to face if they start to

112. See COONS & SUGARMAN, *supra* note 2.

113. *Id.*

114. AM. FED'N FOR CHILD., *supra* note 16.

earn more income. For those families, not only will more income mean higher regular income taxes but also at some point it will mean the loss of the scholarship (or a lost initial opportunity to obtain one). These consequences seem quite unfair to some people and could actually discourage families from working. Third, some favor universal eligibility on the ground that this strategy creates more public support for the plan, drawing the analogy to the wider public support for universal Social Security as compared to welfare for the poor. Finally, some favor universal eligibility because they favor privatizing schooling to the extent possible.¹¹⁵ For those in favor of school privatization, having financially well-off families leave public schools is acceptable. This sentiment is in sharp contrast with advocates who favor targeting and who oppose universal scholarship plans which they envision would primarily benefit already-advantaged families.

One thing seems clear: those who advocate for plans limited to families who meet certain income requirements will push for greater regulation of participating schools if a plan were ultimately made universal, whereas they might be content with more limited regulation if the only beneficiaries of the plan were those less well off. This political reality might make some who favor universal plans quite content to start with targeted plans and then later engage the question of expanded eligibility. Another political reality is that targeted plans are far more likely to gain at least some support among Democrats.

If the tax credit school scholarship plan is to be targeted, and assuming for now that it is targeted at lower income families, it becomes important to decide just how modest the family's income must be. Is the goal to focus the plan centrally on "the poor"—people who are on welfare or who have what amount to minimum wage jobs or only modest-paid, part-time employment? Or should eligibility also extend to what are conventionally termed "working class families" (perhaps today one might call them lower middle class families)? We are talking here, for example, about the difference between, say, living at or below the poverty level versus, say, 150% or perhaps even 200% of the federal poverty level. Another way of looking at this issue in the school context would be to ask whether a child must be eligible for free school lunches or

115. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 87 (University of Chicago Press, 1962).

whether it is enough to qualify for reduced price lunches in order to receive a scholarship?

Many who favor targeted eligibility would support a plan whereby families with income of up to, say, 175% of the federal poverty level were eligible, so long as in practice the plan worked to importantly and perhaps disproportionately to benefit families living at or below the poverty level. One can think about this too in terms of income deciles. Maybe the plan should include families with income in the three lowest deciles, but require that families are somewhat distributed across those deciles so the bulk of recipients do not end up coming from families in the 20%-30% range rather than the 0%-20% range.

A related question is whether scholarship eligibility is a sharp cut-off point (with a yes/no answer on either side of a specific dollar amount) or whether eligibility should phase out as income starts to rise over a certain point with smaller and smaller scholarships available to those in the phase-out range.

And yet another related question is what happens to a family in year 2 whose children qualified for scholarships in year 1 when the family income was X and now the family income has gone up to Y. If Y is above the initial eligibility cut off, is the family just cut out? Or should those already on the plan have a higher income cut off going forward? For example, if initial eligibility was capped at 125% of the federal poverty level, should those receiving scholarships once in the plan have a cap of, say, 175%? Or should there be a phase out of the amount of the scholarship for those who already in the plan and whose income increases, regardless of whether there is a phase out for initial eligibility?

Using the federal poverty level or some proportion of it as an eligibility test is perhaps attractive since it takes into account family size, which is relevant because the more children a family has, the greater the hurdle in paying for them all to attend private school. However, because the official government poverty level calculations assume that children are enrolled in free public schools, that measure does not fully take into account the substantially higher financial burden faced by families in choosing private school for all of its school-age children, if there are more than one. To be sure, not all families who choose to self-pay for private schools send all of their children to such schools. Regardless, the basic point here is that for a large family, even with income at 200% of the federal poverty level, trying to pay the full tuition to send all of the children to private school is likely financially daunting. Hence, one

could at least imagine a more realistic family income eligibility cut off that varied with family size to a greater degree than the household poverty level now does. Pennsylvania has adopted just this approach.¹¹⁶ An alternative approach would be to adopt a higher maximum family income level, but such an approach then allows reasonably well-off families with only one school age child to become eligible.

States have adopted a range of solutions to this issue of eligibility. While nearly all plans have adopted family income restrictions, states have enacted wildly different maximum income amounts. In Florida, initial eligibility is largely limited (with special provisions for children in foster care) to those who qualify for free or reduced price school lunches.¹¹⁷ In 2012, the Florida income eligibility level was about \$42,000 for a family of four.¹¹⁸ The family income maximum is modestly increased, however, for those families already in the plan, and eventually scholarship amounts are phased out as family income levels increase.¹¹⁹

Elsewhere, states are adopting increasingly generous initial maximum family income levels. Iowa set the family income limit at three times the federal poverty level or about \$69,000 for a family of four in 2012.¹²⁰ For Arizona's corporate tax plan, the income eligibility level was 185% of the income eligibility for reduced price school lunch or nearly \$79,000.¹²¹ In Indiana, it was 200% of that number or about \$85,000,¹²² and it was 300% of that number in Oklahoma or about \$128,000 which not only is dramatically higher than Florida's but also sweeps in much of the middle class.¹²³

The core Arizona individual tax credit plan does not have any such income limit, and over the years of its operation there have been claims that a substantial share of the scholarship recipients are not from low

116. 72 PA. STAT. ANN. § 8702-F (West 2012).

117. FLA. STAT. § 1002.395(3) (2012).

118. See Child Nutrition Programs—Income Eligibility Guidelines, 76 Fed. Reg. 16,724 (March 25, 2011), available at <http://www.fns.usda.gov/cnd/governance/notices/iegs/IEGs11-12.pdf>; see also GLENN & SWINDLER, *supra* note 21, at 40.

119. Email from Doug Tuthill, *supra* note 72 (noting that 1) renewal families can have income increases to 200% of the federal poverty level and retain a 100% scholarship; 2) renewal families whose income increases to 215% of the federal poverty level receive a 75% scholarship and those with 230% receive a 50% scholarship; and 3) renewal families whose household income is above 230% of the federal poverty level no long qualify).

120. IOWA CODE § 422.11S.5.a (2011).

121. ARIZ. REV. STAT. ANN. § 43-1504(A) (2012).

122. IND. CODE § 20-51-1-5(4) (2012).

123. OKLA. STAT. tit. 68, § 2357.206 (F)(1) (2012); see also GLENN & SWINDLER, *supra* note 21, at 57.

income households.¹²⁴ A recent study, using 2009-2010 data, found that scholarship recipient families, on average, had lower income than the then Arizona state average income of about \$60,000, and two-thirds met the income requirement for the state's corporate tax credit plan (no more than 185% of the income qualifying one for a reduced price school lunch—about \$79,000 in 2012).¹²⁵ However, only about 13% of families receiving scholarships were “poor” by U.S. Census Bureau terms (income under \$20,000 for a family of four).¹²⁶ Unless the pattern changes, it may be said that, at a minimum, perhaps a third of the families receiving scholarships from this portion of the Arizona plan would be considered financially well-off by most people (i.e., income of at least 33% more than the state average). Recent Arizona legislation pushed against this pattern by requiring SGOs to report the extent to which their scholarships are awarded to low-income families.¹²⁷

In Pennsylvania, scholarship recipients must be a member of a household whose family income is under \$75,000 per year (plus \$15,000 per dependent child).¹²⁸ A 2009 study found that the average income per family then participating in the scholarship program was only \$29,000 (well below the maximum), suggesting perhaps that SGOs are awarding individual scholarships on the basis of need even within the income requirements.¹²⁹ Georgia's plan has no family income limit, although it is not yet clear what share of the beneficiaries will turn out to be children from well-off families.

Two more lurking matters here concern a possible cap in the scholarship tax credit plan. First, suppose there is an overall legislative cap (or suppose there are just not enough contributions to satisfy the demand for scholarships). If so, it was assumed above that those who received schol-

124. See, e.g., Ronald J. Hansen & Pat Kossan, *Tuition Aid Program Benefits Wealthy Families, Raises Concerns*, THE ARIZONA REPUBLIC (Aug. 1, 2009), www.azcentral.com/arizonarepublic/news/articles/2009/08/01/20090801sto-whobenefits0801.html; McIntosh, *supra* note 59.

125. See Vicki E. Murray, *An Analysis of Arizona Individual Income Tax-Credit Scholarship Recipients' Family Income, 2009-10 School Year*, at 6 (Harvard Kennedy Sch. Program on Educ. Policy & Governance, Working Paper No. 18, 2010), available at http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG10-18_Murray.pdf.

126. See *Id.*

127. ARIZ. REV. STAT. ANN. § 43-1604(7) (2012).

128. 72 PA. STAT. ANN. § 8702-F (West 2012) (combining qualifications under “Maximum annual household income” and “Income allowance,” effective June 30, 2013).

129. LEGISLATIVE BUDGET AND FINANCE COMMITTEE, PRELIMINARY REPORT ON PENNSYLVANIA'S EDUCATIONAL IMPROVEMENT TAX CREDIT, 11 (2009), available at <http://lbf.c.legis.state.pa.us/reports/2009/40.PDF>.

arships the prior year would be entitled to have them continued before any new children receive scholarships from the plan. This principle does not require, however, that the child has to attend the school selected by the family the prior year. The latter would seem unduly restrictive to many supporters of the program and ambiguous as to what happens when the child is switching schools when entering, say, middle or high school. Indeed, there is something somewhat cruel in offering a scholarship to a family one year and then taking it away the next one (or taking it away if the family exercises further choice by opting for a new school). However, if those already in the plan have priority in receiving scholarships the next year, then in a state with a capped plan this may mean that, other things being equal, those who failed to get into the program at the start face a much smaller chance of winning a scholarship later on.

Second, states must decide how to deal with siblings of students who have already received scholarships, especially if there is more demand for scholarships than supply. Here, opinion is likely to be divided. For reasons of family convenience and to quell what is likely to be jealousy within the family, it is easy to jump to the conclusion that if one child is able to obtain a scholarship to attend a private school, then the others should as well. Yet, on the other hand, perhaps plan benefits should be shared and that families who, in effect win the lottery once, should have no special advantage later on. Some might even argue that families with one child in the program should go to the bottom of the queue before reviewing additional scholarships for their other children. Obviously, these issues of rationing are nonexistent in uncapped programs where contributions equal or exceed demand.

It does not seem that any existing state program requires a SGO to continue awarding a scholarship to an eligible child for subsequent years once an initial award has been made (although a few plans require preference be given to such children);¹³⁰ nor do laws appear to require giving (or denying) priority to siblings.¹³¹ In practice, however, children who are in the program tend to receive scholarship renewals so long as they remain eligible (and further, their parents are quick to apply on behalf of younger sibling as they become eligible for the program).¹³²

130. LA. REV. STAT. ANN. § 47:6301 (2012).

131. *But see* § 43-1603(F) (stating that under Arizona's new 2012 Plus "Switcher" program, which allows an expanded cap for individual donors, if STOs maintain a waiting list of students, they must give priority to "students and siblings of students" on the waiting list).

132. Email from Doug Tuthill, *supra* note 72.

The discussion so far has assumed that if there are to be eligibility requirements that such requirements should be on the basis of family income. However, that is not the only possibility. Scholarships could, instead, be reserved for specific types of children or, in programs with an overall cap, certain types of students could have first priority in receiving scholarships. Examples of such children who might get preference could be limited English learners, disabled children, children who are currently performing below grade level to a specified extent or children in foster care. Or, in something of the same vein, one could imagine combining program eligibility to those who are low income as well as to those who are not low income but who fit one of these types of categories. Alternatively, a program could be more restrictive by requiring that the family is both low income and that its child falls into one of these categories.

One way to think about these considerations is to ask whether low or modest family income simply represents financial inability and overcoming that inability is the basis of what the plan is about. Many supporters of tax credit school scholarship plans see things this way. Yet others might decide that the central policy concern is to serve families and children with special needs for which low family income might simply be used as a proxy, or included as one of a number of proxies employed by the plan. Further, as indicated above, some might put aside family income altogether and focus eligibility on one or more of those special need categories (e.g., disabled, non-English speaking, achieving below grade level, etcetera). So far, most states focus eligibility on family income; however, Oklahoma's plan is centrally aimed at both children with special needs and those who seek to escape failing public schools (which may explain the relatively higher income eligibility level in that state).¹³³ Florida and Arizona, as examples, have some special eligibility pathways for certain types of children, like those in foster care or with special needs, although currently these programs are primarily serving families on the basis of financial need.¹³⁴

133. OKLA. STAT. tit. 68, § 2357.206(F)(3) (2012); see also *Oklahoma Equal Opportunity Educational Scholarships*, FRIEDMAN FOUND. FOR EDUC. CHOICE, <http://www.edchoice.org/School-Choice/Programs/Oklahoma-Equal-Opportunity-Education-Scholarships.aspx> (last visited Nov. 13, 2013).

134. FLA. STAT. § 1002.395(3) (2012) (stating that students placed in foster care are eligible regardless of household income); § 43-1184 (codifying Lexie's Law, a corporate scholarship tax credit program for students with disabilities and foster children).

To be sure, it should not be assumed that families that have children with special needs will automatically want their children attending private schools. Families may find their children are being well-served (or parents sense from other parents in similar situations that their needy children will be well-served) in public schools. Moreover, some families with special needs children might oppose the tax credit scholarship plan if they fear that the plan will in some way undermine the quality of the program their children have or would have in public schools. Of course, by contrast, some supporters of the plan may believe that creating this sort of choice can actually improve the education obtained by children in both public schools as well as in the private schools opted for under the plan.

In the context of the debate on school vouchers, there is frequently a divide among supporters on the issue of what school choice is fundamentally about. Some favor school choice for its own sake, that is, for empowering parents to make the choice they believe to be in the best interest of their own children.¹³⁵ Others, by contrast, base their support for choice on a deep belief that school choice creates competition and draws in private parties and will therefore inevitably yield higher educational achievement for children in both private and public schools.¹³⁶ This divide among school choice supporters will likely to be reflected in the details of any tax credit school scholarship plan.

The final and critical eligibility issue addressed here is whether a tax credit school scholarship plan should be unavailable to those already attending private schools when they first apply. If so, such plans must decide whether to limit eligibility to students attending public schools when they first apply or whether to limit eligibility simply to those not

135. *School Choice is Here to Stay*. AM CENT. FOR SCH. CHOICE. <http://www.amcsc.org/publications/heretostay.html> (last visited Apr. 9, 2013).

136. See e.g., Jay P. Greene, *The Hidden Research Consensus for School Choice*, in CHARTERS, VOUCHERS AND PUBLIC EDUCATION 83-104 (Paul E. Peterson & David E. Campbell, eds., Brookings Inst. Press, 2001), available at <http://www.uark.edu/ua/der/People/Greene/The%20Hidden%20Research%20Consequences.PDF>; Jay P. Greene et al., *School Choice in Milwaukee: A Randomized Experiment*, in LEARNING FROM SCHOOL CHOICE 190-213 (Paul E. Peterson and Bryan C. Hassel, eds., Brookings Instit. Press, 1998), available at <http://www.uark.edu/ua/der/People/Greene/Effectiveness-of-school-choice.pdf>; Cecilia E. Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, 113 Q. J. ECON. 2, 553-602 (1998), available at <http://www.jstor.org/stable/2586913>; Caroline M. Hoxby, *School Choice and School Productivity (or Could School Choice be a Tide that Lifts All Boats?)* (Nat'l Bureau of Econ. Research, Working Paper No. 8873, 2002), available at <http://www.nber.org/papers/w8873>; see also FRIEDMAN FOUND. FOR EDUC. CHOICE, <http://www.edchoice.org/> (last visited Nov. 13, 2013).

already in private school when they apply. The difference is essentially that under the latter a child starting kindergarten in a private school could be eligible and under the former that child could not qualify.

The arguments for restricting eligibility to those not yet in private school are twofold. First, if the point is to expand choice opportunities to families, it is not necessary to extend benefits to families who have already successfully opted for private schools. Second, if the state seeks to save money under the plan, this goal will be better promoted by limiting scholarships only to children who the state would otherwise be spending funds on.

Of course, inevitably some children currently attending public schools might transfer to private schools regardless of the scholarship. However, it is probably impossible to administer a plan that depends on accurately making such a prediction at the individual student level. Still, a plan that requires that students transfer from public schools likely restricts the plan mostly to children who would otherwise remain in public schools, particularly if such a plan focused on lower income families.

The argument for including those students who are just starting kindergarten or who have already enrolled in private school is primarily one of equity. This is especially the case for plans targeting lower income families. Why should poor families who have managed to scrape together funds to put their child in private school now be excluded from scholarship eligibility when families who did not even try to save for private school can win scholarships for their children? In addition, a "no prior private school" rule could entice parents who might otherwise send their children to private kindergarten to put their children in public kindergarten to ensure their children's scholarship eligibility for private school starting in the first grade.

A compromise of these two perspectives might be achieved by phasing in the plan differently for different groups. Perhaps initially, only those who have been enrolled in public schools for at least the last year would be eligible. Moreover, a plan could provide that, say, in the third year of the plan all kindergartners would qualify, and that, say, in year six of the plan, those already enrolled in private schools could also qualify. Such a phase-in approach might work well particularly if scholarships are targeted on low-income families and especially if the plan has no overall aggregate cap.

Lastly, an even narrower strategy might be to restrict eligibility to families (and perhaps only low income families) whose children are cur-

rently attending low performing public schools. Advocates of this approach may see these children in most need of more options (although some individual children in low performing schools might actually be doing reasonably well). Such advocates may also view the threat of losing families as a mechanism to spur now failing public schools to make internal reforms in the hopes of retaining their existing families.

Clearly, a number of difficult choices must be made in establishing the eligibility parameters of any tax credit school scholarship plan and states with existing plans have chosen a variety of solutions. In Iowa, scholarships may be initially awarded to those already attending private schools.¹³⁷ Under the core portion of the Arizona individual plan, funded from individual (rather than corporate) donations, scholarships may also be initially awarded to those already attending private schools.¹³⁸ In most other tax credit plans, as illustrated by the rules in Indiana, Georgia and Arizona's corporate programs, the laws explicitly require that the applicant child seeking an initial scholarship not already be enrolled in private school; this generally means then that either the child is already attending public school or is just starting school (i.e., entering kindergarten).¹³⁹ With the addition of Arizona's new 2012 Plus Switcher program, Arizona now has a mixed approach.¹⁴⁰ Individual donations up to the original donation cap (\$517 per individual and \$1,028 per couple for the 2013 tax year) are directed towards the original Individual Tax Credit, which allows scholarships to be initially awarded to those already attending private school.¹⁴¹ Additional individual donations up to a second donation cap (also \$517 per individual and \$1,028 per couple for the 2013 tax year) are directed towards the new Plus Switcher program, which largely restricts the eligibility of scholarship recipients to those previously attending public schools or entering kindergarten.¹⁴²

Beyond student eligibility requirements, states have not imposed significant additional restrictions on how SGOs award scholarships. It is not well understood whether SGOs themselves operate under other than

137. IOWA CODE § 422.11S.5.a (2011) (stating that the only requirement for an eligible student is that the student is a member of a household meeting the income requirement mandated by the statute).

138. ARIZ. REV. STAT. ANN. § 43-1603 (2012).

139. *See e.g.*, GA. CODE ANN. §§ 20-2A, 48-7-29.16 (2012); Ind. Code § 6-3.1-30.5 (2012); § 43-1504.A.

140. §§ 43-1089, 43-1089.3.

141. § 43-1089.

142. § 43-1089.3.

essentially a first-come, first-served basis. For example, Florida's Step Up for Students appears to function on a first-come, first-served basis for new applicants to the program.¹⁴³ Arizona has many dozens of SGOs under its individual tax credit plan and many individual SGOs have announced policies as to what schools or what types of schools they provide scholarships for.¹⁴⁴ For example, some SGOs focus on providing scholarships for those attending only Christian schools or only Catholic schools or only Lutheran schools, or even only schools of a certain sort in a specific county.¹⁴⁵ However, there are not clear indications that individual applicants to the designated schools are singled out on the basis of pre-announced criteria like those discussed above (e.g., being a limited English speaker).

Research on how things are actually playing out in states with different eligibility criteria might help states considering adopting this sort of plan in deciding which provision makes the most sense to them.

V. THE SCHOLARSHIP AMOUNT AND WHETHER SCHOLARSHIP FAMILIES MAY BE ASKED TO MAKE TUITION PAYMENTS

This section explores two inter-related issues regarding scholarship terms. First, what scholarship amount should SGOs award? Second, should private schools that scholarship-holding children attend be allowed to charge families tuition beyond the scholarship amount?

Public schools, of course, do not charge tuition (putting aside complaints that some "fees" that public school students are these days being asked to pay are effectively tuition and are unfair and very burdensome on low income families). Charter schools, which, in terms of actual implementation, have become the centerpiece of the school choice movement, also do not charge tuition. Charter schools are permitted to raise additional funds, for example, from outside donors, foundations, and through federal government programs. However, because charter

143. See STEP UP FOR STUDENTS, <http://www.stepupforstudents.org> (last visited Nov. 13, 2013).

144. AZ DEP'T OF REVENUE, SCHOOL TUITION ORGANIZATIONS CERTIFIED TO RECEIVE DONATIONS FOR THE INDIVIDUAL INCOME TAX CREDITS (2013), available at http://www.azdor.gov/LinkClick.aspx?fileticket=LHaa_OLtedHQ=&tabid=136.

145. *Id.*

schools are public schools they may not require the parents of their enrolled students to pay.¹⁴⁶

One reason for this ban on charging fees is the fear that allowing charter schools to charge such fees would sharply restrict the ability of lower income families to access those schools. Therefore, charging fees could mean that charter schools would become an example of school choice for the haves but not the have-nots. Also, by precluding the charging of extra tuition, this policy puts pressure on the legislature to provide adequate funding for charter schools (although in practice because many charter schools are now funded at rates significantly lower than those provided in support of regular public schools, charter schools often believe that they must obtain outside funding to remain financially viable).¹⁴⁷ Finally, many people hold the ideological viewpoint that “public” schools should be free (a vision held by those who become infuriated at having to pay for access to public resources like parks, roads and museums).

One could imagine a similar policy of “no extra tuition” made applicable to a tax credit school scholarship plan. Certainly, a universal eligibility plan without such a policy could well wind up with the result that scholarship recipients would mostly be children from well-off families.

On the other hand, the issue is more delicate if a tax credit school scholarship plan is restricted to lower income families. Assume that there are, simply put, two types of schools. First, are private schools (most of which are probably already in existence) whose students mostly will *not* be scholarship holders. These include both high tuition schools catering to wealthier families and modest or even low tuition schools catering to middle and lower income families. Second, are private schools which enroll only or nearly exclusively students who are scholarship-eligible. These schools could be both existing as well as newly-created.

Clearly, if one wants the tax credit school scholarship plan to allow some children from lower income households to obtain access to the first sort of schools, it would be essential that such schools could charge tuition to *non-scholarship* children. However, in this scenario the ques-

146. See Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools*, 53 ADMIN. L. REV. AM. U. 869, 873 (2001), available at [http://www.law.berkeley.edu/files/Approving_Charter_Schools-The_Gate_Keeper_Function\(1\).pdf](http://www.law.berkeley.edu/files/Approving_Charter_Schools-The_Gate_Keeper_Function(1).pdf).

147. See *id.*; Stephen D. Sugarman, *Charter School Funding Issues*, 10 EDUC. POLICY ANALYSIS ARCHIVES 34 (2002), available at <http://epaa.asu.edu/ojs/article/view/313>.

tion remains whether schools could charge tuition to *scholarship-holding* children. There are at least three options here: 1) schools could not charge tuition to students with scholarships, 2) schools could charge tuition to scholarship-holding children at any amount, or 3) schools could charge tuition to scholarship-holding children but only up to an amount capped by the rules of the scholarship program. With respect to the latter, the maximum amount could be set at the difference between the scholarship's value and the school's normal full tuition with the idea of preventing a school from capitalizing on the scholarships by pricing attendance at the school higher for families with them. Alternatively, a maximum amount contributed by scholarship families might lower than the difference between the scholarship value and the school's normal tuition amount at a rate deemed fair to ask lower income families to contribute.

In considering this issue of whether to charge tuition to scholarship-holding students, it is important also to take into account the reality that many private schools charging high tuition already operate financial aid programs and that some schools (especially religious schools) with lower tuition rates, routinely waive most or all of the tuition for a substantial share of their students (relying instead, for example, on general church subsidies to finance the school).

Surely, proponents of tax credit school scholarship plans do not intend to simply displace these existing financial aid arrangements. Hence, such plans might require that schools accepting scholarship students maintain their existing level of financial aid efforts as a condition of eligibility. Yet, on the other hand, for some schools such a policy might be unfeasible. It is possible that some religious schools would cease operation without the tax credit school scholarship plan or something similar because their own internal ability to continue to subsidize their operations is fast disappearing. These schools may be unable to maintain their prior levels of financial aid. Hence, a maintenance-of-effort requirement with respect to financial aid for such schools might result in their closing their doors.

That possible requirement aside, one way to think about the tax credit school scholarship plan for existing private schools with existing financial aid programs is that they could combine the new plan with their existing aid plan to become more generous. For example, schools which currently provide full scholarships to children from low-income families could expand the number of children from low-income families attend-

ing their school. Alternatively, a school could use the tax credit scholarship plan to fund low-income families and shift their existing financial aid towards less needy families. At the same time, to the extent that these schools currently give lower income families partial scholarships, the tax credit scholarship plan might allow them to turn those into full or nearly full scholarships, and so on. This analysis assumes that the tax credit scholarship plan does not cover the full cost of tuition.

For high-tuition private schools, it seems unlikely that SGOs will be willing (or perhaps even permitted) to provide full scholarships to cover the entire cost of education (i.e., after all these costs are more than what is normally spent on children in public schools). The reasons for this are twofold. First, the public may find it inappropriate for the state to fully fund expensive private schooling even though tax expenditures. That is not to say that children would be prohibited from using scholarships at such schools. Rather, as noted in the prior paragraph, for such schools the goal would be to combine the new scholarships in some way with the school's existing financial aid plan so as to increase the number of children from low-income families attending such schools. Second, allowing SGOs to provide full scholarships to students attending expensive private schools would undermine any goal associated with saving the state money through such a program.

For modest cost schools, other considerations are relevant. Some existing modest cost private schools spend less on their pupils than is spent on regular public school students, and in turn, charge tuition below what public schools tend to spend on their enrollees. Therefore, perhaps tax credit school scholarship plans should award scholarships sufficient to pay the full tuition at schools whose tuition is below the amount that the state spends per child in public schools.

However, this assumes that schools set tuition based on costs, that is, that schools which charge low tuition do so because they are able to provide adequate education at low cost. However, that may not be the case. Rather schools may charge tuition based on demand. Some low-tuition private schools surely believe that they should be spending more per student to provide the sort of education their families seek, but they are unable to do that today because the families they serve can only pay so much in tuition. Moreover, that tuition may be insufficient to meet the school's goals. Such schools just cut corners and do the best they can. However, if most or even all of their pupils become scholarship holders under a tax credit school scholarship plan, such schools might well seek

to raise tuition to improve both the quality of the school and its financial footing. This, of course, assumes that the plan would allow these schools to charge some tuition to scholarship-holders beyond the amount awarded in scholarship.

It seems clear that newly created schools will set tuition at least as high as the amount contributed via scholarship. Some of these schools might find that charging tuition beyond the scholarship amount would make it harder to attract families and more difficult to compete for scholarship students. (Although, on the other hand, the price difference could signal better quality to families who might be willing to scrape up the difference.)

Think now about how the SGOs should respond (or should be allowed to respond) to these matters. One policy might be for the state to require that all scholarships granted by the SGOs be \$X per child, per year. Under this policy, \$X could be adjusted based upon whether the child is attending, say, an elementary school or a high school. The question would then be whether schools could charge scholarship students tuition beyond \$X. If not, the plan's reach is likely to be fairly limited unless \$X is a fairly generous sum.

A different policy might be to provide that all the scholarships had to be the lesser of \$Y or the school's actual tuition. Under this policy, when the school's normal tuition is greater than \$Y, the issue remains as to whether a school could charge tuition beyond \$Y to scholarship holders.

A very different state policy would be to defer these decisions to SGOs and to allow SGOs to adopt rules as to scholarship amounts, perhaps subject to transparency as to what its rules are. First, the SGO would have to decide whether or not it thought it fair to ask the parents to contribute anything to tuition. If so, an SGO might deliberately set an individual's scholarship below a school's tuition amount (and perhaps even ask the school not to fill in the difference with its own financial aid). Alternatively, the SGO might adopt a policy of uniform scholarships, etc.

Although reasonable people might understandably differ, if a tax credit school scholarship plan is restricted to lower income families, then perhaps it is best to allow SGOs to experiment with different approaches. Some SGOs would probably set the amount of the scholarships they award at the lesser of a specific maximum sum (perhaps adjusted for grade level and/or special student needs) or the school's actual tuition. This approach could be combined with a rule that permitted schools to

charge families the school's normal tuition. In that case, families would only be able to use the scholarship if they not only attained admission to a participating private school, but also were able to afford additional tuition that the school required of them. On the other hand, some SGOs might be more aggressive, focusing scholarships on students attending schools which capped tuition at the scholarship amount (or charged no more than a monthly amount that the SGO believed that even low-income families could afford and be fairly asked to pay).

In the programs enacted to date, only some state plans have imposed a maximum on the amount of the scholarship that may be awarded, have not regulated what SGOs can do under the maximum where one exists, and have not precluded participating schools from charging participant families the difference between the scholarship and the school's regular full tuition.

For example, Florida's plan capped scholarships at 68% of state spending per pupil in public schools (\$4,335 for 2012-13), with that percentage scheduled to rise to 80% over time.¹⁴⁸ Arizona capped scholarships funded by its corporate tax credit plan at \$4,900 and \$6,200 respectively for K-8 and 9-12 grade students.¹⁴⁹ Georgia set its cap at the level of public school funding (\$9,046 per pupil in 2013-2014).¹⁵⁰ Oklahoma set its cap as the greater of \$5,000 or 80% of public school spending in the recipient student's district.¹⁵¹ By contrast, scholarship amounts are not capped in the plans enacted in Iowa,¹⁵² Indiana,¹⁵³ and under Arizona's individual tax credit plan.¹⁵⁴

However, the scholarship cap amount does not necessarily dictate the average actual amount awarded. In Arizona, under the uncapped individual tax credit portion of the plan, the average scholarship was only about \$1,900 for the year ending in 2011.¹⁵⁵ In that same year, the average value of scholarships awarded under Arizona's corporate tax credit

148. FLA. STAT. § 1002.395(12)(a)(1)(a) (2012); *see also* FLA SCH. CHOICE, *supra* note 18.

149. ARIZ. REV. STAT. ANN. § 43-1504(C) (2012).

150. GA. CODE ANN. § 20-2A-2(1) (2012); *see also* SSO SCHOLARSHIP CAP FOR 2013, GA. DEP'T OF EDUC. (2012), *available at* <http://www.doe.k12.ga.us/External-Affairs-and-Policy/Policy/Documents/SSO%20Scholarship%20Cap.pdf>.

151. OKLA. STAT. tit. 68, § 2357.206(F)(3)(a) (2012).

152. IOWA CODE § 422.11S (2011).

153. IND. CODE § 20-51-3 (2012).

154. § 43-1603.

155. *Arizona - Personal Tax Credits for School Tuition Organizations*, *supra* note 21.

plan (capped at over \$4,000) was about \$2,100.¹⁵⁶ Looking to other states with corporate tax credit plans, the average Florida scholarship essentially reached its cap for the year ending in 2012 (\$4,011)¹⁵⁷ while the average Rhode Island scholarship was around \$2,700 in 2013¹⁵⁸ and the average Pennsylvania scholarship was only around \$1,000 for the year ending in 2012.¹⁵⁹ This variation reveals that only in Florida is it likely that the scholarship plan is providing the family anywhere near what the typical full cost of its child's private school education would be.

In sum, the issues of the amount of the scholarship and whether families of scholarship students may be asked to pay on top of the scholarship are inter-related. Surely, many will find the Florida plan—where scholarships are more valuable and more tightly restricted to low income families—far more attractive than the plans now in place in other states. Nonetheless, the underlying policy questions have no self-evident answers. While helping more low income families choose private schools for their children is probably a widely agreed objective, assuring such families access can be achieved in a variety of ways. After all, even a \$2,000 a year scholarship can make a huge difference for a family selecting a very low tuition school or one that combines its own financial aid program with the tax credit funded scholarship.

VI. SHOULD SCHOOLS ACCEPTING SCHOLARSHIP STUDENTS BE RESTRICTED WITH RESPECT TO WHO THEY ADMIT?

The prior section addressed the questions: how much should scholarships be worth, and whether participating schools should be able to charge scholarship students tuition beyond the scholarship amount if their scholarships do not cover the full amount of the school's regular tuition charge. Those are but two of many issues that designers of a tax

156. *Arizona - Corporate Tax Credits for School Tuition Organizations*, FRIEDMAN FOUND. FOR EDUC. CHOICE <http://www.edchoice.org/School-Choice/Programs/Personal-Tax-Credits-for-School-Tuition-Organizations.aspx> (last visited Nov. 13, 2013).

157. FLA SCH. CHOICE, *supra* note 18.

158. *Rhode Island - Tax Credits for Contributions to Scholarship Organizations*, FRIEDMAN FOUND. FOR EDUC. CHOICE, <http://www.edchoice.org/School-Choice/Programs/Tax-Credits-for-Contributions-to-Scholarship-Organizations.aspx> (last visited Nov. 13, 2013).

159. *Pennsylvania - Educational Improvement Tax Credit*, FRIEDMAN FOUND. FOR EDUC. CHOICE, <http://www.edchoice.org/School-Choice/Programs/Educational-Improvement-Tax-Credit.aspx> (last visited Nov. 13, 2013).

credit school scholarship plan must face in considering how much to regulate participating schools.

In addition is the question of whether schools should surrender some or all autonomy over admissions for both scholarship and non-scholarship students if they gain any funding from scholarship holders. However, let us assume for now that schools participating in the program would retain their existing autonomy as to how they select non-scholarship students. Still, what about their ability to select among scholarship holders? One approach could be that required of charter schools. Charter schools generally are subject to the rule that they must take all comers and select by lottery if applicants exceed available slots.¹⁶⁰ These schools can certainly influence the shape of their applicant pool by how they position their school in the market, how they market the school, how they treat potential applicants, etcetera. However, generally speaking, at the end of the day, if a family wishes to send its child to a charter school it is supposed to have an equal chance for admission as compared to other applicants. This policy could readily be applied to private schools under a tax credit school scholarship plan; that is, schools could set aside X places for scholarship children and those slots could be filled by lottery from among those who have scholarships and apply.

On the other hand, a plan could continue to give schools discretion as to who it admits among both scholarship holders and other students. However, one concern with this approach would be that it would reduce the chance of admission for students from low-income families. There are at least two reasons for this. First, families with more income would be able to afford costs above the scholarship amount and therefore admitting students from such families would not require the school to cover the difference through financial aid. Second, financially better off families are more likely to participate in the life of the school and therefore schools might be biased towards admitting students from families with more resources. Of course, some schools, given their own internal goals, might elect to exercise their discretion precisely to fill scholarship slots with children from the ranks of the lowest-income families.

Were eligibility restricted to families below or just above the poverty line, then one would be assured that all children in the plan would come from truly low income homes (fraud aside), and allowing schools to

160. See Sugarman & Kuboyama, *supra* note 146, at 909 (defining a charter school for the purposes of federal grants under the Public Charter School Program).

select among applicants would not disadvantage poor families. But, of course, schools would then choose on desirability grounds, with desirability depending in each case on the school's mission. It seems safe to predict that the more control schools retain over the admissions process, the more likely existing private schools are to participate in the plan.

Selection on grounds other than family income raises other delicate matters. For example, should participating schools be able to disfavor limited English speaking children and/or children with disabilities? Advocates of families with such children like to protest that it is unfair for the state to fund programs that allow schools to reject children on these grounds. Moreover, many critics are also likely to argue that schools that select on bases like these are likely later on to unjustifiably brag about higher student achievement rates that fail to take into account the nature of their student bodies.

Nonetheless, some private schools may be poorly staffed to deal with certain types of very high need students (e.g., the very substantially disabled and/or the complete non-English speakers). These schools might not serve these students very well if forced to accept them. Still, since it is our general policy to force public schools systems to enroll such children, one can appreciate the likely push back if all of the schools taking scholarship students could avoid this burden. At the same time, even in public schools today, especially needy children are served in specialized public schools in many districts and not mainstreamed into regular public school classrooms. In any event, it is important to acknowledge that if it is thought desirable for highly academically selective private schools to join the plan, it seems quite unlikely that they would if they cannot control their admissions standards. (After all, some public school districts themselves operate selective high schools that have rigorous admissions requirements and will dismiss students who cannot keep pace.) Overall, if participation in the plan is restricted to truly lower income families, the concerns about who might actually benefit from the plan are likely to be different than if financially better-off families are also scholarship-eligible.

A potential compromise position could be that X% of the students a school enrolls with tax credit subsidized scholarships would have to meet certain high need criteria such as coming from a very low income household, being very limited in English speaking ability, and/or being physically or mentally disabled enough to qualify as a "special education" student.

In practice, apart from forbidding discrimination along conventional civil rights criteria (e.g., race),¹⁶¹ state tax credit school scholarship programs enacted to date do not appear to be imposing any selection controls on participating schools.

VII. WHAT OTHER REGULATIONS SHOULD APPLY TO PARTICIPATING SCHOOLS?

Beyond issues of tuition and admissions, other questions that tax credit school scholarship plan designers must answer include whether participating schools must satisfy specific curriculum criteria and/or specific criteria with respect to the certification and qualification of their teachers. Should participating schools be required to provide at least some minimal fair treatment of their enrolled pupils (or at least of scholarship pupils)—e.g., providing them some sort of hearing before they are expelled or otherwise seriously punished? Should participating schools be required to make financial information about themselves public (or at least to SGOs and/or state inspectors)? And should participating schools be required to have their pupils, or at least their scholarship pupils, take certain standardized tests and report the results to the public and/or SGOs and state inspectors?

These factors go broadly to issues of “accountability.” One can think of accountability in at least two ways—accountability to families using the scholarships and accountability to society (or perhaps more narrowly to the taxpayers who donate money that generates the scholarships).

Of course, states already regulate private schools to some extent along these lines, although the extent of this regulation varies considerably from state to state.¹⁶² Most private schools operators probably would prefer no further regulation, leaving it, in effect, to the market and existing rules to determine these matters. However, others might conclude that scholarship-using families and/or donors may want certain minimum requirements to apply to scholarship-accepting schools that the market might not, by itself, generate.

161. See, e.g., 72 PA. STAT. ANN. § 8703-F (West 2012); FLA. STAT. §§ 1002.395, 1002.421(2)(a) (2012).

162. *State Regulation of Private Schools*, U.S. DEP’T OF EDUC., <http://www.ed.gov/admins/comm/choice/regprivschl/index.html> (last modified Oct. 10, 2010).

As for which requirements advocates might prefer, those are likely to vary considerably based on both the advocate's values and an appraisal of what sort of regulation the advocate thinks works most effectively. Some would find it most important that schools be required to make disclosures, but even then people will differ as to what sort of transparencies are most important. For example, some people might prioritize requiring that schools disclose student achievement results. Others may want, either instead or in addition, for schools to be required to disclose things like mission, curriculum, teacher qualifications, financial condition, student rights, etcetera.

Moreover, still others may not be satisfied merely with requiring transparency along one or more dimensions. They might want to insist on certain substantive or procedural requirements for participating schools. Advocates in this latter camp probably believe that many low-income, school-shopping families need help in assuring that the schools among which they may be choosing meet certain minimum requirements.

Indeed, some might argue that participating schools must not only administer specific standardized tests and disclose the result but also they would be permitted to continue to enroll scholarship students only if certain achievement outcomes are met.

While this entire range of possible requirements could be determined by the legislature in setting up a scholarship plan that is not the only option. SGOs could be given the power to decide whether schools have to meet certain requirements of the sort raised above before giving scholarships to students seeking to enroll in (or to continue to attend) such schools.

In practice, some states so far seem to limit the regulation of private schools to whatever controls already exist with respect to private schools in the state. Iowa seems to fall into this category.¹⁶³ Oklahoma requires regular academic progress reporting to parents.¹⁶⁴ Indiana requires participating schools to administer a nationally recognized norm-referenced test (presumably meant to give both parents and public officials information about how participating schools are performing).¹⁶⁵ In addition to requiring such a test, Arizona also requires, in both its individual and corporate tax credit plan, that teachers at participating schools be fin-

163. IOWA CODE § 422.11S.5.b (2011).

164. OKLA. STAT. tit. 68, § 2357.206(F)(5)(d) (2012).

165. IND. CODE § 20-51-1-6 (4) (2012).

gerprinted (presumably as a way of uncovering past criminal conduct of those teachers).¹⁶⁶ Florida's requirements, while not especially restrictive, appear to be the thickest: a federal background check is required of employees who work with students; teachers must meet certain minimum education or experience requirements; new schools must post a surety bond; schools that receive scholarship aid of more than \$250,000 from the program must provide financial reports to the state; and school testing of the sort described above is also required (and aggregate school performance must be publicly disclosed if the school enrolls more than a minimum number of pupils).¹⁶⁷ It seems fair to conclude that states are now experimenting with various requirements and that over time, if scandals or public concerns arise, additional requirement may well be added.

VIII. WHAT ARE THE LIKELY FINANCIAL CONSEQUENCES TO GOVERNMENT OF A TAX CREDIT SCHOOL SCHOLARSHIP PLAN?

This issue was briefly raised earlier and will be explored more thoroughly here. Here is one way to think about it. Imagine that at present only 5% of children eligible for a tax credit school scholarship attend private schools. Assume that the program is put into effect and 10,000 scholarships are awarded. Assume further that the average scholarship is worth \$6,000 a year and that the public schools now spend \$8,000 per pupil. These assumptions alone indicate little about what the cost or net savings of the plan would be to the state, or to all levels of government together.

Fully evaluating the financial impact of such a program requires also knowing a) how much money is saved by having children attend private schools and, hence, not educated in the public schools, b) how many of the children actually receiving the scholarships would be attending public schools were the scholarships not available, and c) how the state system for funding public education works.

Public school officials often argue that little or nothing is saved by a modest number of students leaving their school district. They seem to

166. ARIZ. REV. STAT. ANN. §§ 43-1501(4), 43-1601(3) (2012).

167. FLA. STAT. §§ 1002.395(8), 1002.421 (2012); see also GLENN & SWINDLER, *supra* note 21, at 40.

think that public school costs are largely fixed and there are no variable costs per pupil at the margin when enrollment only slightly declines. They argue that schools still need the same administrators, teachers and other staff, all of whom will be paid even if there are slightly fewer children in each class.¹⁶⁸ Others make the opposite argument, claiming that there are no fixed costs of public education over any sensible time horizon and that every child lost to the public school means savings of at least the average amount now spent per child.¹⁶⁹ Moreover, they might point out that in some situations marginal costs per pupil in public schools are increasing, so that a reduced number of students to serve actually saves the district more than its current average spending per pupil. They illustrate this by pointing out that in many places losing public school students to private schools allows the district to avoid having to build an expensive new school to deal with increasing enrollment were children not siphoned off to private schools.¹⁷⁰ Neither of these extreme positions is likely right in all cases and that individual on-the-ground circumstances can make a great deal of difference in evaluating the financial impact of students switching from public to private schools.

The central message is that public financial savings will only be possible if a substantial share of the scholarship users would not otherwise be attending private school. If all of the scholarship holders would have been in private school anyway, then the plan will impose a cost on the state of the full amount of the scholarships awarded (plus administrative costs).

Using the assumptions introduced at the start of this section, and assuming a 100% tax credit, even if the amount of public school spend-

168. See e.g., Abel Harding & Paul Pinkham, *Concerns Raised Over Florida's Corporate Income Tax Credit Scholarship Program*, FLORIDA TIMES-UNION, Oct. 30, 2010, <http://jacksonville.com/news/metro/2010-10-31/story/concerns-raised-over-scholarship-program> (last updated Nov. 1, 2010).

169. See, e.g., CHRYS DOUGHERTY & STEPHEN BECKER, AN ANALYSIS OF PUBLIC-PRIVATE SCHOOL CHOICE IN TEXAS. (Tex. Pub. Pol'y Found., 1995) (finding that the variable cost ranged from 82 percent of per pupil cost in an elementary school located in a small school division to 94 percent in a middle school located in a large school division based on data from the Texas Education Agency); COTTON M. LINDSAY, FISCAL IMPACT OF THE 2005 UNIVERSAL SCHOLARSHIP TAX CREDIT PROPOSAL (BB&T Ctr. for Econ. Educ. & Pol'y Analysis, Clemson Univ., 2005) (finding that the marginal (or variable) classroom cost of educating a student in South Carolina is greater than 90 percent).

170. John Merrifield et al., *Private School Choice: Options for Texas Children*, NAT'L CTR. FOR POL'Y ANALYSIS (Feb. 28, 2013), <http://www.ncpa.org/pub/st345> (stating that school choice programs in Texas would "increase the funding available per public school student and there would be substantial long-term savings to public schools in reduced capital costs").

ing saved by a student shifting from public to private school under the plan were the full \$8,000 spent on average on children in public schools, if half of the scholarship users would have been in private school anyway, there will be a net cost to the public. This is because 10,000 scholarships at \$6,000 each costs \$6 million in lost tax revenue through the tax credits (plus overhead incurred by the SGOs). If 5,000 of those students would have been in private schools anyway, the savings will only be on the other 5,000 students who would have been in public schools. Even at \$8,000 savings for each of them, this only amounts to \$4 million savings, resulting in a net cost of more than \$2 million. And, if the savings from the 5,000 pupils leaving public school is only, say, \$2,000 per pupil, then the plan would save but \$1 million and have a net cost of \$5 million.

Key, therefore, is where the scholarship winners would otherwise be in school. Imagine there are 1 million children in the state and 200,000 are eligible for the scholarships. Imagine also that before the plan goes into effect, there are 150,000 children in private schools, of which 5% (7,500 students) would have been eligible for scholarships. If 5,000 of the 10,000 scholarship winners were drawn from the 7,500 already in private schools, then, as already illustrated, the plan costs the state money.

But if by contrast only, say, 500 of the scholarship winners would otherwise have been in private school and 9,500 are enticed away from public school because of the scholarship, this plan could save the state substantial amounts (based on the same assumptions made above). That is, 10,000 scholarships cost \$6 million; but were there a savings of \$8,000 each on 9,500 students who otherwise would have been in public school, that is a savings of \$7.6 million (minus the overhead allowed in running this program). On these assumptions, the plan would save the public money.

Beyond the percentage of students previously in public versus private school, the savings also matter. If the per pupil savings from students not being in public school is only, say, \$5,000 (rather than \$8,000) then under this last example the savings would be somewhat less than \$4.75 million which means a net cost of the plan of at least \$1.25 million. So, too, if it is only 6,000, not 9,500 students, who leave public school because of the program; there would be a net cost to the program even if the savings on those who leave would be \$8,000 each. Of course, if the scholarships in this example were capped at less than \$6,000 the savings

from each departing pupil could be substantially larger, thereby altering the calculation dramatically.

In addition, of course, the state could potentially increase its savings by lowering the tax credit to less than 100%. Yet, on the other hand, that strategy might reduce donations such that a scheme that otherwise saved the state money might then save less.

Designers of tax-credit school scholarship plans are not in a strong position to impact how much would actually be saved by children not attending public school. However, they may be in a strong position to impact the share of scholarship winners who otherwise would be attending public schools. For example, if a child had to have been in public school for three years before becoming eligible for a scholarship, fewer scholarship claimants (although not none) would have been in private school even if there were no scholarship plan. However, requiring students to be in public schools for three years before becoming scholarship eligible may be too onerous on family school choice. Still, at least some bow in that direction could be made. For example, perhaps the plan could require that in the first year or two of the program, all children must have attended a local public school in the prior year in order to qualify for a scholarship.

However, states do not seem to be imposing such requirements. Indeed, it is now common for kindergartners, who would otherwise have gone to private school anyway, to qualify for the program without ever having enrolled in public school. Even so, when this design choice is coupled with low-income eligibility requirements the point may be moot as these families would be unlikely to send their children to private schools in the absence of the program.

It is important to consider as well the fact that state budgets are foregoing revenue under these plans but it may be that the savings are in fact realized at the district level. That is, the state itself may well not enjoy the full savings from not having to educate children in public schools because, given how the state's school finance scheme works, most states would share these savings between the state and local school district. Of course, states could change the way it now provides funding to schools and local school districts so as to capture the full savings from implementing a tax credit school scholarship plan. Therefore, designers of tax-credit school scholarship plans need to consider what level of state government does and should capture the savings.

The research is mixed as to whether existing tax credit school scholarship plans save the state or cost money to states. Moreover, the answer likely varies from state-to-state depending on the parameters of the program. Furthermore, it might simply not be reliably known to what extent there are savings. In Florida, several reasonably serious studies have concluded that, so far, the state is saving money.¹⁷¹ But even this conclusion has been contested.¹⁷² The problem is that while it does seem the case for Florida that a very high proportion of participating students would be enrolled in public schools if the scholarship program were not in place, the amount actually saved from their absence from public school is in dispute.¹⁷³ The most recent study of the individual tax credit portion of the Arizona program suggests that perhaps half of the recipient children would continue to be enrolled in private schools were the program discontinued.¹⁷⁴ While that might suggest at first blush that this portion of the Arizona plan costs the state money, it is important to note that the average Arizona scholarship award is rather low, thereby suggesting that there may be very substantial savings for each child who would be in public school absent the plan.

171. See, e.g., OFFICE OF PROGRAM POL'Y ANALYSIS & GOV'T ACCOUNTABILITY, FLORIDA TAX CREDIT SCHOLARSHIP PROGRAM FISCAL YEAR 2008-09 FISCAL IMPACT (2010), available at http://www.floridaschoolchoice.org/information/ctc/files/OPPAGA_March_2010_Report.pdf (finding that Florida's program is saved the state \$34.6 million in 2008-2009); see also The Florida Corporate Income Tax Credit Scholarship Program (Collins Ctr for Pub. Pol'y, 2007), available at http://www.helios.org/uploads/docs/Florida_Tax_Credit_Scholarship_Update.pdf (finding that the Florida program had a positive impact on K-12 General Fund revenues during the three year period studied (2002-2004), allowing increased spending per pupil for those remaining in public schools); Jon East, "Neovoucher" Researcher Relies on Guesswork to Tar Tax Credit Scholarships. REDEFINED (June 20, 2012), <http://www.redefinedonline.org/2012/06/neovoucher-researcher-relies-on-guesswork-to-tar-tax-credit-scholarships/>.

172. Sean Cavanagh, *Tax Credit Strategy Fuels Private School Choice Push*, EDUC. WEEK, June 12, 2012, available at <http://www.edweek.org/ew/articles/2012/06/13/35taxcredits.h31.html>.

173. See, e.g., KEVIN G. WELNER, HOW TO CALCULATE THE COSTS OR SAVINGS OF TAX CREDIT VOUCHER POLICIES, (Nat'l Educ. Pol'y Ctr., 2011), available at <http://nepc.colorado.edu/publication/how-to-calculate> (arguing that Florida's Office of Program Policy Analysis and Government Accountability (OPPAGA) guessed as to the percentage of students who would not have attended private schools but for Florida's tax credit school scholarship plan).

174. Charles North. Estimating the Savings to Arizona Taxpayers of the Private School Tuition Tax Credit (Ctr. for Az. Pol'y, Jan. 1, 2010). But see Dave Wells, *Arizona's Tuition Tax Credit Program's Limited Impact on Private School Enrollment*, MAKE DEMOCRACY WORK (Feb. 8, 2010), <http://www.makedemocracywork.org/columns/2010/02/08/arizona's-tuition-tax-credit-program's-limited-impact-on-private-school-enrollment/>.

IX. ARE TAX CREDIT FUNDED SCHOLARSHIPS ECONOMICALLY DIFFERENT FROM SCHOOL VOUCHERS?

Put most broadly, school voucher plans and tax-credit scholarship plans are economically alike. Under a school voucher plan in which 10,000 vouchers each worth an average of \$5,000 are granted, the cost would be \$5 million. And this is the same cost the state bears in giving up state tax revenue through tax credits of \$5 million that allow the SGOs to issue 10,000 scholarships averaging \$5,000 each.

As noted earlier, for there to be, say, 10,000 scholarships awarded, individual taxpayers must make sufficient donations in order to trigger their tax credits. But so too the political process must agree to fund 10,000 vouchers for that many to be awarded under a voucher plan. It is by no means obvious which mechanism is likely to produce a higher number of aided students. Furthermore, it is not self-evident that the value of the individual vouchers would be more or less or the same as the value of the individual scholarships.

Still, we do know that the average scholarship in most states so far is lower than the average voucher amount in Washington D.C. and Milwaukee, and even Cleveland.¹⁷⁵ That suggests that lower income families are more generously helped through vouchers. On the other hand, the tax credit plans are being adopted state wide, whereas the most prominent school voucher plans thus far have been local (although the recently expanded Ohio plan and the Indiana plans indicate a possible geographic widening in the works).¹⁷⁶ This suggests that a greater number of lower income families may gain access to private school choice via the tax credit plans, and as noted at the start of this article, these plans nationwide already help perhaps three times as many students than are given school vouchers (special education vouchers aside).

For some people, especially conservatives, the tax credit plan might be cosmetically more attractive even if the net economic outcome is the same. This approach reduces tax liabilities and allows taxpayers to choose on their own whether to redirect money that they earned and oth-

175. GLENN & SWINDLER, *supra* note 21, at 11.

176. *Ohio Governor John Kasich Signs Significant School Choice Expansion*, AM. FED'N FOR CHILD. (June 30, 2011), <http://www.federationforchildren.org/articles/398/>; *Indiana Senate Passes Expansive School Voucher Program as School Choice Sweeps the Nation*, AM. FED'N FOR CHILD. (Apr. 21, 2011), <http://www.federationforchildren.org/articles/293>.

erwise would have to turn over to government. Vouchers require collecting taxes and then appropriating funds for the plan. If “tax expenditures” remain buried in the budget process, then the tax-credit plan seems consistent with “smaller government” whether or not that is an economically sensible argument to make.

X. ARE THERE IMPORTANT LEGAL DIFFERENCES BETWEEN THE TAX CREDIT PLAN AND SCHOOL VOUCHER PLANS?

The United States Supreme Court has, in recent years, upheld both the Cleveland school voucher plan¹⁷⁷ and the Arizona tax-credit plan.¹⁷⁸ However, the Court did so on very different grounds. Both were attacked as violating the First Amendment’s prohibition against the establishment of religion. Under the Cleveland plan, most voucher users attended religious schools, and under the Arizona plan not only did most tax credit scholarship users attend religious schools but also many SGOs restricted their scholarship recipients to religious school users. Both plans were religion-neutral on their face.¹⁷⁹ However the legislators voting for these plans in both states likely knew that this pattern would appear as the overwhelming share of private schools in the U.S. are religious schools.¹⁸⁰

In the Cleveland case, the Court saw the voucher plan as part of a larger school choice plan adopted in Cleveland that included other sorts of family options, including perhaps most importantly, both charter schools and the formal ability of eligible families to use the vouchers in suburban public schools (although none of those public schools had accepted

177. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (finding that Ohio’s Pilot Project Scholarship Program does not violate the Establishment Clause).

178. *Arizona Christian Sch. Tuition Org. v. Winn*, 131 U.S. 1436 (2011) (finding that taxpayers lacked standing to bring a suit against Arizona’s tuition tax credit).

179. *See Zelman*, 536 U.S. at 653 (stating that Ohio’s plan “is neutral in all respects towards religion”); *see also* ARIZ. REV. STAT. ANN. § 43-1089 (2012).

180. STEPHEN P. BROUGHMAN ET AL., CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2009-10 PRIVATE SCHOOL UNIVERSE SURVEY 2 (2011), *available at* <http://nces.ed.gov/pubs2011/20111339.pdf> (finding that 68% of private schools, enrolling 80% of private school students had a religious orientation or purpose).

any students under the plan).¹⁸¹ Viewed in this wider framework, the Court did not see the Cleveland innovations in school choice as intended to or having the effect of promoting religion.

In the Arizona case, the Court concluded that the complaining parties had no legal standing to object to taxpayers being granted a tax credit like this and hence had no reason to reach the merits of the plaintiffs' constitutional claim.¹⁸² Moreover, because of the way the Court rephrased prior doctrine as to standing, it is difficult to see just who would have standing to object to the plan.¹⁸³ The Court suggested in passing that if, say, the law prohibited children attending Muslim schools from obtaining scholarships, this would be a different matter.¹⁸⁴ Or perhaps it would also be a different matter if non-religious schools (or families seeking scholarships to send their children to non-religious schools) were excluded. But neither the Arizona plan nor any other existing state plan has either of these features. Nor, seemingly, do charter schools (and their students) or regular public schools (and their students) have standing under the Court's ruling even though their pupils cannot obtain tax-credit scholarships (since these schools do not charge tuition).¹⁸⁵

Hence, from the federal constitutional perspective, both school vouchers and tax credit school scholarships seem legally viable, although arguably (at least for now) the tax credit plans are even more constitutionally secure.

However, the viability under *state constitutional law* of tax credit school scholarship plans and voucher plans may vary from state-to-

181. See *Zelman*, 536 U.S. at 652-53 (finding that Ohio's plan is constitutional because it is consistent with prior cases found not to violate the Establishment Clause in which "government aid program[s] [are] neutral with respect to religion and provide assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice").

182. *Arizona Christian Sch. Tuition Org.*, 131 U.S. at 1436 (finding that taxpayer respondents cannot take advantage of the narrow exception to the general rule against taxpayer standing—announced in *Flast v. Cohen*, 392 U.S. 83 (1968)—and, therefore, lack standing).

183. *Flast v. Cohen*, 392 U.S. 83 (1968).

184. *Arizona Christian Sch. Tuition Org.*, 131 U.S. at 1449 (noting that if "a law or practice, including a tax credit, disadvantages a particular religious group or a particular nonreligious group, the disadvantaged party would not have to rely on *Flast* to obtain redress for a resulting injury").

185. *Id.* at 1445 (finding that in order to meet the narrow *Flast* exception to the rule against taxpayer standing a respondent must first establish a "logical link" between the plaintiff's taxpayer status and the type of legislation enactment attached and second must establish a "nexus" between the plaintiff's taxpayer status and "the precise nature of the constitutional infringement alleged").

state.¹⁸⁶ First, in some states, both types of plans (that is school vouchers and tax credits) could be adopted via state constitutional amendment through the initiative process.¹⁸⁷ One might assume that in those states either plan so adopted would be safe from challenge under the state constitution since the enactment would alter the state's constitution itself. Yet, this is not necessarily so. This is because it may be that in some states only certain types of constitutional change are allowed to be made via the initiative process. For example, perhaps certain basic constitutional principles contained in a state constitution (like, say, the right to a jury trial or the right to free speech or a two house legislature) are not legally changeable via the initiative process. If the separation of church and state, for example, were viewed as one of those basic principles, then either plan might be challengeable even if enacted via a constitutional change.¹⁸⁸ Of course, many states do not even have an initiative process.

Second, although states tend to have constitutional provisions that broadly mimic the language and outlook of the First Amendment's establishment clause, state supreme courts have interpreted their own state constitutional provisions differently despite the similar language.¹⁸⁹ This difference is why school vouchers are valid in some states but not in others regardless of what the U.S. Supreme Court decided under the federal constitution in the Cleveland case.¹⁹⁰

186. Frank R. Kemerer, *Constitutional Dimensions of School Vouchers*, 3 TEX. J. C.L. & C.R. 137, 160-79 (1998) (characterizing states as restrictive, permissive or uncertain with respect to the viability of vouchers under state constitutional law); see also Frank R. Kemerer, *The U.S. Supreme Court's Decision in Cleveland: Where to from here?* (Nat'l Ctr. for Study Privatization in Educ., Occasional Paper No. 51, 2002), available at http://ncspe.org/publications/files/538_OCCP51.pdf.

187. *State-by-State List of Initiative and Referendum Provisions*, INITIATIVE & REFERENDUM INSTITUTE, http://www.iandrinstitute.org/statewide_i%26r.htm (last visited Nov. 13, 2013) (identifying 18 states, including California, that allow initiatives to propose constitutional amendments).

188. *Strauss v. Horton*, 207 P.3d 48 (2009) (disallowing same sex marriages; but the Court addressed the question of whether certain initiatives might so fundamentally alter the existing constitution's fundamental rights as to be disallowed if sought to be altered by the regular initiative process; requiring in such cases that changes be handled via the "revision" process).

189. *Compare Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 482 (1986) (finding that providing financial aid to a blind student to study for a religious vocation did not violate the First Amendment's Establishment Clause), *with Witters v. Wash. Comm'n for the Blind*, 771 P.2d 1119, 1123 (Wash. 1989) (en banc) (finding that despite the constitutionality of the financial aid under federal law, the Washington-state Constitution's provisions forbid the use of state aid for religious instruction). See also Kemerer, *supra* note 186.

190. See *Locke v. Davey*, 540 U.S. 712 (2004) (finding that while the federal Constitution allow recipients of school voucher programs to enroll in religious schools and programs, a state can strike down such a plan in violation of its state Constitution).

Third, quite apart from any First Amendment-like establishment clause provision in state constitutions, many states, but not all, have additional constitutional provisions that could impair school choice plans. Many have “Blaine” amendments which directly prohibit spending on religious schools or on any schools not run by the government.¹⁹¹ States generally adopted these provisions as part of a national campaign after the Civil War to prevent state legislatures from giving financial aid to the then new and growing Catholic school system created by Catholics who objected to what they viewed as Protestant domination and orientation of public schools.¹⁹² To be sure, state Blaine amendment language differs by state and again has been interpreted differently in each state.¹⁹³ But, put generally, Blaine amendment provisions are viewed by some as creating substantial legal barriers to the adoption of school voucher plans in perhaps at least one third of the states.¹⁹⁴ In March 2013 the Indiana Supreme Court upheld the Indiana voucher plan against a legal challenge that in part rested on what is categorized as Indiana’s Blaine Amendment, concluding that the direct beneficiaries of the plan were the families who opted for voucher and not the schools to which they sent their children.¹⁹⁵ But whether this interpretation will spread to other states is quite unclear, especially since many other states have constitutional provisions that are facially more antagonistic to religious schools than is Indiana’s.¹⁹⁶

The tax credit scholarship plan, by contrast, might escape attack under these sorts of state constitutional provisions if interpreted as not a mat-

191. *States*, BLAINE AMENDMENTS, <http://www.blaineamendments.org/states/states.html> (last visited Nov. 13, 2013).

192. *See The Blaine Game: Controversy over the Blaine Amendments and Public Funding of Religion*, PEW FORUM ON RELIGION AND PUBLIC LIFE (July 24, 2008), <http://www.pewforum.org/Church-State-Law/The-Blaine-Game-Controversy-Over-the-Blaine-Amendments-and-Public-Funding-of-Religion.aspx> (an interview with Ira “Chip” Lupu, F. Elwood and Eleanor Davis Professor of Law, The George Washington University Law School).

193. Jonathan D. Boyer, *Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine Amendments*, 43 COLUM. J.L. & SOC. PROBS. 117, 132-38 (2009) (describing the diversity in terms of the language and scope of Blaine Amendments adopted by states).

194. Kemerer, *supra* note 186, at 155 (finding that a “third of states have anti-establishment constitutional provisions that are more strictly worded than the Establishment Clause of the First Amendment and consequently make the constitutionality of a voucher system encompassing sectarian private schools highly problematic, unless, of course, the U.S. Supreme Court were to rule that the Free Exercise Clause and the Equal Protection Clause moot these provisions”).

195. *Meredith v. Pence*, 984 N.E.2d 1213, 1228-29 (Ind. 2013).

196. *See* Stephen D. Sugarman, *Too Soon to Gauge Sweep of Indiana School Voucher Ruling*, REDEFINED (Apr. 19, 2013), <http://www.redefinedonline.org/2013/04/too-soon-to-gauge-sweep-of-indiana-school-voucher-ruling>.

ter of state appropriation and spending, but rather as merely reduced tax liability. This could well turn out to be what saves the Florida tax credit plan, in a state in which school voucher efforts have run into serious legal difficulties.¹⁹⁷ Indeed, it appears that Arizona's adoption of the first state tax credit school scholarship plan was prompted by the belief that this was a legal way to promote school choice that could not be achieved in Arizona via vouchers.¹⁹⁸ While some might find this as illogically and unjustly putting form over substance, that often turns out to be how the law works. Indeed, as already noted above, although the Cleveland voucher plan and the Arizona tax credit plans are very similar economically, they have been upheld on altogether different legal grounds. The upshot then is that, at the state level, even if voucher plans are invalid, a tax credit approach may be legally allowed.¹⁹⁹

197. See *Bush v. Holmes*, 191 So. 2d 392 (Fla. 2006) (finding that Florida's Opportunity Scholarship Program (OSP), a state voucher program expending public funds to allow students to obtain private school education, including religious school education, as an alternative to public school, violated the uniformity clause under Florida's state constitution): see also Toluse Olorunnipa & Brittany Alana Davis, *Florida Voters Reject Most Constitutional Amendments, Including 'Religious Rreedom' Proposal*, TAMPA BAY TIMES (Nov. 6, 2012) <http://www.tampabay.com/news/politics/elections/florida-voters-reject-most-constitutional-amendments-including-religious/1260351> (describing how Florida voters rejected a proposed constitutional amendment to repeal the state's 127 year-old Blaine amendment).

198. See Paul Bender et al., *The Supreme Court of Arizona: Its 1998-99 Decisions*, 32 ARIZ. ST. L.J. 1, 6 (2000) (describing how proponents of Arizona's school voucher program tried a "mechanically different approach to the same end" in developing a tax credit scholarship plan to avoid explicit prohibitions under Arizona's state constitution); see also *Kotterman v. Killian*, 972 P.2d 606, 625 (Ariz. 1999) (en banc) ("The tuition tax credit is a neutral adjustment mechanism for equalizing tax burdens and encouraging educational expenditures [and does not violate] either the Federal or the Arizona Constitution."), cert. denied, 528 U.S. 921 (1999).

199. See *Meredith v. Pence*, 984 N.E.2d 1213 (upholding the constitutionality of Indiana's school voucher program); see also Complaint at 2, *Duncan et al. v. New Hampshire*, No. 219-2013-CV-00011 (filed Jan. 9, 2013), available at http://www.au.org/files/pdf_documents/NH_Religious_School_Funding-Complaint.pdf (alleging that New Hampshire's Education Tax Credit program violates two provisions of the New Hampshire Constitution: Part I, Article 6, which states that "no person shall ever be compelled to pay towards the support of the schools of any sect or denomination"; and Part II, Article 83, which provides that "no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination."). See generally Danielle Dreillinger, *Louisiana Supreme Court Rules Voucher Funding Violates the State Constitution*, TIMES-PICAYUNE (May 7, 2013), http://www.nola.com/education/index.ssf/2013/05/breaking_louisiana_supreme_cou.html (affirming Nov. 16 ruling that Louisiana voucher program violated the state Constitution by diverting funds from the MTP, which can only be used for "public elementary and secondary schools" to private schools).

XI. EXPANSION OF THE TAX CREDIT SCHOOL SCHOLARSHIP PLAN TO THE FEDERAL LEVEL?

In 2013, Senator Marco Rubio (R-FL) introduced a bill to create a federal level tax credit school scholarship initiative.²⁰⁰ To understand the well-designed as well as perhaps dubious features of Senator Rubio's proposal, it is important to appreciate the details of his proposal and how these details compare with the features of existing state plans discussed thus far.

As described, Florida restricts scholarships funded by tax credits to children from truly low income households; the child must be eligible for a free or reduced school lunch—meaning that the child must come from a family whose household income is just over \$40,000 a year (in 2012) for a family of four.²⁰¹ Other states, as was shown, are less restrictive in terms of which families are eligible. Oklahoma's plan reaches families well up into the middle class as a family of four with an annual household income of more than \$120,000 is still eligible to qualify.²⁰² Senator Rubio's plan, while not as restrictive as Florida's, focuses the scholarships on families with income no more than 250% of the poverty level (which is just under \$60,000 for a family of four today).²⁰³ The main point to emphasize in Senator Rubio's plan is that the bill clearly seeks to empower Americans currently least able to exercise school choice.

As discussed in Part II(c), several state plans give tax credits to both individual and corporate donors (and for corporate donors the plans sometimes allow credits against a variety of state taxes). Senator Rubio's bill does the same—allowing both married couples and single taxpayers to obtain a federal income tax credit for an annual contribution of up to \$4,500 and allowing corporate entities a corporate income tax credit of

200. Press Release, Office of U.S. Senator Marco Rubio, Senator Rubio Introduces Legislation to Expand School Choice, (Feb. 13, 2013), <http://www.rubio.senate.gov/public/index.cfm/press-releases?ID=0d00ca69-f39c-462c-990b-4eda9a5b299c>; *see also* Educational Opportunities Act, S. ___, 113th Cong. (2013), *available at* http://www.rubio.senate.gov/public/index.cfm/files/serve?File_id=b3a7da66-1597-48db-9ff7-83b3f53dd8e4 [hereinafter Educational Opportunities Act].

201. FLA. STAT. § 1002.395(3) (2012); *see* Child Nutrition Programs-Income Eligibility Guidelines, 76 Fed. Reg. 16,724 (Mar. 25, 2011), *available at* <http://www.fns.usda.gov/cnd/governance/notices/iegs/IEGs11-12.pdf>.

202. OKLA. STAT. tit. 68, § 2357.206(F)(1) (2012); *see also* 2007-2011 American Community Survey, U.S. CENSUS BUREAU, http://www.census.gov/newsroom/releases/archives/news_conferences/20121203_acs5yr.html (last visited Nov. 13, 2013).

203. Educational Opportunities Act, *supra* note 200.

up to \$100,000 annually.²⁰⁴ Senator Rubio's proposed tax credit limit for couples and individuals is about twice that now allowed in Arizona, for example. As we saw, some states have no cap on donations, and indeed in Florida a few very large corporate donors contribute millions each year to the plan.²⁰⁵ On this measure, Senator Rubio's bill is perhaps best characterized as generous, yet cautious.

Senator Rubio's proposed tax credit is a 100% credit.²⁰⁶ This, of course, means that for every qualifying dollar contributed, federal income taxes would be reduced by a dollar, thereby making contributions essentially costless to the donors. This is similar to both the plans enacted in Florida²⁰⁷ and Arizona.²⁰⁸ Moreover, this is more generous than is true in states that grant only a partial tax credit, such as the 65% credit allowed in Iowa²⁰⁹ and the 50% credit allowed in Indiana.²¹⁰ In those latter states, donors are essentially putting up some of their own money.

Most states that have adopted these plans have imposed a maximum overall limit on the aggregate amount of tax credits that may be claimed each year by the program. These maxima vary enormously and are often not reached in states that have imposed them.²¹¹ Senator Rubio's plan has no such limit.²¹² Imposing an overall aggregate cap on a federal program would probably be complicated and costly, but clearly not impossible, for the IRS to administer in a way that would allow potential donors to know whether their contribution was within the national maximum and hence actually eligible for the credit in that tax year.

One striking difference between many state plans and Senator Rubio's proposal is that there is no limit on the amount of the scholarship that may be awarded to an individual student.²¹³ As described above, Florida,

204. *Id.*

205. § 1002.395; see also GLENN & SWINDLER, *supra* note 21, at 40.

206. Educational Opportunities Act, *supra* note 200.

207. § 1002.395(5)(b).

208. ARIZ. REV. STAT. ANN. §§ 43-1089, 43-1183 (2012).

209. IOWA CODE § 422.11S (2011).

210. IND. CODE § 6-3.1-30.5-8 (2012).

211. Here are some facts from the 2012-2013 school choice yearbook about the aggregate limits: Iowa (with a 65% tax credit value) received \$13,461,537 in donations in 2012 which results in about \$8.75M in revenue lost (so Iowa reached its cap in aggregate). Indiana (50% tax credit) received \$2,542,659 in donation in 2011 of its \$5M cap (so under the cap). Then Oklahoma received \$26,000 in 2012 and it has a 50% tax credit value and statewide cap of \$3.5M (so also under though this was its first year). Florida maxed out its cap at \$229M. GLENN & SWINDLER, *supra* note 21.

212. See Educational Opportunities Act, *supra* note 200.

213. *Id.*

for example, currently caps the scholarships that may be granted at about \$4,500;²¹⁴ by contrast, in Georgia the limit is just over \$9,000.²¹⁵ However, under Senator Rubio's federal plan, like those in Iowa²¹⁶ and Indiana,²¹⁷ it would be legally possible for a child to win a full scholarship at a high cost elite private school and, hence, indirectly obtain government financial aid well beyond what is now being spent on that child in public schools. This is perhaps unwise. Note, however, that nothing in Senator Rubio's bill would require SGOs to award full scholarships or high value scholarships. Rather, the plan simply does not impose a limit.²¹⁸ As was described above, although the scholarships that are awarded in Florida tend to be around the \$4,500 ceiling, the average scholarship in many other states is less than \$2,000 a year even when the cap is higher.²¹⁹

However, the most striking difference between most state plans, and Senator Rubio's plan is that all children already enrolled in private schools would be eligible for scholarships.²²⁰ Indeed, it might well be that, at least at the outset, most of the scholarship recipients will be families whose children are already in private schools. As described earlier, most state plans generally restrict initial eligibility to children currently attending public schools and (often) to those just starting school (i.e., in kindergarten). States have adopted this restriction because they are not eager to have state tax dollars support children attending private schools, and the claim that families need financial aid to make a choice of private education is belied by the reality. Therefore, Senator Rubio's plan is quite different from those restricted state tax credit plans that are frequently touted as clever ways of saving government money.

Indeed, because it is a federal tax credit, 100% of the cost of the plan would amount to new federal spending—to be sure, in the form of tax expenditures. It might seem surprising that someone as conservative as Senator Rubio would call for this potentially sharp increase in federal expenditures. Yet, because this spending comes in the form of a tax credit, the result is that the plan would deprive the federal government of rev-

214. FLA. STAT. § 1002.395(12)(a)(1)(a) (2012); *see also* FLA SCH. CHOICE, *supra* note 18.

215. GA. CODE ANN. § 20-2A-2(1) (2012); *see also* SSO SCHOLARSHIP CAP FOR 2013, *supra* note 150.

216. IOWA CODE § 422.11S (2011).

217. IND. CODE § 20-51-3 (2012).

218. *See* Educational Opportunities Act, *supra* note 200.

219. *See supra* notes 157-161 and accompanying text.

220. *See* Educational Opportunities Act. *supra* note 200.

enue and, other things equal, force the federal government to cut spending elsewhere in order to finance the plan. In this respect, one can perhaps see the conservative appeal (at least to the extent that spending on private schooling is thought preferable to other federal spending).

If Senator Rubio's plan were adopted, it would likely save states and local school districts money because scholarship winners who would otherwise be in public school would attend private schools on a federal scholarship awarded under the Senator's plan. In this sense, it is somewhat analogous to proposals to have the federal government fully fund Medicaid, rather than share the cost of Medicaid with the states, as happens now. Of course, Republicans like Senator Rubio tend to have the opposite goal of reducing, not increasing, federal spending on Medicaid.

The SGOs that would come into being under Senator Rubio's bill are very much like those now operating under state plans. They must be tax exempt organizations that specialize in awarding these sorts of scholarships and, like many state plans, they may keep no more than 10 % of what they receive for administrative costs.²²¹ Were Senator Rubio's bill to pass, perhaps existing SGOs (or newly formed sister organizations) would be the first to take on this role with regards to the new federal tax credit.

Senator Rubio's bill makes clear that someone who gets a tax credit for contributing to a SGO operating under his program may not also get a tax deduction under federal law—no double benefit.²²² But it does not specify what is to happen under state law.²²³ Unless state laws were changed it might well be that under current rules donors could not only get the federal tax credit but also a state tax deduction, and this might allow donors to actually make money from such contributions—a probably undesirable result. Moreover, deductibility for state tax purposes would at least partially undercut the financial benefit that the Senator's

221. Compare Educational Opportunities Act, *supra* note 200, with ARIZ. REV. STAT. ANN. § 43-1602(C)(1) (2012) (requiring 90% of contributions to be used for scholarships under the tax credit plan for individuals), and GA. CODE ANN. § 20-2A-1(3)(A) (2012) (requiring to 90% of contributions to be used for scholarships), and IND. CODE § 20-51-3-3(2) (2012) (requiring to 90% of contributions to be used for scholarships), and IOWA CODE § 422.11S.5.c.1 (2011) (requiring to 90% of contributions to be used for scholarships), and OKLA. STAT. tit. 68, § 2357.206 (D) (2012) (requiring to 90% of contributions to be used for scholarship).

222. Educational Opportunities Act, *supra* note 200 (stating that for both the individual and corporate plans, "No deduction shall be allowed under any provision of this chapter for any expense for which a credit is allowed under this section.").

223. See Educational Opportunities Act, *supra* note 200.

plan would provide to states by funding private school attendance of pupils who would otherwise be in public schools.

Senator Rubio's plan, like most state plans, requires that the SGOs give scholarships to children attending more than one school and the schools for which the scholarships are granted may not illegally discriminate (although Senator Rubio's bill refers only to state laws on discrimination whereas some state plans refer to federal civil rights laws).²²⁴ Otherwise, apart from one matter discussed next, Senator Rubio would impose no further requirements on participating private schools. This, of course, gives schools maximum freedom, but it does not give maximum choice to families, which some think is the basic ideology underlying these plans. Charter schools, another important element in the "school choice" movement, better conform to this outlook since they typically must accept all who apply (and admit by lottery if there is excess demand).²²⁵ But in barely restricting the admissions policies of private schools in his bill, Senator Rubio is largely paralleling existing state tax credit scholarship plans.

One key deviation from the "hands off" approach that otherwise pervades Senator Rubio's bill is an elaborate evaluation scheme. Simply put, it requires participating schools to give students standardized tests and then report the results of these tests to parents.²²⁶ Many Republicans especially favor this sort of accountability strategy—believing that required disclosures of test results make parents better choosers of what is best for their children. Notice, however, there are no corresponding curriculum or teacher quality or qualifications requirements in the Senator's bill, apart, of course, from any existing state law requirements for private schools (for which requirements vary significantly from state-to-state).²²⁷

It is altogether unclear whether Senator Rubio wishes for his plan to fully replace the state plans (a somewhat anti-federalism outcome). This could happen if all of the demand for scholarships were met with feder-

224. *Id.* (describing how scholarship granting organizations may only award scholarships to students who attend schools which "comply with applicable State laws, including laws relating to unlawful discrimination . . .").

225. *See* Sugarman & Kuboyama, *supra* note 146, at 909 (defining a charter school for the purposes of federal grants under the Public Charter School Program).

226. Educational Opportunities Act, *supra* note 200 (describing "Eligible School Reporting Requirements").

227. *Id.*

al tax credit donations. However, this is unlikely and so it is difficult to predict the interactions between a federal and state plans.

Senator Rubio's plan, like all state plans, allows scholarships to be used at private religious schools—not only Catholic and Protestant schools, but of course, Jewish and Muslim and other religious schools as well. And, as we know, most current scholarship recipients under the state plans use scholarships at religious schools.²²⁸ Although this seems to be constitutional thus far, those favoring a high wall of separation between church and state might seek to challenge the Senator's plan anyway.

Senator Rubio's bill is in its early stage, could easily be amended, and, for now, it is highly unlikely to be adopted by the current Congress. Hence, while this analysis focuses on the details of Senator Rubio's plan, the main point is that Senator Rubio has put a bold idea on the table that supporters of more school choice for lower income families should generally support.

XII. CONCLUSION

The overall theme of this article, as the architect Mies van der Rohe once emphasized, is “God is in the detail.”²²⁹ Tax credit school scholarship plans are a new and growing idea, with a dozen states now having put them in place. But the terms of these plans differ substantially, and potentially could differ even more so as the idea diffuses across the country. People have different motivations to support the adoption of these plans and trying to sort out how a political majority can be put together in their support is perhaps analogous to trying to understand how sausage is made. Nonetheless, the dominant theme underlying these plans appears to be that they are meant to empower more low (and perhaps middle) income families in making school choices for their children. Judged by that measure, some state plans are more on target than others. Florida's seems the best-targeted, as well as the most generous and robust.

228. See *supra* Part I.

229. See *Mies van der Rohe Dies at 83; Leader of Modern Architecture*, N.Y. TIMES (Aug. 19, 1969), www.nytimes.com/learning/general/onthisday/bday/0327.html.

To really understand how these tax credit plans are structured or how a new state plan ought to be structured, it is crucial to pay attention to a number of key parameters:

1. What families are eligible (as measured by income and up to what level, and by whether their children are already in private schools)?
2. How large must or may the scholarships be (and how large are they likely to be if there is discretion)? (What do such limits mean for the obligation of the family whose child wins a scholarship to pay in part out of its own pocket?)
3. To what extent are schools who accept scholarship students to be regulated and by whom (in terms of their testing regimes, teacher qualifications, and control over their admissions)?
4. Are students who initially win scholarships reasonably assured of ongoing scholarship aid so long as their families remain eligible and they remain in private schools (and may their families switch private schools and retain their child's scholarship)?
5. Against what taxes are the tax credits allowed (individual and/or corporate) and are there plan maxima (and, if so, are they applied at the taxpayer level and/or on an overall statewide basis)?
6. Who can be a scholarship granting organization and how are they regulated (in terms of to whom they grant scholarships, of what amount, and what conditions may they impose on schools that wish to accept the scholarships)?
7. What are the likely financial consequences to state government and local school districts based on the parameters selected?
8. Is the plan likely to be upheld against a legal challenge brought under state and/or federal law?