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School Choice in South Carolina: An Analysis of Whether Private School Tax Credits are Right for South Carolina

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**SCHOOL CHOICE IN SOUTH CAROLINA:
AN ANALYSIS OF WHETHER PRIVATE SCHOOL TAX CREDITS ARE RIGHT FOR
SOUTH CAROLINA**

I. INTRODUCTION	903
II. BACKGROUND.....	907
<i>A. School Choice—What Is It?</i>	907
<i>B. School Choice Programs in Other States</i>	909
<i>C. Current Problems with Public Schools in South Carolina</i>	914
III. THE ARGUMENTS FOR AND AGAINST SCHOOL CHOICE	915
<i>A. Proponents' Arguments for School Choice in South Carolina</i>	915
<i>B. Opponents' Arguments Against School Choice in South Carolina</i>	916
IV. PROPOSALS FOR SCHOOL CHOICE LEGISLATION IN SOUTH CAROLINA	922
<i>A. Differences Between House Bill 4894 and Other States' Programs</i>	922
<i>B. House Bill 4894 and Accountability</i>	923
<i>C. Judicial Challenges to a School Choice Program in South Carolina</i>	925
<i>D. Likely Impacts of the Adoption of a School Choice Program in South Carolina</i>	926
V. CONCLUSION.....	928

I. INTRODUCTION

Education is an important issue for many Americans, as the 2012 presidential campaign demonstrated.¹ While campaigning, the candidates were frequently asked to discuss their views on education policy, and school choice was a major part of that discussion.² Mitt Romney, the Republican nominee, strongly supported school choice, advocating for federal funding to “follow the child,” rather than go to the specific state or school district.³ President Barack Obama, the Democratic nominee, opposed school choice and, since being elected President, has attempted to cut back the school choice programs already initiated in Washington, D.C.⁴ This stark disagreement on the issue of school choice is

1. See generally Editorial, *Education Choice Clear in Presidential Race*, N.Y. TEACHER, Sept. 27, 2012, at 8, available at <http://www.uft.org/editorials/education-choice-clear-presidential-race> (explaining that education is a key issues for voters).

2. See, e.g., Robby Soave, *Obama Declines to Support School Choice in Debate*, DAILY CALLER (Oct. 4, 2012, 3:46 AM), <http://dailycaller.com/2012/10/04/obama-declines-to-support-school-choice-in-debate/> (quoting Mitt Romney, Republican presidential candidate) (highlighting Romney’s discussion of school choice in the first presidential debate).

3. See *id.* The phrase “follow the child” is frequently used in connection with traditional school vouchers.

4. See *id.*

mirrored in the South Carolina General Assembly, although not cleanly along party lines.⁵ For almost ten years, legislators have tried, unsuccessfully, to pass school choice bills.⁶ The most recent attempt was House Bill 4894,⁷ which was a compromise among several different proposals.⁸ The bill offered three income tax deductions: a \$4,000 deduction for tuition payment to an independent school,⁹ a \$2,000 deduction for home-schooled students, and a \$1,000 deduction for students who transfer out of their residential school district.¹⁰ The bill provided for the creation of scholarship granting organizations (SGOs), which would receive donations from individuals and corporations and award scholarships to eligible students.¹¹ Any student who was eligible for free or reduced lunch and whose family met the qualifications for receiving Medicaid benefits would have been eligible for a scholarship of up to \$5,000 or 75% of tuition, whichever is less, from an SGO.¹² Students with exceptional needs would have been eligible for a scholarship of up to \$10,000 or 75% of tuition, whichever was less.¹³ Donors would have received a dollar-for-dollar tax credit of up to 60% of their total tax liability for any monies donated to a qualifying SGO.¹⁴

5. See generally Sean Cavanagh, *South Carolina Considers Private School Scholarships, Tax Breaks*, EDUC. WK. (May 10, 2012, 2:54 PM), http://blogs.edweek.org/edweek/charterschoice/2012/05/south_carolina_considers_tax_breaks_to_cover_private_school_costs.html (explaining that in South Carolina, some Republicans as well as Democrats have not been supportive of school choice bills).

6. See generally Adam Beam, *School Choice Among Losers During Legislature's Last Day*, THE STATE, June 8, 2012, at B1 (explaining that South Carolina's first school choice bill was introduced in 2004).

7. See H.R. 4894, 119th Gen. Assemb., 2d Reg. Sess. (S.C. 2012), available at http://www.schouse.gov/sess119_2011-2012/bills/4894.htm.

8. See Corey Hutchins, *School Choice Dead in S.C. This Year?*, FREE TIMES, May 23–29, 2012, at 9 (noting that the proposal is a compromise and describing school choice as “one of the most divisive issues in the State House”); see also *Hearing on H. 4894 Before the Subcomm. on Sales & Income Tax of the H. Comm. on Ways & Means*, 119th Gen. Assemb., 2d Reg. Sess. 17 (S.C. 2012) [hereinafter *Hearing*] (statement of Rep. Bedingfield, Sponsor of H. 4894) (commending the committee's compromise on the bill).

9. House Bill 4894 defined an independent school as “a school, other than a public school, where the compulsory attendance requirement of [the state] may be met and that does not discriminate based on the grounds of race, color, or national origin.” H.R. 4894. This term will be used interchangeably with “private school” throughout the rest of this paper.

10. See *id.*; see also *Hearing*, *supra* note 8, at 1–2 (statement of Emily Heatwole, Research Analyst in K–12 Special Schools) (reiterating these deductions).

11. See H.R. 4894.

12. See *id.*

13. See *id.* According to research analyst Emily Heatwole, students with exceptional needs include any child who has a “significant cognitive, mental, physical or emotional disability and whose parents or legal guardians believe that the services provided by the school district of legal residence do not sufficiently meet the needs of their child.” *Hearing*, *supra* note 8, at 3 (statement of Emily Heatwole, Research Analyst in K–12 Special Schools).

14. See H.R. 4894.

House Bill 4894 was introduced in the House of Representatives in February 2012 and referred to the House Ways and Means Committee.¹⁵ The bill made it through committee with minor amendments¹⁶ and eventually passed in the House.¹⁷ Although efforts to pass school choice legislation began in 2004, House Bill 4894 was the first bill to successfully make it through one of the two houses.¹⁸ Surprisingly, the bill made it through the Senate Finance Committee, but it died on the floor of the Senate without discussion at the close of the legislative session.¹⁹

School choice is a controversial issue in South Carolina.²⁰ Commentators generally attribute the General Assembly's inability to pass school choice legislation to the lack of bipartisan support, as people on both sides of the issue have strong opinions on the advantages and disadvantages of school choice.²¹ Proponents contend that both children and schools will benefit from giving parents the ability to choose the school that they decide is best suited for their child.²² They argue that children will benefit from learning in a school that is the best "fit" for them,²³ and traditional public schools will be driven to provide a higher quality of education if forced to compete with private, charter, and magnet schools, as well as better performing public schools.²⁴ The basis of this argument, first recognized by economist Milton Friedman, is that competition will lead to "improvements in services and achievements" in public schools.²⁵ On the other hand, opponents of school choice contend that the focus should be on improving the quality of public schools, rather than using the state's resources to experiment with school choice.²⁶ Opponents of school choice maintain that

15. [2012] 1 S.C. HOUSE J. 913–14.

16. See HOUSE WAYS AND MEANS COMMITTEE, MINUTES OF COMMITTEE MEETING (Mar. 6, 2012).

17. See Beam, *supra* note 6.

18. See *id.*

19. See *id.*

20. See, e.g., *id.* (describing House Bill 4894 as "one of the session's most controversial bills").

21. See, e.g., Cavanagh, *supra* note 5 (noting that Republican state Senator Larry Grooms "attributes th[e] lack of traction to a failure to muster at least some support from Democrats, though he also says some GOP lawmakers have not been supportive").

22. See generally *Why School Choice?*, S. CAROLINIANS FOR RESPONSIBLE GOV'T, <http://www.scr.gov/why> (last visited Apr. 8, 2013) (defining school choice and answering frequently asked questions in an attempt to educate the public on the benefits of school choice).

23. See *id.*

24. See S.C. EDUC. OVERSIGHT COMM., AT A GLANCE: SCHOOL CHOICE (2011), <http://www.eoc.sc.gov/In%20the%20News/At-A-Glance/2011/Schoolchoice.pdf>.

25. *Id.* Economist Milton Friedman first proposed the application of market theory principles to education in his essay, *The Role of Government in Education*. See generally Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 129 (Robert A. Solo ed., 1955) (describing the role government should play in education to foster higher standards).

26. See Beam, *supra* note 6 (quoting Scott Price, General Counsel, S.C. School Boards Association). Notice that the emphasis is on the schools, not the education of the students through the public schools.

tax credits will benefit private schools at the expense of public schools.²⁷ They argue that school choice is a way to allow public funds to go to private schools, including religious schools,²⁸ which would not only fail to combat the problems public schools face today but also leave public schools in a worse position.²⁹

So, which side is correct? What effect would adopting a bill comparable to House Bill 4894 have on education in South Carolina? This Note will argue that South Carolina should adopt legislation that implements a tax credit scholarship program, but both sides must make appropriate compromises to ensure that the program is accountable and workable for students and schools in South Carolina. Controversy aside, this Note will rely on undisputed facts to analyze, from a neutral perspective, the likely implications of the adoption of a school choice bill in South Carolina. First, in Part II.A, this Note will explain the meaning of “school choice” and the different kinds of programs that term involves, focusing mainly on vouchers and tax credit scholarships. In Part II.B, this Note will examine school choice programs in other states. Several states have implemented programs with varying degrees of success,³⁰ and this Note will look to those programs to see if the South Carolina General Assembly can learn something from these states’ experiences. In Part II.C, this Note will examine the problems South Carolina public schools face and the issues any proposed school choice initiative will have to address. In Part III.A, this Note will analyze the arguments in support of school choice; specifically, how a bill, such as House Bill 4894, could fix some of the problems South Carolina public schools face. Finally, Part III.B will discuss the arguments of school choice opponents; namely, that a school choice program would exacerbate the existing problems in South Carolina.

In Part IV, this Note will look to the future and examine how adoption of a school choice bill would potentially affect South Carolina schools, children, parents, and taxpayers. In Part IV.A, this Note will examine House Bill 4894 and the program it proposed, including differences from other states’ programs. In Part IV.B, this Note will examine accountability aspects of House Bill 4894 and possible changes that would make participating schools and SGOs more accountable. In Part IV.C, this Note will discuss potential challenges to a school choice statute and how the South Carolina judiciary would likely rule on them. Then, in Part IV.D, this Note will examine the likely effect a school choice program would have on public schools, private schools, and the overall tax

27. See, e.g., Stephanie Saul, *Public Money Finds Back Door to Private Schools*, N.Y. TIMES, May 22, 2012, at A1 (explaining how Georgia’s tax credit scholarships are used to indirectly support private schools while “shift[ing] tax dollars away from traditional public schools”).

28. Opponents challenge this aspect of school choice programs as a violation of the Establishment Clause. See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440 (2011) (challenging a tax credit as a violation of the Establishment Clause).

29. See generally Saul, *supra* note 27 (describing how Georgia’s tax credit scholarships are used “to benefit private schools at the expense of the neediest children”).

30. See *Why School Choice?*, *supra* note 22.

revenue of the state. Finally, in Part V, this Note will suggest that South Carolina should adopt a bill similar to House Bill 4894, with modest changes, and that the best way to accomplish this goal is for the bill to embody a compromise of the positions of proponents and opponents of the issue.

II. BACKGROUND

A. School Choice—What Is It?

Concisely defined, school choice is the parents' ability to choose the school they feel is "best suited for their child."³¹ By helping parents to better afford the costs of independent schools or homeschooling, school choice purports to provide access to different types of schooling that many upper- and middle-income families already have, while promoting parental involvement and competitive academic diversity.³² The premise of this argument in support of school choice is that "[n]o child should receive an education based on where they live, and the value of their home."³³

There are several kinds of school choice programs.³⁴ Two of the most popular are traditional school voucher programs and tax credit scholarship programs,³⁵ both of which involve government funding that allows parents to choose the school their child will attend.³⁶ Traditional school voucher programs, also called "opportunity scholarship programs," make higher quality schools more accessible to children, particularly those from low-income families or those with special needs.³⁷ Educational dollars "follow the child,"³⁸ and parents are given "a voucher with which they can enroll their child at a government-approved public or private school of their choice."³⁹ The funding is either given to the parents in the form of a check, which is endorsed over to the school of the

31. *Id.*

32. *See id.*

33. *Id.*

34. *See generally* Isabel Chou, Note, "Opportunity" For All?: How Tax Credit Scholarships Will Fare in New Jersey, 64 RUTGERS L. REV. 295, 303 & n.55 (2011) (noting that school choice options include school vouchers, tax credit scholarships, magnet schools, open enrollment, charter schools, and home schools).

35. *See id.*

36. *See id.*

37. *See* MALCOLM GLENN & MICHELLE GININGER, ALLIANCE FOR SCH. CHOICE, SCHOOL CHOICE NOW: THE YEAR OF SCHOOL CHOICE, SCHOOL CHOICE YEARBOOK 2011–12, at 9 (2012), http://s3.amazonaws.com/assets.allianceforschoolchoice.com/admin_assets/uploads/167/School%20Choice%20Yearbook%202012-13.pdf.

38. *Id.* (internal quotation marks omitted).

39. *See* Chou, *supra* note 34, at 304–05. What constitutes a "government-approved" school can vary by program. It usually means the school meets criterion set forth in legislation. *See, e.g.*, H.R. 4894, 119th Gen. Assemb., 2d Reg. Sess. (S.C. 2012), *available at* http://www.schouse.gov/sess119_2011-2012/bills/4894.htm (describing how an approved list of independent schools will be published meeting certain criteria).

parents' choice or is paid directly to that school.⁴⁰ Voucher programs take several forms: (1) universal vouchers, for which all children are eligible; (2) means-tested vouchers, for which children whose families fall below a specific income level are eligible; (3) failing schools vouchers, for which children who are not performing adequately in public schools or who are attending low-performing public schools are eligible; (4) special needs vouchers, for which children with special educational needs or Individualized Education Plans (IEPs)⁴¹ are eligible; and (5) town tuitioning, for which children living in towns without a public school that operates at their grade levels are eligible.⁴² School vouchers fulfill Milton Friedman's vision of an education system "where the government financing of education is separated from the government operation of schools."⁴³ This separation keeps the focus on the education of students through public schools, rather than on the schools themselves.⁴⁴ Public schools are the means to an end, not the end itself.⁴⁵

Another highly popular school choice program involves tax credit scholarships.⁴⁶ Tax credit scholarships provide individuals and corporations with an income tax credit for donating money to privately owned nonprofit organizations,⁴⁷ which provide students with scholarships to attend the schools of their choice.⁴⁸ These scholarship organizations usually create their own criteria for deciding which students are eligible and which students will receive the scholarships.⁴⁹ While tax credits resemble traditional vouchers, the scholarships are not funded through public monies and are thus subject to different legal challenges.⁵⁰ Although voucher programs were created first,⁵¹ today, more low-income students use tax credit scholarships to attend private

40. See Chou, *supra* note 34, at 305.

41. An IEP is a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with [the statutory requirements]." 20 U.S.C. § 1414(d)(1)(A)(i) (2006).

42. See FRIEDMAN FOUND. FOR EDUC. CHOICE, 2012 ABCs OF SCHOOL CHOICE: RISING TIDE 4 (Paul DiPerna ed., 2012).

43. *Id.*

44. See Interview with Neil Mellen, Comm'n's & Research Dir., S. Carolinians for Responsible Gov't, in Columbia, S.C. (Sept. 5, 2012).

45. See *id.*

46. See FRIEDMAN FOUND. FOR EDUC. CHOICE, *supra* note 42, at 4.

47. These organizations take different names in different states: Scholarship Organizations (SOs), School Tuition Organizations (STOs), Scholarship Granting Organizations (SGOs), Student Scholarship Organizations (SSOs), and Scholarship Funding Organizations (SFOs). GLENN & GININGER, *supra* note 37, at 10.

48. FRIEDMAN FOUND. FOR EDUC. CHOICE, *supra* note 42, at 4.

49. See GLENN & GININGER, *supra* note 37, at 10.

50. See, e.g., Chou, *supra* note 34, at 316 (discussing the different legal implications of vouchers and tax credits under state constitutions).

51. See generally Friedman, *supra* note 25, at 127 (first using the term "voucher" in his 1955 piece).

schools than traditional school vouchers.⁵² Surveys reveal that school choice organizations “view educational tax credits [as] superior to vouchers from a political and legal perspective.”⁵³ Because vouchers are funded through direct state aid, they often come with government mandates that can impair a participating school’s ability to use innovative teaching methods and meet the students’ individual needs.⁵⁴ Because tax credit scholarships are funded through individual and corporate donations rather than direct state aid, there is less state regulation, enabling participating schools to exercise “greater flexibility and creativity” in responding to students’ needs.⁵⁵ Because there are fewer government regulations, more schools are willing to participate, giving parents greater choice as to which school their child will attend, and giving donors more choice as to which students receive the scholarships.⁵⁶ For the foregoing reasons, a trend of favoring tax credit scholarships over traditional school vouchers has emerged.⁵⁷ In response to this trend, the South Carolina General Assembly considered House Bill 4894, a tax credit scholarship program, rather than a traditional school voucher program as it first debated in 2004.⁵⁸

B. School Choice Programs in Other States

In 2011, school choice became an important feature of mainstream education reform across the United States.⁵⁹ That year, “[forty-one] states and the U.S. Congress introduced publicly funded private school choice legislation, seven new programs were enacted, and [eleven] programs were expanded,” often with bipartisan support.⁶⁰ By the end of 2011, there were twenty-seven private school choice programs in thirteen states plus the District of Columbia and Douglas County, Colorado.⁶¹ More specifically, there were fifteen voucher programs⁶² (eight general programs⁶³ and seven special needs programs⁶⁴), ten tax credit

52. David Figlio & Cassandra M. D. Hart, *Does Competition Improve Public Schools?: New Evidence from the Florida Tax-Credit Scholarship Program*, EDUC. NEXT, Winter 2011, at 75.

53. See ASS’N OF WALDORF SCH. OF N. AM. & INST. FOR SOC. RENEWAL, INDEPENDENT SCHOOLS AND SCHOOL CHOICE LEGISLATION IN THE UNITED STATES 40 (2007) (citing ADAM B. SCHAEFFER, MACKINAC CTR. FOR PUB. POLICY, SCHOOL CHOICE SNAPSHOT: A 2006 SURVEY OF U.S. POLICY AND ADVOCACY ORGANIZATIONS 15 (2006)).

54. See *id.* at 46.

55. *Id.*

56. See *id.*

57. See *id.*

58. See Hutchins, *supra* note 8; see also H.R. 4894, 119th Gen. Assemb., 2d Reg. Sess. (S.C. 2012), available at http://www.schouse.gov/sess119_2011-2012/bills/4894.htm (describing the tax credits given).

59. GLENN & GININGER, *supra* note 37, at 16.

60. *Id.* at 11, 29.

61. *Id.* at 11.

62. *Id.*

63. The general voucher programs include six means-tested voucher programs, directed towards low-income families, operating in Indiana, Wisconsin (two distinct programs), Washington,

scholarship programs⁶⁵ (ten general⁶⁶ and one special needs⁶⁷), one special needs education savings account program,⁶⁸ and one special needs individual tuition tax credit program.⁶⁹

With one of the largest school choice programs in the United States,⁷⁰ Florida's program was one of the eleven programs to expand in 2011.⁷¹ Florida enacted two programs, the John M. McKay Scholarships for Students with Disabilities Program and the Florida Tax Credit Scholarship Program (FTC).⁷² The first is a voucher program making any student with a disability eligible for a McKay voucher to attend the school of his or her choice—either a private school or a different public school.⁷³ In 2011, the Florida legislature expanded the program to extend eligibility to a large number of students classified as “504 Plan” students.⁷⁴ The value of a McKay voucher is the expense that a public school would incur for that particular student if he or she had remained in the public school, not exceeding the cost of the private school's tuition.⁷⁵ Consequently, because the value of a McKay voucher is contingent on the severity of the child's disability, it can vary widely.⁷⁶ In 2011, the average value of a McKay voucher was \$6,693.⁷⁷ During the 2011–2012 school year, 22,861 students used McKay vouchers, with 985 private schools participating in the program.⁷⁸

D.C., Ohio, and Louisiana, and two failing school voucher programs operating in Louisiana and Ohio. *Id.* at 9.

64. Florida, Georgia, Louisiana, Oklahoma, Ohio (two separate programs), and Utah currently operate special needs scholarship programs. *Id.*

65. *Id.* at 11.

66. Arizona (three separate programs), Florida, Georgia, Indiana, Iowa, Oklahoma, Pennsylvania, and Rhode Island currently operate general scholarship tax credit programs. *Id.* at 10.

67. Arizona operates the special needs tax credit scholarship program. *Id.*

68. Arizona operates this program. *Id.*

69. An individual tuition tax credit is “an individual state income tax credit of significant size for educational expenses, including private school tuition.” *Id.* at 14. Although there are individual tax credits in other states, North Carolina's Tax Credits for Children with Disabilities is the only credit that is substantial enough to enable families to afford the costs of private school tuition. *Id.*

70. See Figlio & Hart, *supra* note 52, at 75.

71. See GLENN & GININGER, *supra* note 37, at 11, 19.

72. See generally FRIEDMAN FOUND. FOR EDUC. CHOICE, *supra* note 42, at 22–25 (detailing specifics of Florida's school choice programs).

73. *Id.* at 22.

74. *Id.* (internal quotation marks omitted). “504 Plan” refers to section 504 of the Rehabilitation Act of 1973, which defines persons with disabilities as “persons with a physical or mental impairment, which substantially limits one or more major life activities.” *Id.* (citing 29 U.S.C. § 705 (20) (2006)). Persons “who have a history of impairment or who are regarded as having a physical or mental impairment” also fall within this category. *Id.* (citing § 705). Major life activities are things such as taking care of one's self, walking, working, and learning. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 23.

Florida's other school choice program, the FTC, provides corporations income and insurance-premium tax credits for donations to Scholarship Funding Organizations (SFOs), which are "privately run nonprofit organizations that distribute private school scholarships."⁷⁹ The SFOs grant tuition, textbook, and transportation scholarships to low-income students.⁸⁰ In 2011, Florida expanded the FTC by eliminating the tax liability cap and allowing corporations to "carry forward an unused amount of tax credit to the next fiscal year."⁸¹ Participation has increased dramatically in recent years: 37,578 students and 1,114 schools participated in the 2011–2012 school year.⁸²

Because the McKay Voucher Program and the FTC have been in place for several years, various organizations have conducted studies to gauge the success of Florida's school choice programs.⁸³ *Education Next* found that students enrolled in schools facing the threat of losing students to private schools because of the availability of tax credit scholarships improved their test scores more than students in schools not facing such a threat.⁸⁴ The study found that the improvement in test scores was realized before any students actually used the scholarships to switch schools and thus was the result of "the threat of competition alone."⁸⁵ The study concluded that "private school competition, brought about by the creation of scholarships for students from low-income families, is likely to have positive effects on the performance of traditional public schools."⁸⁶ This conclusion supports proponents of Milton Friedman's argument that open-market competition would force poorly performing public schools to improve in order to compete with the private schools made available to their students because of school choice programs.⁸⁷

Arizona also has well-established school choice programs, one of which was challenged in litigation that the United States Supreme Court ultimately decided.⁸⁸ Arizona's school choice programs take the form of three tax credits: personal tax credits, corporate tax credits, and Lexie's Law corporate tax

79. *Id.* at 24.

80. *See id.*

81. *Id.*

82. *Id.* at 24–25; *see also* Figlio & Hart, *supra* note 52, at 76 fig.1 (citing COLLINS CTR. FOR PUB. POLICY, THE FLORIDA CORPORATE INCOME TAX CREDIT SCHOLARSHIP PROGRAM: UPDATED FISCAL ANALYSIS FEBRUARY 2007, at 6 (2007); FLA. HOUSE OF REPRESENTATIVES, FLORIDA TAX CREDIT SCHOLARSHIP PROGRAM 219 (2010–2011)) (showing the enrollment figures 2003–2010).

83. *See, e.g.,* Figlio & Hart, *supra* note 52, at 75–80 (discussing *Education Next's* study of Florida's tax-credit scholarship program which showed that competition improved public schools).

84. *See id.* at 76.

85. *Id.*

86. *Id.* at 80.

87. *See generally* Stefani Carter, Note, *School Tax Credits*, 39 HARV. J. ON LEGIS. 521, 524–25 (2002) (explaining how Milton Friedman's competitive, free market approach forces public schools to improve in order to compete against private schools).

88. *See* *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440 (2011).

credits.⁸⁹ The personal tax credit provides a dollar-for-dollar credit of up to \$500 on an individual's income taxes for donations to a School Tuition Organization (STO).⁹⁰ STOs, which are privately owned nonprofit organizations, can create their own eligibility guidelines, although most STOs award scholarships based exclusively on a student's financial need.⁹¹ The scholarships cannot exceed \$4,700 for grades K–8 and \$6,000 for grades 9–12, with these amounts set to increase by \$100 each year.⁹² However, in 2010, the average scholarship value was only \$1,791.⁹³ Since the launch of the program in 1998, it has experienced a large increase in both student and donor participation.⁹⁴

Arizona modeled its corporate tax credit program after the individual tax credit program, and “the two programs work in tandem.”⁹⁵ STOs that participate in the individual tax credit program may also participate in the corporate tax program.⁹⁶ Corporate donors may receive a tax credit equal to the full amount they contribute.⁹⁷ While the statute caps corporate tax credit scholarships at the same amount as the individual tax credit scholarships, the corporate scholarships had a higher average value of \$2,212 in 2010.⁹⁸ Additionally, there are two eligibility requirements for the corporate program that do not apply to the individual tax credit scholarship program.⁹⁹ For a student to be eligible for a scholarship through the corporate program, his or her family's income must be “below 185[%] of the income eligible for reduced-price lunch.”¹⁰⁰ Additionally, the student must “previously have attended a public school or be entering kindergarten” to participate in the program.¹⁰¹ Aside from these two requirements, an STO may establish its own guidelines for determining who is eligible and how to decide which students will receive the scholarships.¹⁰² Since the program began in 2006, participation has increased to 4,215 scholarships, worth a combined \$9,322,231, awarded in 2010.¹⁰³ The statute caps the total value of corporate tax credits to \$10 million each year, but it permits this figure to increase by 20% annually.¹⁰⁴

89. See generally FRIEDMAN FOUND. FOR EDUC. CHOICE, *supra* note 42, at 10–15 (noting the important aspects of Arizona's school choice programs).

90. *Id.* at 10.

91. *Id.*

92. *Id.*

93. *Id.*

94. See *id.* at 11.

95. *Id.* at 12.

96. *Id.*

97. *Id.*

98. See *id.* at 10, 12.

99. Compare *id.* at 10 (no set eligibility guidelines), with *id.* at 13 (specific eligibility guidelines).

100. *Id.* at 13.

101. *Id.*

102. See *id.*

103. See *id.*

104. *Id.* at 12.

Arizona's third tax credit program, known as "Lexie's Law Corporate Tax Credits," distributes scholarships to "special education students and foster care students in public schools."¹⁰⁵ Rather than applying to STOs, "[students] apply to a state-authorized scholarship organization for help covering the costs of tuition" after they have been admitted to a private school.¹⁰⁶ The value of the scholarship is "equal to the lesser of the private school tuition or 90[%] of the state funding that would otherwise go to the pupil if he or she had remained in public school."¹⁰⁷ Although the amount can vary depending on the severity of the student's disability, the average scholarship value was \$4,310 in 2010.¹⁰⁸ Under the Lexie's Law Corporate Tax Credits scholarship program, qualifying students can obtain special education scholarships and displaced public scholarships.¹⁰⁹ Special education scholarships are available for children who are enrolled in public school and have a disability under either the federal Individuals with Disabilities Education Act or section 504 of the Rehabilitation Act.¹¹⁰ Displaced public scholarships are available for students who have been placed in foster care at any time before graduating from high school; the statute does not require that these students be currently enrolled in a public school.¹¹¹

Arizona's school choice programs are considered "overwhelmingly successful."¹¹² In response to allegations that Arizona's individual tax-credit scholarship program mainly serves students from high-income families, Vicki E. Murray of the Pacific Research Institute conducted a study and concluded that the program primarily benefits low-and-middle income families, and that the program dramatically expanded the ability of parents to select the best schools for their children.¹¹³ In Arizona, support for school choice is strong; in the state's most recent elections, residents elected legislative candidates from both parties who pledged to champion educational choice.¹¹⁴ The bipartisan support

105. *Id.* at 14.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 14–15.

110. *Id.*; see also Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2006) (providing one statute under which students can qualify as having a disability); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (2006)) (providing the other statute).

111. *Id.* at 15.

112. See Carter, *supra* note 87, at 535.

113. See Vicki E. Murray, *An Analysis of Arizona Individual Income Tax-Credit Scholarship Recipients' Family Income, 2009–10 School Year* 16 (Program on Educ. Policy & Governance, Harvard Kennedy Sch., Working Paper 10-18, 2010), http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG10-18_Murray.pdf.

114. See *Bipartisan Victories Fuel Strong Election Night Performance for Arizona Educational Choice Champions*, AM. FED'N FOR CHILD. (Nov. 7, 2012), <http://www.federationforchildren.org/articles/739> (quoting Kevin P. Chavous, Senior Advisor, Am. Fed'n for Children).

is evidence that Arizona residents approve of the programs, as well as their most recent expansion.¹¹⁵

C. Current Problems with Public Schools in South Carolina

South Carolina has repeatedly appeared at or near the bottom of national education rankings.¹¹⁶ For the high school class of 2009, the national average graduation rate was 73.4%.¹¹⁷ In contrast, the South Carolina graduation rate was only 61.7%,¹¹⁸ placing South Carolina forty-eighth nationally, above only New Mexico, Nevada, and the District of Columbia.¹¹⁹ Although South Carolina's graduation rate is improving much faster than the rates in other states,¹²⁰ it remains far below the national average.¹²¹ The *2010–2011 Annual Update of Building a Grad Nation: Progress and Challenge in Ending the High School Dropout Epidemic* reported that fifty-nine South Carolina high schools were “dropout factories”—schools where 60% of students or fewer graduate.¹²² While this was an improvement from 2008, when eighty-four schools were dropout factories,¹²³ South Carolina's low graduation rate is still a statewide crisis; at least one-third of the state's high schools have low graduation rates and over one half of school districts have at least one low-graduation-rate high school.¹²⁴

Despite public assumptions based on these low graduation rates, educational funding in South Carolina is well above the national average.¹²⁵ Although the

115. *See id.*

116. *See, e.g.,* MATTHEW LADNER & DAN LIPS, AM. LEGISLATIVE EXCH. COUNCIL, REPORT CARD ON AMERICAN EDUCATION: RANKING STATE K-12 PERFORMANCE, PROGRESS, AND REFORM 89 (17th ed. 2012), http://www.alec.org/docs/17thReportCard/ALECs_17th_Report_Card.pdf (ranking South Carolina second to last in student performance for 2011). Only West Virginia ranked lower than South Carolina. *See id.* In 2009, South Carolina ranked last. *See* MATTHEW LADNER ET AL., AM. LEGISLATIVE EXCH. COUNCIL, REPORT CARD ON AMERICAN EDUCATION: RANKING STATE K-12 PERFORMANCE, PROGRESS, AND REFORM 64 (16th ed. 2010).

117. EDUC. RESEARCH CTR., TRAILING BEHIND, MOVING FORWARD: LATINO STUDENTS IN U.S. SCHOOLS: SOUTH CAROLINA—STATE HIGHLIGHTS 2012, at 4 (2012).

118. *Id.*

119. *Id.* at 5.

120. *See id.* at 6.

121. *See id.* at 5.

122. ROBERT BALFANZ ET AL., BUILDING A GRAD NATION: PROGRESS AND CHALLENGE IN ENDING THE HIGH SCHOOL DROPOUT EPIDEMIC 2010–2011 ANNUAL UPDATE 1, 7 (2011), <http://diplomasnow.files.wordpress.com/2011/02/gradnation-rd6-final.pdf>.

123. *See id.* at 7.

124. *See* ROBERT BALFANZ ET AL., GRADUATING AMERICA: MEETING THE CHALLENGE OF LOW GRADUATION-RATE HIGH SCHOOLS 15 & fig.4 (2009), http://www.jff.org/sites/default/files/graduating_america_072209_0.pdf.

125. *See* NEIL MELLEN, S. CAROLINIANS FOR RESPONSIBLE GOV'T FOUND., EDUCATION FUNDING IN SOUTH CAROLINA 2011–12, at 5 (2012), <http://www.scrfoundation.org/wp-content/uploads/2011/10/Foundation-Funding-Paper-2011.pdf> (citing a 2010 U.S. Department of Education report indicating that, in 2008, South Carolina ranked twenty-third in spending at \$11,045 per pupil, with a national average was \$10,899 per pupil).

economic recession has left South Carolina with one of the highest unemployment rates in the country,¹²⁶ educational funding decreased only slightly and has since returned to its prerecession numbers.¹²⁷ From 2000 to 2010, total education spending increased from about \$5.5 billion to \$8.5 billion;¹²⁸ however, only three out of eleven goals that the South Carolina Education Oversight Committee set in 2000 were met in 2010.¹²⁹ Rather than question why the state had failed to meet these goals, the committee reported some progress and set new goals for 2020.¹³⁰

III. THE ARGUMENTS FOR AND AGAINST SCHOOL CHOICE

A. Proponents' Arguments for School Choice in South Carolina

Proponents of school choice in South Carolina argue that simply throwing more money at schools will not fix the problems facing the state's public schools.¹³¹ This argument, proponents say, is where school choice can function to help students obtain a better, more tailored education; help South Carolina's public schools improve academic performance; and relieve some of their burdens by reducing the number of children they are responsible for educating.¹³² School choice allows parents to get involved and find the right school for their child.¹³³ Because every student learns in a different way, providing a child's parents with several different options will make it more likely that children will have the opportunity to learn in an environment that fits their specific needs and enhances their academic potential.¹³⁴ While upper- and upper-middle-income families have always had options when it comes to which school their children could

126. See BALFANZ ET AL., *supra* note 124, at 16.

127. See MELLEN, *supra* note 125, at 2.

128. See *id.* at 3.

129. Interview with Neil Mellen, *supra* note 44; see also S.C. EDUC. OVERSIGHT COMM., WHERE ARE WE NOW?: EVALUATING SOUTH CAROLINA'S PROGRESS TOWARD REACHING THE 2010 GOAL AND ESTABLISHING A VISION FOR 2020 (2009) (showing South Carolina's willingness to look forward to new goals and failure to look to past goals that were not reached).

130. Interview with Neil Mellen, *supra* note 44; see also S.C. EDUC. OVERSIGHT COMM., *supra* note 129 (illustrating the goals for 2020).

131. See, e.g., *Why School Choice?*, *supra* note 22 (contending that a school choice program is necessary in South Carolina because "money has not translated into academic achievement"); see also ERIC A. HANUSHEK & ALFRED A. LINDSETH, SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS 52 (2009) ("[T]he lack of any consistent relationship between more spending and better test scores has been documented time and time again . . ."); MELLEN, *supra* note 125, at 3 (stating that despite increases in funding, there is no consistent relationship between funding levels and student performance).

132. See, e.g., *Why School Choice?*, *supra* note 22 (asserting that a school choice program would result in "smaller class sizes and higher per-student funding in the public schools, as well as cost-savings for the state government").

133. See *id.*

134. See *id.*

attend, lower-income families have generally not had such options.¹³⁵ For example, if upper-income parents are dissatisfied with their child's school, they have the financial ability to move to another place zoned for a different school, enroll their child in private school, or home school their child. Low-income parents in the same predicament do not have the financial ability to pursue these options, leaving their child essentially stuck in the unsatisfactory school.¹³⁶ Thus, proponents reason that "[s]chool choice is especially important in allowing poorer families to join the educational marketplace since they would not otherwise have the income to take advantage of choices among more expensive schools that are already available to the more affluent."¹³⁷ According to proponents, school choice will help level the playing field, which so often has given students from upper- and middle-income families an advantage over students from lower-income households.¹³⁸

Providing all students with the ability to "vote with their feet,"¹³⁹ is also a part of the free market competition argument Milton Friedman developed.¹⁴⁰ Friedman maintains that by giving parents, who are dissatisfied with their child's school, the ability to send their child to the school of their choice, public schools would be compelled to compete with those higher quality schools.¹⁴¹ Parents would be able to penalize poor school performance by moving their children to different schools, which would cause the school to receive less funding, and if enough students left, would force the school to shut down.¹⁴² Reports analyzing Florida's programs have shown that the threat of losing students may incentivize schools to "cultivate parental satisfaction by operating more efficiently and improving the outcomes valued by students and parents."¹⁴³ Thus, Florida's experience seems to validate Friedman's arguments.¹⁴⁴

B. Opponents' Arguments Against School Choice in South Carolina

Not everyone believes that school choice is the answer to the problems facing public education in South Carolina.¹⁴⁵ Opponents of school choice argue

135. See Carter, *supra* note 87, at 524; see also Grover J. Whitehurst, *Let the Dollars Follow the Child*, EDUC. NEXT, Spring 2012, at 8, 10 (noting that upper-income populations have the ability to move to better school districts if they desire).

136. See Whitehurst, *supra* note 135, at 10.

137. Carter, *supra* note 87, at 524.

138. See *id.*

139. Whitehurst, *supra* note 135, at 10.

140. See Carter, *supra* note 87, at 524.

141. See *id.*

142. See *id.* at 526 (quoting Timothy T. Blank, Note, *The Milwaukee Parental Choice Program, Its Policies, and Its Legal Implications*, 1 REGENT U. L. REV. 107, 133 (1991)).

143. See Figlio & Hart, *supra* note 52, at 76.

144. See *id.*

145. See, e.g., *Hearing*, *supra* note 8, at 21 (statement of Debbie Elmore, Communications Director, South Carolina School Boards Association) ("For every study you show me that it says

that current public education funding is insufficient, since public schools are already struggling to maintain programs and services, and that vouchers and tax credits would reduce this funding further.¹⁴⁶ They contend that because a portion of the funding that public schools receive from local, state, and federal governments is tied to each student, by allowing more students to go to private schools, tax credit scholarships or vouchers would cause public schools to lose funding, making improvements even more difficult to achieve.¹⁴⁷ Opponents argue that, even if the number of students decreases, costs of running the schools and providing transportation remain the same, not saving the state money, and therefore, schools will have less money to operate than before.¹⁴⁸ In response to this argument, proponents counter that a tax credit on income tax will not affect public school funding because education funding comes from property taxes.¹⁴⁹ However, the basis of proponents' educational marketplace theory is that, if a substantial number of students switch schools, public school funding would be negatively affected and the school would either have to improve or be shut down.¹⁵⁰ These two arguments cannot coexist because there is an inherent inconsistency in arguing that the threat of losing funding because of students switching schools will encourage schools to improve, while also arguing that public school funding will not be negatively affected. In actuality, because of the way school funding is established in South Carolina, with only thirty-one cents of every dollar being allocated based on student enrollment,¹⁵¹ public school funding will likely not decrease to the extent some opponents of school choice fear. However, this actuality also means that, from a marketplace theory perspective, there will be less incentive for those schools to improve in order to compete. Even without a huge financial incentive to compete, public schools will likely want to maintain integrity and public pride and avoid losing students

that states are better because of these programs, I can show you another study that proves just the opposite.”).

146. See, e.g., Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, 39 (1993) (“Funds allocated to pay for vouchers inevitably come out of the overall public school budget. . . . [I]t makes little sense to expropriate precious resources from the public schools and give them to private schools.”).

147. See Carter, *supra* note 87, at 531.

148. The argument opponents assert is that the cost of having the lights on will not decrease because there are nineteen students in the classroom, rather than twenty. See S.C. EDUC. OVERSIGHT COMM., *supra* note 24; see also Chou, *supra* note 34, at 302 (quoting AM. FED’N OF TEACHERS, AFT VOUCHER FACT SHEET 2, <http://www.aft.org/pdfs/teachers/voucherfactsheet06.pdf>) (stating that the cost of running a classroom remains the same despite a student leaving). However, because the school will receive less funding as a result of having fewer students, it will have less money to pay the same costs. See Chou, *supra* note 34 (citing AM. FED’N OF TEACHERS, *supra*).

149. *S.C. Educational Opportunity Act: Hearing on H. 3407 Before the H. Comm. on Ways & Means*, 119th Gen. Assemb., 1st Reg. Sess. 34–35 (S.C. 2011) (statement of Burnie Maybank).

150. See Carter, *supra* note 87, at 526 (citing Blank, *supra* note 142, at 133).

151. See MELLEN, *supra* note 125, at 6.

to private schools, thus motivating poorly performing public schools to improve in the face of competition.

In addition to arguments that school choice programs will negatively impact public schools rather than improve them, opponents of school choice also argue that school choice programs will fail to actually benefit lower-income families.¹⁵² They contend that because most vouchers and tax credit scholarships do not cover the entire cost of tuition for private schools, low-income families, which are likely unable to make up the difference, will not be able to use the scholarships and will remain without access to private schools.¹⁵³ The median 2010–2011 cost of private school tuition in South Carolina was \$4,400 for seventh grade and \$4,500 for tenth grade.¹⁵⁴ Although those figures are probably less than many people might presume, under House Bill 4894, SGOs could have only provided a *maximum* of \$5,000 or 75% of the cost of tuition, whichever was less, for low-income students.¹⁵⁵ Because the bill made no mention of the other 25%, it appears that that burden would have fallen onto the student's family.¹⁵⁶ If parents of low-income families are unable to pay the rest of their child's tuition, the partial scholarship would have been insufficient to equalize access to higher quality schools.¹⁵⁷

Furthermore, some opponents argue that the private schools low-income students would be able to afford—those with lower tuitions—are “sub-quality,” as most, if not all, of the “good” private schools would exceed the students' price range, even with the tax credit scholarship.¹⁵⁸ Thus, only students from middle- and upper-income households, many of whom already had the ability to choose which school to attend, would benefit, while students from lower-income families would be forced to remain at poorly performing public schools with reduced funding.¹⁵⁹

152. See Green, *supra* note 146, at 39.

153. See *id.* at 40.

154. MELLE, *supra* note 125, at 4.

155. H.R. 4894, 119th Gen. Assemb., 2d Reg. Sess. (S.C. 2012), available at http://www.schouse.gov/sess119_2011-2012/bills/4894.htm.

156. See, e.g., S.C. EDUC. OVERSIGHT COMM., *supra* note 24 (discussing how parents who chose to use the tax credit scholarships “may increase their costs as they pay the tuition gap between the credit . . . and the school expense”).

157. See Green, *supra* note 146, at 40.

158. See, e.g., *id.* (“[Lower-income] parents [are] forced to choose between sub-quality private education and underfunded public schools.”).

159. See *id.* Although low-income students may not be able to take advantage of the scholarships and pay the remaining tuition gap to enroll in private schools, they would still be eligible to use the scholarships to transfer to a better performing public school. See *supra* notes 7–14 and accompanying text. However, overcrowding and the possibility that no better performing public school exists in a reasonable geographic proximity prohibit this option from completely solving the issue. See Kristi Hein, *Getting the Public School You Want: School Choice and the Law*, SCH. WISE PRESS (1997), <http://www.schoolwisepress.com/smart/browse/hein3.html> (explaining that a similar problem of overcrowding and lack of adequate options arises in the context of open enrollment programs).

Additionally, there remains doubt as to whether school choice programs in other states have actually yielded the positive results that proponents anticipated.¹⁶⁰ Opponents argue that, rather than improving social circumstances, free market competition would actually expand inequalities among students.¹⁶¹ Even if school choice programs provide a significant number of students the financial ability to attend private schools, the private schools will be able to pick and choose which students to accept.¹⁶² Thus, opponents fear that private schools will take all of the “good” students, leaving public schools with all of the “bad” students.¹⁶³ This form of “skimming,” opponents argue, will enhance private schools at the cost of public schools.¹⁶⁴

Opponents also contend that school choice will negatively affect the participating private schools.¹⁶⁵ One of the main concerns opponents have with the actual implementation of a school choice program is accountability.¹⁶⁶ Because the government will be indirectly funding private schools, the taxpayers will want the participating private schools to remain accountable.¹⁶⁷ However, the expectation of accountability presents a dilemma, because private schools do not want to lose their autonomy.¹⁶⁸ Arguably, what makes private schools unique, and thus attractive, is the flexibility and independence that administrators and teachers enjoy in choosing student curricula.¹⁶⁹ Private schools do not want to become pseudo-public schools, but that might be the result if a private school’s ability to participate in school choice programs is contingent on its students passing state-required tests.¹⁷⁰ However, the state needs to know that

160. See, e.g., *Hearing*, *supra* note 8, at 21 (statement of Debbie Elmore, Communications Director, South Carolina School Boards Association) (“For every study you show me that . . . says that states are better off because of [school choice tax credit] programs, I can show you another study that proves just the opposite.”).

161. See Carter, *supra* note 87, at 529–30.

162. See Green, *supra* note 146, at 40.

163. See *id.* (citing JOSEPH E. BRYSON & SAMUEL H. HOUSTON, JR., *THE SUPREME COURT AND PUBLIC FUNDS FOR RELIGIOUS SCHOOLS: THE BURGER YEARS, 1969–1986*, at 41 (1990)); see also Interview with Neil Mellen, *supra* note 44 (stating that only the good, smart, or rich kids would leave).

164. See Interview with Neil Mellen, *supra* note 44. But see *Why School Choice?*, *supra* note 22 (arguing that skimming will not occur because “[p]arents with children who excel in traditional public schools . . . are the least likely to transfer to a non-public school”).

165. See, e.g., *Hearing*, *supra* note 8, at 23–25 (statement of Molly Spearman, South Carolina Association of School Administrators) (expressing concern over the lack of accountability in private schools).

166. See *id.*

167. See *id.*

168. See Interview with Neil Mellen, *supra* note 44.

169. See *id.* Additionally, because private schools are able to expel problem children, public schools would still be responsible for educating those students.

170. See *id.* But see ASS’N OF WALDORF SCH., *supra* note 53, at 32 (quoting GREG FORSTER, MILTON & ROSE D. FRIEDMAN FOUND., *FUNDING SCHOOL CHOICE: A ROAD MAP TO TAX-CREDIT SCHOLARSHIP PROGRAMS AND SCHOLARSHIP GRANTING ORGANIZATIONS* 9 (2006)) (arguing that requiring private schools to administer a standardized test to scholarship students would not be too much of a burden).

students at private schools that receive government funding are learning and being prepared for the jobs of the future.¹⁷¹ Thus, the dilemma is real and will likely lead to considerable tension between opponents and proponents of school choice in the enactment and implementation of a school choice statute.

Another important issue opponents of school choice raise is whether vouchers and tax credit scholarships violate the Establishment Clause of the First Amendment by providing public funding to private religious schools.¹⁷² However, despite numerous challenges to school choice programs in other states on this ground, courts have consistently held the programs to be constitutional.¹⁷³ In *Zelman v. Simmons-Harris*,¹⁷⁴ the Supreme Court held that traditional school vouchers do not violate the Establishment Clause.¹⁷⁵ In that case, taxpayers in Ohio challenged the voucher portion of Ohio's Pilot Scholarship Program, claiming that it violated the Establishment Clause because a majority of participating students enrolled in religiously affiliated schools.¹⁷⁶ However, the Court noted that a government aid program does not violate the Establishment Clause if it is "neutral with respect to religion [and] provides benefits directly to a wide spectrum of individuals" who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice.¹⁷⁷ Because the Ohio program provided benefits to a broad class of individuals based solely on financial need and place of residence, and allowed individuals to exercise a genuine choice among schools public and private, secular and religious, the Court concluded that the program was "a program of true private choice."¹⁷⁸ Therefore, the Court held that the program was constitutional.¹⁷⁹

In 2011, in *Arizona Christian School Tuition Organization v. Winn*, the Supreme Court held that the plaintiffs, who challenged Arizona's private school tax credit statute as a violation of the Establishment Clause, did not have standing.¹⁸⁰ The plaintiffs contended that, despite the general rule that taxpayers lack standing to challenge government expenditures, their case fell within the narrow exception *Flast v. Cohen*¹⁸¹ established.¹⁸² However, the Court

171. See *Hearing*, *supra* note 8, at 24–25 (statement of Molly Spearman, South Carolina Association of School Administrators).

172. See Chou, *supra* note 34, at 301–02 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002)).

173. See Carter, *supra* note 87, at 531–32 (quoting *Mueller v. Allen*, 463 U.S. 388, 393 (1983)) ("The Supreme Court, however, has emphasized its 'consistent rejection of the argument that any program which in some manner aids an institution with a religious affiliation violates the Establishment Clause.'").

174. 536 U.S. 639.

175. *Id.* at 662–63.

176. See *id.* at 647, 648.

177. *Id.* at 662.

178. *Id.*

179. *Id.* at 662–63.

180. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011).

181. 392 U.S. 83 (1968).

disagreed, concluding that a tax credit is not the same as a governmental expenditure, taking plaintiffs outside of the *Flast* exception, such that they did not have standing to bring their claim.¹⁸³ The Court stated that although a tax credit and a governmental expenditure “can have similar economic consequences,” tax credits do not implicate an individual’s tax dollars in the same way.¹⁸⁴ The Court explained that when Arizona taxpayers chose to contribute to a scholarship tuition organization, they were spending their own money, not money the State collected from all taxpayers.¹⁸⁵ The program did not “extrac[t] and spen[d]” a conscientious dissenter’s funds in service of an establishment.”¹⁸⁶ And, as the tax credits did not amount to a “religious tax” or “a tithe,” the Court held that the plaintiffs failed to show an injury as required for standing purposes.¹⁸⁷ Additionally, the Court held that the plaintiffs failed to satisfy the other two standing requirements of causation and redressability since an injunction limiting the tax credit’s operation would not remedy any injury the plaintiffs suffered.¹⁸⁸ The Court reasoned that the contributions were being made by individuals and were not traceable to the government.¹⁸⁹ Therefore, the Court reversed the court of appeals’ judgment, reaffirming the trial court’s dismissal of the case.¹⁹⁰

Commentators contend that the Court’s holding has effectively taken away opponents’ federal constitutional arguments.¹⁹¹ After *Winn*, it is unlikely that a taxpayer, or even a parent or a student, would be able to establish standing to challenge similar tax credit scholarship programs under the United States Constitution.¹⁹² However, opponents may still challenge school choice programs under state constitutional provisions.¹⁹³ Despite the Court’s holding in *Zelman* that school vouchers were constitutional, “[s]everal voucher programs in the country have been successfully challenged under state constitutions, which often provide more explicit protections against the use of public funding in religious schools.”¹⁹⁴ Still, the distinction between vouchers and tax credits is

182. *Winn*, 131 S. Ct. at 1445 (citing *Flast*, 392 U.S. at 106). The *Flast* exception provides a “narrow exception” to the “general rule against taxpayer standing.” *Id.* (quoting *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988)) (internal quotation marks omitted).

183. *See id.* at 1447 (quoting *Flast*, 392 U.S. at 103, 106).

184. *Id.*

185. *Id.*

186. *Id.* (alteration in original) (quoting *Flast*, 392 U.S. at 106).

187. *Id.*

188. *Id.*

189. *See id.* at 1447–48.

190. *See id.* at 1441, 1449.

191. *See* Chou, *supra* note 34, at 312.

192. *See id.*

193. *See id.* at 302; *see also* ASS’N OF WALDORF SCH., *supra* note 53, at 23–24 (explaining why opponents focus on state constitutions when challenging parental choice).

194. Chou, *supra* note 34, at 302.

important.¹⁹⁵ In *Winn*, the Supreme Court drew a distinction between the tax credits and vouchers, which are reasonably construed as direct state funding, stating that tax credit scholarships were not public funding and only indirectly supported religious schools.¹⁹⁶ Therefore, tax credit scholarship programs might withstand challenges under state constitutions better than a school voucher program. This distinction may be one of the reasons tax credits are becoming the more favored school choice program.

IV. PROPOSALS FOR SCHOOL CHOICE LEGISLATION IN SOUTH CAROLINA

A. *Differences Between House Bill 4894 and Other States' Programs*

House Bill 4894 proposed the use of similar mechanisms to the tax credit scholarship programs implemented in Florida and Arizona, and it contained several similar provisions.¹⁹⁷ However, there were also differences that could have had a substantial impact on the program and thus led to different results.¹⁹⁸ One of the principal differences was the size of the program that House Bill 4894 proposed; the SGO cap was set at \$15 million for low-income students and \$10 million for students with special needs.¹⁹⁹ The proposed \$15 million cap was \$5 million higher than the Arizona corporate tax credit.²⁰⁰ That level of funding showed that proponents of school choice in South Carolina are prepared to make a full commitment; however, that degree of commitment raises some concerns. Most other states that have adopted school choice legislation started small and gradually enlarged the programs as acceptance and participation grew.²⁰¹ It would be wise for South Carolina to mirror this approach. Rather than starting with a cap that is substantially higher than Arizona's—one of the largest programs in the country²⁰²—South Carolina should start with a smaller cap.

195. See *id.* at 316 (explaining that unlike vouchers, which can reasonably be construed as direct state funding, “tax credit programs are not per se funded by taxpayer dollars”).

196. See *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447 (2011) (quoting *Flast v. Cohen*, 392 U.S. 83, 103, 106 (1968)) (differentiating between a tax credit and a government expenditure); see also Chou, *supra* note 34, at 316 (explaining the difference between the two).

197. Compare H.R. 4894, 119th Gen. Assemb., 2d Reg. Sess. (S.C. 2012), available at http://www.schouse.gov/sess119_2011-2012/bills/4894.htm (explaining the provisions of the tax credit scholarship program), with FRIEDMAN FOUND. FOR EDUC. CHOICE, *supra* note 42, at 12, 24 (describing Arizona's and Florida's programs).

198. Compare H.R. 4894 (setting a \$15 million cap for low-income students and \$10 million cap for students with special needs), with FRIEDMAN FOUND. FOR EDUC. CHOICE, *supra* note 42, at 12 (limiting the total worth of tax credits per year to \$10 million for low-income students).

199. See H.R. 4894.

200. See FRIEDMAN FOUND. FOR EDUC. CHOICE, *supra* note 42, at 12.

201. See generally *id.* at 10–77 (providing background information, graphs, and charts related to school choice programs around the country).

202. Compare *id.* at 12 (describing Arizona's program), with *id.* at 10–77 (providing the caps for other programs in the country).

Even with built-in increases, the smaller initial cap would lessen the initial impact on the state's general fund. Additionally, it would allow for growth and development after the popularity and success of these programs can be determined. Moreover, by ensuring that there is sufficient demand for the scholarships, the General Assembly can make sure that the amount saved in education funding will compensate for the loss of revenue.²⁰³

B. House Bill 4894 and Accountability

For a school choice bill to be successful, its proposed programs “must be effective and accountable, with a high level of transparency, to ensure the highest level of program quality and sustainability.”²⁰⁴ To achieve this result, three kinds of accountability are necessary: academic, administrative, and financial.²⁰⁵ Academic accountability requires transparency, which provides parents with information that will help them decide the best school for their children.²⁰⁶ This information will also allow taxpayers and donors to decide whether to donate and enable them to determine how the programs impact academic achievement.²⁰⁷ Administrative accountability requires schools to “meet health and safety codes, comply with nondiscrimination requirements, and conduct background checks on employees.”²⁰⁸ For scholarship tax credit programs, administrative accountability would also require SGOs to report all contributions and scholarship information and to conduct background checks on SGO operators.²⁰⁹ Financial accountability requires schools and SGOs to file annual reports to show financial sustainability.²¹⁰

House Bill 4894 included several requirements dealing with accountability.²¹¹ To promote academic accountability, participating schools would have had to undergo a required annual compliance audit to ensure that their curriculum included courses set forth in the state's diploma requirements and that they were administering either national achievement tests, state standardized tests, or both, to determine student progress.²¹² The bill also would

203. See OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, THE CORPORATE INCOME TAX CREDIT SCHOLARSHIP PROGRAM SAVES STATE DOLLARS I (2008), <http://www.oppaga.state.fl.us/reports/pdf/0868rpt.pdf>.

204. See GLENN & GININGER, *supra* note 37, at 31.

205. See *id.*

206. See *id.*

207. See *id.*

208. *Id.* Because public schools are already required to do these things, this prong only affects private schools. See, e.g., S.C. CODE ANN. REGS. 43–52 (2011) (requiring criminal background checks for South Carolina public school teachers).

209. See *id.*

210. See *id.*

211. See H.R. 4894, 119th Gen. Assemb., 2d Reg. Sess. (S.C. 2012), available at http://www.schouse.gov/sess119_2011-2012/bills/4894.htm.

212. See *id.*; see also *Hearing, supra* note 8, at 3–4 (statement of Emily Heatwole, Research Analyst in K–12 Special Schools) (describing the compliance audit).

have required participating independent schools to be members of the Southern Association of Colleges and Schools, the South Carolina Association of Christian Schools, or the South Carolina Independent Schools Association.²¹³

To promote administrative accountability, the bill have required participating schools to maintain “adequate school facilities that foster productive learning and a healthy environment, are accessible to students with physical disabilities, and are subject to applicable federal, state and local laws.”²¹⁴ Additionally, the Education Oversight Committee would have been responsible for determining which schools meet the bill’s criteria and publishing a list of approved schools annually.²¹⁵ The committee also would have promulgated regulations to further explain the criteria, with the help of an advisory committee comprised of parents and independent school representatives.²¹⁶

Unlike the Arizona and Florida tax credit legislation, which require SGOs to submit donation and scholarship details and file annual financial reports, House Bill 4894 did not include this type of a financial accountability provision.²¹⁷ Nor did it include any provisions on SGO accountability.²¹⁸ Additionally, Florida requires background checks of SGO operators and school employees, as well as annual financial reports from schools.²¹⁹ It also requires schools to go through an independent evaluation.²²⁰ South Carolina legislators should consider adding these additional accountability measures as they have proven successful in both Arizona and Florida.²²¹

South Carolina legislators should also consider including a provision that sets forth a program to educate parents about the different options available to them. Educating parents about the available options will be critical to the successful implementation of a school choice program.²²² Parents will need to

213. H.R. 4894.

214. *Hearing*, *supra* note 8, at 4 (statement of Emily Heatwole, Research Analyst in K–12 Special Schools).

215. *Id.*

216. *See id.* at 4–5.

217. *Compare* H.R. 4894 (requiring only an annual audit), *with* GLENN & GININGER, *supra* note 37, at 71 (both states require such reporting).

218. *See* H.R. 4894.

219. *See* GLENN & GININGER, *supra* note 37, at 71.

220. *See id.*

221. *See supra* notes 70, 112 and accompanying text.

222. *See generally* Jeffrey R. Henig, *School Choice Outcomes*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 68, 74–75 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (citing Jeffrey R. Henig, *The Local Dynamics of Choice: Ethnic Preferences and Institutional Responses*, in *WHO CHOOSES? WHO LOSES?: CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE* 95, 110 (Bruce Fuller et al. eds., 1996); Gary Bridge, *Information Imperfections: The Achilles Heel of Entitlement Plans*, 86 *SCH. REV.* 504, 512, 514–19 (1978); Mark Schneider et al., *Networks to Nowhere: Segregation and Stratification in Networks of Information About Schools*, 41 *AM. J. POL. SCI.* 1201, 1219–20 (1997); Mark Schneider et al., *Shopping for Schools: In the Land of the Blind, the One-Eyed Parent May Be Enough*, 42 *AM. J.*

know what participating private schools, if any, are open to their child; how to apply for scholarships; what the likely value of scholarships are; and how the scholarships are awarded. Although the bill did not mention the importance of educating parents on its face, making certain that parents know how to take advantage of the available opportunities is crucial in ensuring that a school choice program benefits as many students as possible and maximizes its positive effects.

Opponents of school choice argue that House Bill 4894's accountability provisions were insufficient.²²³ They contend that the testing requirement lacked an element that would have allowed the public to learn the results of the testing.²²⁴ Public school test scores are reported and are available in newspapers and online, but there is no analogous reporting requirement for testing done by participating private schools.²²⁵ Opponents also contend that accreditation by Southern Association of Accreditation, South Carolina Independent School Association, or any of the other organizations listed in the bill does not necessarily equate to a school's success.²²⁶ Some of the programs House Bill 4894 included do not even require members to be accredited, and so opponents argue there should be a more finite, involuntary accreditation process.²²⁷ Also, opponents complain that there are no public school representatives on the Education Oversight Committee's advisory committee, which eliminates the voice of public schools where it arguably most needs to be heard.²²⁸ South Carolina legislators should consider these issues and address opponents' concerns in subsequent school choice bills. By doing so, future school choice bills will be more likely to garner bipartisan support and therefore have a greater chance of passing in both houses of the General Assembly.

C. Judicial Challenges to a School Choice Program in South Carolina

While the Supreme Court held in *Winn* that the plaintiffs did not have standing, the Court essentially eliminated school choice opponents' argument that tax credit scholarship programs violate the Establishment Clause of the First Amendment; however, opponents may still challenge tax credit scholarship programs under state constitutions.²²⁹ The South Carolina Constitution states that "[n]o money shall be paid from public funds nor shall the credit of the State

POL. SCI. 769, 776 (1998)) (discussing the issue of unequal access to information regarding the options available to parents).

223. See, e.g., *Hearing*, *supra* note 8, at 24–25 (statement of Molly Spearman, South Carolina Association of School Administrators) (expressing concern over the lack of accountability in private schools).

224. See *id.*

225. See *id.*

226. See, e.g., *id.* at 28–29 (arguing that accreditation does not indicate a "great school").

227. See *id.* at 29.

228. See *id.* at 30.

229. See *supra* notes 180–96 and accompanying text.

or any of its political subdivisions be used for the *direct* benefit of any religious or other private education institution.”²³⁰ In 1973, South Carolina amended this provision by eliminating a “ban on ‘indirect’ funding of private educational institutions.”²³¹ Legislators reportedly made the change to allow for the use of public funds to assist students who independently chose to attend private schools, including schools with religious affiliations.²³² As amended, this “moderately restrictive” provision prohibits direct funding but arguably allows indirect state funding of private religious schools.²³³ Under the dictum in *Winn*, tax credits are distinct from governmental expenditures, and any injury arising from the government’s decision *not* to impose a tax (i.e., to allow a tax credit) would be speculative.²³⁴ Therefore, if challengers contend a bill similar to House Bill 4894 violates the South Carolina Constitution—assuming they have standing—the South Carolina Supreme Court will likely find that tax credit scholarships are not unconstitutional. Moreover, because the money to fund the scholarships comes from individuals, rather than the state, tax credit scholarships are not traceable to the government and, at most, would be considered “indirect” government funding, which is no longer prohibited by the state’s constitutional provision.²³⁵

D. Likely Impacts of the Adoption of a School Choice Program in South Carolina

If South Carolina were to adopt a bill similar to House Bill 4894, the change would not be seen overnight. Like the programs in other states, implementation may be gradual, and participation would likely increase after a couple of years.²³⁶ SGOs would need to be created, private schools would need to decide whether they wish to participate, and parents would need to be educated about their newly created choices.

Furthermore, there are concerns specific to South Carolina that may take time to address. There are two counties in South Carolina with no independent

230. S.C. CONST. art. XI, § 4 (emphasis added).

231. RICHARD D. KOMER & CLARK NEILY, INST. FOR JUSTICE & AM. LEGISLATIVE EXCH. COUNCIL, SCHOOL CHOICE AND STATE CONSTITUTIONS: A GUIDE TO DESIGNING SCHOOL CHOICE PROGRAMS 74 (2007), <http://www.alec.org/docs/IJ-ALEC-school-choice.pdf>.

232. See *id.* (citing FINAL REPORT OF THE COMMITTEE TO MAKE A STUDY OF THE SOUTH CAROLINA CONSTITUTION OF 1895, at 98–101).

233. See Chou, *supra* note 34, at 315 (internal quotation marks omitted).

234. See *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447 (2011) (quoting *Flast v. Cohen*, 392 U.S. 83, 103, 106 (1968)).

235. See *id.* (quoting *Flast*, 392 U.S. at 106). The Court’s analysis in *Winn* seems to present a potential problem for traditional voucher programs, which a court is more likely to consider a government expenditure. To avoid attacks under the South Carolina constitution on this basis, S.C. legislators would be better off focusing on tax credit scholarship programs exclusively, as in House Bill 4894.

236. See generally GLENN & GININGER, *supra* note 37, at 42–68 (providing graphs on student participation in school choice programs over the years around the country).

schools, and several rural districts with only one or two.²³⁷ If an area completely lacks private schools or enrollment in the limited number of private schools in an area fills quickly, students in those rural areas may not have the opportunity to take advantage of tax credit scholarships. Additionally, students in those areas may not live close enough to a private school for them to feasibly attend.²³⁸ Legislators will need to address this issue and determine how a school choice program could benefit students who are located long distances from private schools or in areas with too few private schools.

Another area of concern is the impact that legislation similar to House Bill 4894 would have on state revenue. The South Carolina Board of Economic Advisors estimated that, if adopted, House Bill 4894 would reduce “General Fund income taxes, insurance premium taxes, and bank license fees by \$36,723,225 in [Fiscal Year] 2012–13.”²³⁹ Although this prediction has been criticized as exaggerated,²⁴⁰ a reduction anywhere near this figure is enough to cause legislators and citizens alike to take a second look. Opponents are concerned that some services will have to be cut or that there will be tax increases in other areas to offset this loss of revenue.²⁴¹ Accordingly, some opponents argue that a school choice bill should not be introduced until there is major tax reform in South Carolina and a new education funding formula in place.²⁴² However, proponents argue that any losses to revenue will not need to be offset because public schools will be relieved of the burden of educating hundreds or even thousands of students, and thus require less funding.²⁴³ More specifically, they argue that the special needs scholarships in particular will relieve public schools of the substantial burden of providing education to special

237. See *Why School Choice?, Myths*, S. CAROLINIANS FOR RESPONSIBLE GOV'T, <http://www.scr.gov.org/why/myths/> (last visited Apr. 16, 2013); see also Interview with Neil Mellen, *supra* note 44 (stating that most counties have about three independent schools).

238. This problem was not an issue in the implementation of Florida's school choice programs because the majority of students live in or around metropolitan areas. These areas have a large number of private schools, of all types, with the space and resources for more students to attend. See generally Figlio & Hart, *supra* note 52, at 80 (indicating that 90% of Florida's students reside in metropolitan areas and acknowledging that “the effects of a scholarship program may not exert the same degree of competitive pressure on public schools” in states where a larger percentage of students live in rural areas).

239. BRIAN WHITE ET AL., S.C. BD. OF ECON. ADVISORS, STATEMENT OF ESTIMATED STATE REVENUE IMPACT H. 4894, at 1 (2012).

240. See, e.g., *Fuzzy Math: Calculating the “Cost” of School Choice*, S. CAROLINIANS FOR RESPONSIBLE GOV'T, <http://www.scr.gov.org/2011/04/27/fuzzy-math-calculating-the-cost-of-school-choice> (last visited Apr. 16, 2013) (criticizing the Board of Economic Advisors for making sloppy assumptions while calculating the expected cost of recent school choice bills in South Carolina).

241. See *Hearing*, *supra* note 8, at 12 (statement of Rep. Hosey).

242. See *id.* at 30–31 (statement of Molly Spearman, South Carolina Association of School Administrators).

243. See OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, *supra* note 203, at 4.

need students, which involves higher costs.²⁴⁴ In support of this argument, proponents could point to Florida, where reports indicate that the loss of state revenue resulting from the school choice program was less than the amount saved on public school spending.²⁴⁵ The Office of Program Policy Analysis and Government Accountability reported that Florida “saved \$1.49 in education funding for every dollar loss in corporate income tax revenue due to scholarship contributions.”²⁴⁶ The same report showed that expanding the cap on tax credits would lead to additional savings as long as there was sufficient demand for the scholarships.²⁴⁷ Some commentators doubt the ability of South Carolina legislators to accurately predict the impact to state revenue and say that taxpayers should wait and determine the best sources for funding.²⁴⁸

Although both sides speculate about the potential impact to state revenue, it would be wise for legislators to start with smaller caps to give the schools, students, and the state general fund the opportunity to adjust in an orderly, incremental manner. By starting with a smaller program, even if it includes built-in annual increases, the budget could be incrementally adjusted as schools realize the savings and determine how much funding they need to operate effectively. Additionally, this plan would ensure that the tax credit cap does not exceed the demand for scholarships such that the tax credits given are offset by the education funding savings that are realized by public schools when students utilize the scholarships.²⁴⁹

V. CONCLUSION

As evidenced by its rankings,²⁵⁰ the South Carolina education system is in need of significant reform, and a tax credit scholarship program is one viable option for improving the system. Although House Bill 4894 had several attractive qualities, legislators should make several key changes if and when they decide to introduce a new school choice bill. In order for a bill to pass in the House and the Senate, the General Assembly must include more detailed provisions regarding accountability and the manner in which parents of eligible students can best learn about their options. Legislators should also communicate with private schools that express interest in participating in a school choice program to discuss grant or scholarship opportunities that will allow low-income students to make up the differences between the SGO scholarships and the cost

244. See *Hearing*, *supra* note 8, at 13–14 (statement of Rep. White, Chairperson, House Ways & Means Comm.).

245. See OFFICE OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, *supra* note 203, at 4.

246. *Id.*

247. See *id.* at 5.

248. See, e.g., *Hearing*, *supra* note 8, at 11–17 (dialogue between Rep. Hosey and Rep. White, Chairman, House Ways & Means Comm.) (discussing the financial implications of the bill).

249. See *supra* notes 242–46 and accompanying text.

250. See LADNER & LIPS, *supra* note 116, at 89.

of tuition, which could allow more students to take advantage of the scholarships. It would also be prudent to adopt or consider any proposed school choice bill before the annual budget is considered, so that it can be decided in advance, where any loss in state revenue might best be offset.²⁵¹ Increased regulation of the SGOs and the eligibility requirements could help prevent “skimming” and discrimination in private school enrollment, but legislators should also consider how students in rural areas can take advantage of these programs, possibly through various methods of transporting students from districts where there are no, or few, private schools. While House Bill 4894 represented a compromise between opponents and proponents, continued cooperation is necessary to address the concerns of both viewpoints and to achieve the best outcome. It is only through a combined effort that the education system will improve and the students of South Carolina will be afforded the opportunity to receive the best education available.

Sarah Katherine Johnson

251. This will be especially helpful at first, when the state has not determined how much it will save in education funding. See OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, *supra* note 203, at 5 (explaining how there can be a “lag between when contributions are made to the scholarship fund, which reduce state corporate tax collections, and when these contributions are used by students who otherwise would attend public schools, reducing state educational expenses”).

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