
SCHOOL CHOICES IN THE SUNFLOWER STATE: THE
KANSAS TAX CREDIT SCHOLARSHIP FOR LOW-INCOME
STUDENTS PROGRAM

By: Jon Huske Davies

In many of the nation's—and Kansas'—metropolitan areas, schools are unequal in terms of resources and student outcomes. Throughout the country's metropolitan areas, including those in Kansas City¹, Topeka, and Wichita, suburban school districts tend to be better resourced and student success rates excel compared to urban school districts.² These conditions are not an accident of nature.³ The current inequitable conditions within the different states' public-school systems are the result of long histories of discriminatory and inequitable school policies.⁴ Recently, school choice programs have been proposed as an effective means to overcome these inequities in the public school system.⁵ In Kansas, school choice has taken the form of a "Tax Credit Scholarship" program.⁶ The stated purpose of the program is to increase educational opportunities for low-income students in low-performing school districts, and therefore address the inequities within the public school system.⁷ However, the Kansas school choice laws are not good policy if the goal is to address the

¹ See Sam Dillon, *Large Urban-Suburban Gap Seen in Graduation Rates*, N.Y. TIMES (Apr. 22, 2009), <https://www.nytimes.com/2009/04/22/education/22dropout.html> [<https://perma.cc/5BA2-HXDH>].

² See *infra* pp. 5–10.

³ See *infra* pp. 2–9.

⁴ *Id.*

⁵ See *infra* pp. 9–17.

⁶ KAN. STAT. ANN. §§ 72-4351–4357 (West 2017).

⁷ KAN. STAT. ANN. § 72-4353 (West 2015).

major inequities in the Public School System.⁸ Instead, the program likely results in further inequities.⁹

In general, it is not clear how effective school choice policies will be in contributing to improved student outcomes or equality of educational opportunity.¹⁰ Indeed, school choice reforms may contribute to the persistence of the educational achievement gap between students in suburban, relatively high-income school districts that serve white communities and students in urban, lower-income school districts that serve areas with relatively high minority populations.¹¹ In fact, school choice policies may allow for the structural inequities that lead to the achievement gap to be ignored; as the burden of failure is shifted from the community to the family and individual.¹² Market-like reforms should not be applied to public education. The country's public-school systems are arguably the most important of its public institutions, and they provide one of the most important public goods necessary for a successful Republic. If the public-school system is broken, then the public-school system needs to be fixed.

Discussion will proceed as follows. Part I of this article looks at the history of state and school district policies propagating inequality in the Kansas public-school system. Part II discusses tax credit scholarship programs in general and the Kansas Tax Credit Scholarship for Low Income Students Program in particular. Part III provides an analysis of the likely and possible effects of the Kansas program. Part IV briefly discusses the merits of market fundamentalism in the contemporary school policy debates and provides alternative policies that may be more effective at increasing equality of educational opportunity in Kansas. Part V contains a brief conclusion.

⁸ See *infra* pp. 31–43.

⁹ *Id.*

¹⁰ See Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1105 (2014) (explaining that the loss of “education connoisseurs” voices will harm “poor and minority school districts...most in need of this economic and social capital”).

¹¹ *Id.*

¹² *Id.*

I. A BRIEF HISTORY OF INEQUALITY OF EDUCATIONAL OPPORTUNITY IN KANSAS

Like many of its sister states, Kansas schools were segregated for much of the 19th and 20th Centuries.¹³ During the state's first legislative session, lawmakers passed a measure allowing racial segregation in common schools.¹⁴ A year later, another law passed allowing for segregation that was specific to city school districts.¹⁵ At first, the law for city school districts was applicable only to the Leavenworth city school district.¹⁶ In 1865, an amendment to the law applicable to city school districts allowed cities of less than 3,000 to segregate, seemingly to allow for Topeka, and perhaps other cities, to establish segregated schools in their city school districts.¹⁷ In 1867, a

¹³ See, e.g., Gerald W. Heaney, *Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity*, 69 MINN. L. REV. 735, 751 n.110 (1985) (discussing school segregation laws in effect in 1900 and noting that 19 of 37 states with school segregation laws mandated the operation of separate schools for black and white children); Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 UCLA L. REV. 677, 682 (1997) (noting that even in states where statutes were enacted to prohibit segregation "many local school districts in each of these states operated segregated schools in open defiance of state law until the early 1950s").

¹⁴ Act of Sept. 2, 1861, ch. 76, § 1, 1861 Kan. Sess. Laws 256, 261 (repealed 1874) (legislation granting school district residents consisting of the qualified electors and white female persons over the age of 21 not subject to statutory disqualification the power to vote for the creation of "separate" but "equal" schools for white and "colored" children).

¹⁵ Act of Mar. 4, 1862, ch. 46, § 1, 1862 Kan. Sess. Laws 384 (requiring cities of at least 7,000 people to appropriate all taxes collected from "black or mulatto" persons for school purposes be applied to funding of separate schools for their children) (amended 1864); Act of Feb. 8, 1864, ch. 67, 1864 Kan. Sess. Laws 117 (amending the 1862 act to permit rather than mandate separate schools in incorporated cities) (repealed 1957). In 1867 the law governing the incorporation of cities was reworked, to allow for cities to incorporate either as cities of the first class or of the second class, depending on population. See Act of Feb. 26, 1867, ch. 69, § 1, 1867 Kan. Sess. Laws 134 (allowing for cities with a population between 1,000 and 15,000 to incorporate as cities of the second class). At the time, the establishment of separate schools was permitted in both types of incorporated cities. See *id.*

¹⁶ Leavenworth was the only city in Kansas with a population sufficient for incorporation under the act. See U.S. CENSUS BUREAU, CENSUS (1860).

¹⁷ See Act of Feb. 20, 1865, ch. 47, 1865 Kan. Sess. Laws 108. The bill was introduced by S.D. Macdonald of Topeka. See H. JOURNAL, 4th Sess. 275 (Kan. 1865) (stating that "Mr. Macdonald introduced House Bill No. 173, 'An act

new law afforded some protection to black students by fining school board members if they denied entry into a common school to any student.¹⁸ Additionally, statutes passed during much of the 1870's restricted the school district's ability to establish separate schools.¹⁹ In 1876, education laws were re-written, removing all authority for any type of school district to establish or maintain segregated schools.²⁰ However, a statute passed in 1879, allowing for segregation in cities

supplemental to an act to incorporate cities of Kansas"). *See also* THE LAWS OF THE STATE OF KANSAS PASSED AT THE FIFTH SESSION OF THE LEGISLATURE, 9 (1865) (noting that Macdonald was from Topeka). In 1865 Topeka schools were segregated when Black and White children began to be educated on separate floors in the school building they shared. *See* THOMAS C. COX, BLACKS IN TOPEKA KANSAS, 1865-1915: A SOCIAL HISTORY 27 (1991). Topeka's population in 1865 was 1,310. *Id.* at 201.

¹⁸ Act of Feb. 26, 1867, ch. 125, § 1, 1867 Kan. Sess. Laws 211 (prohibiting district boards from refusing to admit any child into the common schools and fining district boards that refuse admission to a child).

¹⁹ *See, e.g.*, Act of Mar. 5, 1873, ch. 65, 1873 Kan. Sess. Laws 126 (providing no provisions for the establishment of segregated schools in cities of the second class); Act of Feb. 27, 1874, ch. 49, 1874 Kan. Sess. Laws 82 (making it a misdemeanor to make a "distinction on account of race, color, or previous condition of servitude" in any state "school of public instruction"); *id.* at 83 (repealing all acts or parts of acts inconsistent with the 1874 Act to Provide for the Protection of Citizens in Their Civil and Public Rights).

²⁰ *See* Act of Mar. 4, 1876, ch. 122, 1876 Kan. Sess. Laws 238, 263-69 (providing no provisions allowing for the establishment of segregated schools in cities of the first class); *id.* at 269-75 (providing no provisions allowing for the establishment of segregated schools in cities of the second class); *id.* at 275 (providing no provisions for the establishment of segregated schools in cities of the third class); *id.* at 256-57 (providing no provisions allowing for the establishment of segregated schools in common school districts). *See also* Reynolds v. Board of Educ. of Topeka, 72 P. 274, 276 (Kan. 1903) (noting that the during this period the statutes providing for the establishment of segregated schools in cities of the first class "were no longer operative as laws"); *but see* Board of Educ. of Ottawa v. Tinnon, 26 Kan. 1, 18-19 (1881) (noting in dictum that the power to segregate schools has always existed in the city of Leavenworth, "from its earliest territorial days down to the present time").

of the first class.²¹ A version of this law would stay on the books until 1957.²²

There were notable inconsistencies in the application and enforcement of segregation policies. Although permissible in the elementary schools of cities of the first class, segregation was illegal in other types of schools.²³ However, schools were often segregated even where it was not legally permissible to do so.²⁴ At times, Kansas

²¹ See Act of Mar. 11, 1879, ch. 81, § 1, 1879 Kan. Sess. Laws 163 (repealed 1957). Cities of the first class could include prohibitions against segregation through special legislation. For example, the 1889 act providing for the incorporation of Wichita as a city of the first class banned segregation within the city's public schools. See Act of Feb. 25, 1889, ch. 227, § 4, 1889 Kan. Sess. Laws 329 (prohibiting discrimination on account of race or color in Wichita schools); *Rowles v. Board of Educ. of Wichita*, 91 P. 88, 89 (Kan. 1907) (holding that the special act made it unlawful for separate schools to be established in Wichita). The law was amended in 1905 to allow for the establishment of segregated high schools in Kansas City, Kansas. See Act of Feb. 22, 1905, ch. 414, § 1, 1905 Kan. Sess. Laws 676 (allowing for the establishment of segregated high schools in Kansas City, Kansas) (repealed 1957); *Richardson v. Board of Educ. of Kansas City*, 84 P. 538, 538 (Kan. 1906) (holding that the establishment of segregated high schools in Kansas City, Kansas was permissible under the 1905 law). This was apparently the result of exceptionally high racial tensions in Kansas City, Kansas. See David Peavler, *Drawing the Color Line in Kansas City: The Creation of Sumner High School*, 27 KAN. HIST.: A J. OF THE CENTRAL PLAINS 188, 190 (2005).

²² See Act of Apr. 1, 1957, ch. 389, 1957 Kan. Sess. Laws 847 (repealing the law allowing for segregation in cities of the first class).

²³ See, e.g., *Tinnon*, 26 Kan. at 21–23 (holding that the operation of separate schools in cities of the second class was not permissible under Kansas law). The *Tinnon* case has become somewhat famous in recent decades as “the earliest discoverable judicial statement that the Fourteenth Amendment prohibited legal segregation of public schools.” Andrew Kull, *A Nineteenth-Century Precursor of Brown v. Board of Education: The Trial Court Opinion in the Kansas School Segregation Case of 1881*, 68 CHI. KENT L. REV. 1199, 1201 (1993).

²⁴ See *Whitlow v. Board of Educ. of Council Grove*, 196 P. 772, 773 (Kan. 1921) (discussing, but not litigating, the establishment of a “colored” school in Council Grove); *Farmers' State Bank of Bonner Springs v. School Dist. No. 100*, 4 P.2d 404, 405 (Kan. 1931) (discussing, but not litigating, the operation of a “colored” school in a rural school district in Johnson County). Separate schools were operated in cities where segregation had long been prohibited even in the period after the Supreme Court's 1954 and 1955 *Brown* decisions. See *Cameron v. Board of Educ. of Bonner Springs*, 318 P.2d 988, 989–90 (Kan. 1957). It was not unusual for impermissible school segregation to exist for years before finally challenged. See, e.g., *Webb v. School Dist. No. 90*, 206 P.2d 1066, 1068 (Kan. 1949) (“[Y]ears ago the district unlawfully organized and established a separate grade school for the attendance of Negro children. . .”).

courts allowed impermissible instances of segregation to continue even when directly challenged through litigation.²⁵ At other times, the courts enforced the prohibition against impermissible segregation when challenged.²⁶

Communities across the country were able to maintain racially segregated schools through a variety of methods, despite the formal end to legal segregation in public schools brought on by *Brown v. Board* in 1954.²⁷ The same was true in Kansas metropolitan areas, where city school districts expanded along with the suburbanizing

²⁵ See, e.g., *Jones v. McProud*, 64 P. 602, 602 (Kan. 1901) (denying admission to the local high school to colored students who had completed grade 8 on the basis that the lowest grade level in the high school was grade 10, and the school district had recently added grade 9 to the school for Black children, which was found not to be “inferior in standing” to the other schools in the district). Oskaloosa did not have a sufficient population to incorporate as a city of the first class. See U.S. CENSUS BUREAU, CENSUS (1900) (showing Oskaloosa to have a population of 978). See also J. Morgan Kousser, *Before Plessy, Before Brown: The Development of the Law of Racial Integration in Louisiana and Kansas*, in TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 213, 233–39 (Paul Finkelman & Stephen E. Gottlieb eds., 1991) (discussing pre-*Brown* desegregation cases in Kansas, including multiple district court decisions where unlawful segregation was allowed to continue despite being challenged in the courts).

²⁶ See *Knox v. Board of Educ. of Independence*, 25 P. 616, 617–19 (Kan. 1891) (holding that the legislature had not conferred the power to segregate schools on the basis of race to cities of the second class); *Williams v. Board of Educ. of Parsons*, 99 P. 216, 218 (Kan. 1908) (holding that when a city establishes separate schools for “Colored” and white children “where the location of a school for one of these classes is such that access to it is beset with such dangers to life and limb that children of the class for which it is designated ought not to be required to attend it, such children are denied equal educational facilities”); See *Graham v. Board of Educ. of Topeka*, 114 P.2d 313 (Kan. 1941) (holding that separate grade structures in the racially segregated schools of Topeka constituted a denial of “equal treatment” guaranteed by the Kansas and United States constitutions).

²⁷ *Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 495 (1954) (holding “that in the field of public education the doctrine of ‘separate but equal’ has no place [and that] separate educational facilities are inherently unequal”).

white²⁸ population.²⁹ This allowed city school districts to maintain segregation through such practices as siting schools in racially homogenous areas and creating “optional attendance zones” in neighborhoods undergoing demographic transition.³⁰ In the mid-1960’s, courts began to pursue desegregation more aggressively as federal enforcement of *Brown v. Board* and successor cases increased. However, in many of the nation’s metropolitan areas, suburbanization and school district fragmentation allowed the continuation of segregation along inter-district boundaries.

²⁸ Residential segregation was maintained during eras of suburbanization through a variety of methods. In earlier periods, racially restrictive covenants acted to enforce residential segregation. *See, e.g.*, *Clark v. Vaughan*, 292 P. 783 (Kan. 1930) (discussing validity of racially restrictive covenants, determining that such provisions were generally valid, except where circumstances change to such a degree that enforcement is no longer equitable); Bruce D. Baker & Preston C. Green, *Kansas—Separate and Unequal by Design: What’s the Matter with the Rising State Role in Kansas Education?*, in *THE RISING STATE: HOW STATE POWER IS TRANSFORMING OUR NATION’S SCHOOLS* 133, 137 (Bonnie C. Fusarelli & Bruce S. Cooper eds., 2009) (explaining that suburban housing in Kansas remained racially restrictive until at least 1962, despite the Supreme Court’s ruling in *Shelley v. Kraemer*, 334 U.S. 1 (1948)). From 1924 to at least the 1950’s real estate agents followed a “code of ethics” requiring the “steering” of households on the basis of race to certain neighborhoods. *See, e.g.*, ROSE HELPER, *RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS* 201 (1969); DAVIS MCENTIRE, *RESIDENCE AND RACE* 246 (1960) (noting that some local real estate boards interpreted a 1950 revision to the code which did not explicitly mention race to have the same meaning as the prior code). Additionally, racially discriminatory lending practices acted to maintain residential segregation. *See, e.g.*, ROBERT LOUIS ROTENBERG & GARY W. MCDONOGH, *THE CULTURAL MEANING OF URBAN SPACE* 152 (1993) (detailing racially discriminatory lending practices during the 1970’s in Kansas City, Kansas).

²⁹ *See, e.g.*, *Brown v. Board of Educ. of Topeka*, 892 F.2d 851, 856 (1989) (mentioning the effect of annexation of suburban areas by Topeka, and its effect on intra-district segregation after *Brown*; the annexations mentioned here occurred in the late 1950’s); RAYMOND WOLTERS, *RACE AND EDUCATION: 1954-2007* 61–62 (2008) (noting intra-district “white flight”, or suburbanization, and intra-district segregation within the Topeka Public School District).

³⁰ *See, e.g.*, *Brown*, 892 F.2d at 881–84 (1989) (discussing that school closures, portable classrooms, and optional attendance zones were used as methods to concentrate students of one race in certain schools and thereby acted to maintain segregation in Topeka during the 1950’s and 60’s); *United States v. Unified School Dist. No. 500*, 610 F.2d 688, 690 (1979) (noting that over 50% of the Black students in the Kansas City, Kansas school district were assigned to schools that were greater than 98% Black. Two schools, Sumner High and Grant Elementary, were found to be 100% Black).

During this decade, Kansas saw revolutionary changes to state-level school policies; creating what can best be described as Tiebout-like³¹ systems in Kansas metropolitan areas.³² In such Tiebout metropolitan areas, the provision of public goods is fragmented between multiple jurisdictions.³³ Theoretically, in the Tiebout system, households are able to choose a jurisdiction that provides the bundle of public goods the household prefers. In practice, the Tiebout system tends to result in housing prices becoming directly correlated to school quality or desirability.³⁴ Thus, “school choice” in a Tiebout system is exercised through the housing market.³⁵ Such systems allow for school

³¹ See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, (1956) (explaining the theoretical underpinnings of the Tiebout system); See Gregory K. Ingram & Daphne A. Kenyon, *Introduction to EDUCATION, LAND, AND LOCATION* 1, 2–4 (Gregory K. Ingram & Daphne A. Kenyon eds., 2014) (linking the “Tiebout model” to fragmented school districts).

³² The first major wave of public-school reform in the aftermath of Brown included the 1963 School Unification Act. See Act of Apr. 18, 1963, ch. 393, 1963 Kan. Sess. Law 901 (codified as Kan. Stat. Ann. § 72-6734) (repealed 2003); Baker & Green, *supra* note 28, at 135. The act promoted consolidation between rural, suburbanizing districts. However, consolidation between urban and suburbanizing districts was not encouraged. See Preston C. Green III et al., *How the Kansas Courts Have Permitted and May Remedy Racial Funding Disparities in the Aftermath of Brown*, 53 WASHBURN L.J. 439, 441 (2014). Other laws enacted during this period which contributed to the creation of a Tiebout system include an amendment to the law governing city annexations. Previously the law had provided that cities and city school districts must have identical boundaries. See, e.g., *Smith v. Board of Educ. of Pittsburg*, 278 P. 741, 741 (1929) (holding that annexation by a city of a first class of land, even land in the boundaries of a school district of a city of the second class, transfers school district jurisdiction to the school district of the city of the first class). However, the law was amended in 1965 so that annexation by a city did not extend city school district boundaries. See Act of Feb. 19, 1965, ch. 420, § 21, 1965 Kan. Sess. Laws 956, 977 (codified as Kan. Stat. Ann. § 72-515). Thus, mid-1960’s school reforms lead to the solidification of the boundaries separating urban and rural, suburbanizing districts.

³³ See, e.g., Richard Briffault, *Our Localism: Part II-Localism and Legal Theory*, 90 COLUM. L. REV. 346, 402 (1990) (noting that “an endorsement of fragmentation” follows “directly from the Tiebout model”); Douglas W. Kmiec & Eric L. Diamond, *New Federalism Is Not Enough: The Privatization of Non-Public Goods*, 7 HARV. J.L. & PUB. POL’Y 321, 351–61 (1984) (discussing the merits of jurisdictional fragmentation and the “Tiebout hypothesis”); Ingram & Kenyon, *supra* note 31.

³⁴ Ingram & Kenyon, *supra* note 31, at 1 (noting that housing prices tend to reflect school quality).

³⁵ Erica Frankenberg, *Splintering School Districts: Understanding the Link Between Segregation and Fragmentation*, 34 L. & SOC. INQUIRY 869, 871 (2009)

segregation on the basis of race and socioeconomic status to continue on an inter-district level.³⁶

From the 1960's onwards, Kansas metropolitan areas have experienced consistent suburbanization.³⁷ While central city school districts have seen continuous declines in enrollment, suburban school districts have seen continuous increases.³⁸ The quality of public schools in suburban areas has likewise increased; while the relative desirability of central city schools has decreased.³⁹ The higher relative

("A form of school choice exists in moving to a different school district-for those who can afford to buy homes in districts considered to provide high-quality schools and do not face racial barriers in the housing market.").

³⁶ See, e.g., Erika K. Wilson, *Toward A Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1418 (2014) (discussing inter-district segregation in fragmented metropolitan areas and noting that fragmented school districts foster "exclusion based on race and class").

³⁷ See, e.g., Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 94 (2003) (discussing increased suburbanization up through the 1990's).

For example, in 1980, 23,425 students were enrolled in KCKPS. See THE UNIVERSITY OF KANSAS CENTER FOR PUBLIC AFFAIRS, 1980 KANSAS STATISTICAL ABSTRACT, 80 (1980), <http://www.ipsr.ku.edu/ksdata/ksah/KSA16.pdf> [<https://perma.cc/FK9A-LL3E>] (listing enrollment for all Kansas school districts in the 1980 school year). In 1998 only 19,876 students were enrolled in KCKPS. See JOHN AUGENBLICK, et al., A COMPREHENSIVE STUDY ON THE ORGANIZATION OF KANSAS SCHOOL DISTRICTS, Appendix I (2001), https://www.ksde.org/Portals/0/School%20Finance/budget/Legal_Max/sdbs--Final%20Complete%20Report.pdf [<https://perma.cc/GA6Y-UB3S>] (listing full time enrollment for all Kansas school districts for the years 1989, 1993, and 1998.). Wichita Public Schools had an enrollment of around 68,000 in 1968. See Steven G. Rivkin, *Residential Segregation and School Integration*, 67 SOC. OF EDUC. 279, 287 (Oct. 1994) (listing the enrollment within the Wichita public school system at 68,000). By 1980 enrollment fell to 42,350. See THE UNIVERSITY OF KANSAS CENTER FOR PUBLIC AFFAIRS, 1980 KANSAS STATISTICAL ABSTRACT, *supra* note 37, at 79. During the 1970's, enrollment in Topeka Public Schools fell by more than 30%. See RAYMOND WOLTERS, THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION 262 (1992). Meanwhile suburban school districts saw rapid growth. For example, USD 437 grew from 2,460 students in 1980 to nearly 5,000 students by 1998. See AUGENBLICK, *supra* note 37, at 124. USD 266, a suburban district in the Wichita metropolitan area had an enrollment of only 967 in 1980. See THE UNIVERSITY OF KANSAS CENTER FOR PUBLIC AFFAIRS, 1980 KANSAS STATISTICAL ABSTRACT, at 79. By 1989 enrollment had more than doubled to 2,1970 students and would more than double again to 4,895 students in 1998. See AUGENBLICK, *supra* note 37, at 174 (listing enrollment for all Kansas school districts for the 1989, 1993, and 1998 school years).

³⁹ See *id.*

desirability of suburban schools is evidenced by the rising relative value of homes in suburban school districts compared to homes in urban school districts.⁴⁰ The movement of educational resources to suburban school districts has been aided by state-level school funding formulas favoring suburban school districts over central city school districts.⁴¹

⁴⁰ See, e.g., U.S. CENSUS BUREAU, CENSUS OF HOUSING (1960) (noting that the suburban to city home value ratio in the Topeka metropolitan areas was 95%); U.S. CENSUS BUREAU, CENSUS OF HOUSING (1970) (noting that the suburban to city home value ratio in Topeka was 140%).

⁴¹ After the 1963 School Unification Act, school funding underwent major reforms under the 1965 School Foundation Act. See Charles Berger, *Equity Without Adjudication: Kansas School Finance Reform and the 1992 School District Finance and Quality Performance Act*, 27 J.L. & EDUC. 1, 6 (1998). A pupil to teacher multiplier in the act disadvantaged larger, city school districts by directing significantly more state funding to smaller, rural and suburbanizing districts. Baker & Green, *supra* note 28, at 138–39. Additionally, the act disadvantaged poor school districts in rich counties. See *id.*; Act of Apr. 27, 1965, ch. 402, 1965 Kan. Sess. Laws 887 (codified at Kan. Stat. Ann. §§ 72-7001–7024) (repealed 1973). This may have harmed urban school districts as housing wealth became increasingly suburbanized. See, e.g., US CENSUS BUREAU, *supra* note 40. Subsequent school financing schemes have also tended to hurt poorer school districts. For example, The School District Equalization Act (SDEA) contained a provision restricting the authority of school districts to raise their budgets from year to year, prohibiting school districts with lower budgets from catching up to school districts with higher budgets. See Berger, *supra* note 41, at 12. See also Act of Apr. 16, 1973, ch. 292, 1973 Kan. Sess. Laws 969 (codified at Kan. Stat. Ann. §§ 72-7030–7036) (repealed 1992). Additionally, the SDEA provided higher levels of base funding to districts with smaller enrollments than to districts with large student populations. See Baker & Green, *supra* note 28, at 139–40. The 1992 School District Finance and Quality Performance Accreditation Act (SDFQPA) “froze into place prior disparities”, by, for example, setting a strict revenue cap on school districts and providing a 25% adjustment for the number of children attending new school facilities, which was initially only received by children in suburban school districts. See *id.* at 141 (discussing the SDFQPA). See also Act of May 20, 1992, ch. 280, 1992 Kan. Sess. Laws 1691 (codified as Kan. Stat. Ann. §§ 72-6405–6440) (repealed 2015). In 2015, SDFQPA was replaced with the Classroom Learning Assuring Student Success Act (CLASS) funding system. See Classroom Learning Assuring Student Success Act, ch. 4, 2015 Kan. Sess. Laws 34 (codified at KAN. STAT. ANN. §§ 72-6463 – 6481 & 72-6483– 6485 (held unconstitutional by *Gannon v. Kansas*, 390 P.3d 461, 488 (Kan. 2017))). CLASS was found to exacerbate wealth-based disparities between school districts. *Gannon v. State*, 390 P.3d 461, 488 (Kan. 2017) (stating that, “[w]e conclude as a matter of law that CLASS fails,” to meet the requirements imposed on the legislature by the Kansas constitution). CLASS was replaced by the Kansas School Equity and Enhancement Act (KSEEA) in 2017. See *Kansas School Equity and Enhancement*

Despite some improvements in equity, school district quality and individual educational opportunity remain unequal. Inequitable funding formulas have been challenged and found unconstitutional in multiple rounds of litigation since the 1970's.⁴² The legislature has, both voluntarily and in response to legal challenges, raised nominal state funding per pupil on a statewide level.⁴³ For school districts in central cities, specific funding for low-income or high cost pupils has been provided through mechanisms such as the “at-risk pupil” weighting found in recent school funding formulas.⁴⁴ Despite these measures, a significant achievement gap remains between central city and suburban school districts in the state’s metropolitan areas.⁴⁵

Act, ch. 95, 2017 Kan. Sess. Laws 968, 983–84 (codified at KAN. STAT. ANN. §§ 72-5131–5176 (held unconstitutional by *Gannon v. Kansas*, 402 P.3d 513, 531 (Kan. 2017))). The funding formula in KSEEA was almost identical to the funding formula in the SDFQPA immediately prior to its repeal. *Gannon v. Kansas*, 402 P.3d 513, 522 (Kan. 2017). The formula in the KSEEA and related statutes increased spending flexibility, but also increased wealth-based disparities. *See Gannon*, 402 P.3d at 544.

⁴² The first challenge to school funding laws occurred in 1972, with a district court holding that the School Foundation Act was unconstitutional under the Kansas Constitution. *Caldwell v. State*, No. 50616 (Kan. Dist. Ct. Johnson County, Aug. 30, 1972); *Knowles v. State Board of Educ.*, No. 77CV251 (Kan. Dist. Ct. Shawnee County, Jan. 26, 1981); *Mock v. State*, No. 91-CV-1009 (Kan. Dist. Ct. Shawnee County, Oct. 14, 1991); *see also* Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. KAN. L. REV. 1021, 1035–37 (2006) (discussing the *Caldwell*, *Knowles*, and *Mock* decisions); *Montoy v. State*, 138 P.3d 755, 757 (Kan. 2006) (providing summary of *Montoy* series of litigation and holding funding formula was constitutional); *Gannon*, 402 P.3d at 516–18 (Kan. 2017) (providing background to *Gannon* litigation and holding that the state’s funding formula failed to constitutionally fund schools).

⁴³ *See generally, supra* Section I.

⁴⁴ *See, e.g., Levy, supra* note 42, at 1038 (discussing enrollment weighting, including at-risk weighting, under the SDFQPA).

⁴⁵ For example, graduation rates are consistently higher in suburban districts compared to central city school districts. For the 2016–17 school year, the graduation rate in Topeka Public Schools was 77.4%, while the graduation rate in the Auburn-Washburn school district was 94.4%. The graduation rate in Wichita Public Schools was 73.9% while the graduation rate in the Maize school district was 91.9%. The graduation rate for the Kansas City Kansas Public Schools district was 71.0% while the graduation rate in the Piper school district was 92.7%. KAN. STATE DEP’T OF EDUC., 2016-2017 STATE GRADUATION RATE – FOUR YEAR ADJUSTED COHORT FORMULA BY DISTRICT RACE, AND GENDER (ALL SCHOOLS), https://zenodo.org/record/1170511/files/KSDE%20Data%20on%20Grad%20Rate%202016_17.pdf [<https://perma.cc/K5S6-M27G>].

Furthermore, housing values in Kansas suburban districts continue to be much higher than housing values in central city districts.⁴⁶ As a result, lower-income families may be unable to move to suburban school districts with high-performing schools.⁴⁷ Thus, households in poverty and low-income households tend to be concentrated in central city districts.⁴⁸ Due to the correlation between income and racial or ethnic group, central city districts tend to enroll relatively more minority students compared to suburban districts.⁴⁹ In 2014, Kansas lawmakers enacted the Kansas Tax Credit for Low Income Students Scholarships Program to help families who are unable to exercise school choice through the housing market or enrollment in private

⁴⁶ For example, in 2016, the median home value in the Topeka Public Schools district was \$87,100. In the Auburn-Washburn district the median home value was \$177,600. In the Wichita Public Schools district median housing value was \$103,000. In the Maize school district median housing value was \$179,200. In the Kansas City Kansas Public Schools district, the median home value was \$78,500. In the Piper school district median home value was \$207,300. *See* U.S. CENSUS BUREAU, 2012–2016 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES: OWNER OCCUPIED HOUSING UNITS (2016), https://zenodo.org/record/1170511/files/housing_value_KS_school_districts_2016.pdf [<https://perma.cc/LH3Q-FC7Z>].

⁴⁷ Lower income families may be unable to move to high performing suburban districts due to housing costs. *See id.* (comparing home prices in urban and suburban school districts); *see also* Ingram & Kenyon, *supra* note 31, at 2–4.

⁴⁸ For example, for the 2017-18 school year 69% of students in the Topeka Public Schools district were approved for free lunches while 24% of students were approved in the Auburn-Washburn school district. In the Wichita Public Schools district 63.5% of students were approved, while in the Maize school district 13.3% of students qualified. In the Kansas City Kansas Public Schools district 76.1% of students were approved while in the Piper school district 15.7% of the student population qualified. *See* KAN. STATE DEP'T OF EDUC., 2017-2018 STATE STUDENTS APPROVED FOR FREE – OR REDUCED-PRICE LUNCHES BY DISTRICT (ALL SCHOOLS) (2018), https://zenodo.org/record/1170511/files/KSDE_Data_STudents_Approved_for_Free_or_Reduced_Lunch_2017_18.pdf [<https://perma.cc/8FZ9-4YGW>].

⁴⁹ For example, in 2016 minorities, that is individuals who identified as non-White, accounted for 23.5% of the total population within the Topeka Public Schools district and 12% of the total population within the Auburn-Washburn school district. Minorities accounted for around 26% of the total population within the Wichita Public Schools district and around 9% of the total population in the Maize school district. Minorities accounted for about 45% of the total population in the Kansas City Kansas school district and 21% of the total population in the Piper school district. *See* U.S. CENSUS BUREAU, 2012-2016 AMERICAN COMMUNITY SURVEY, 5-YEAR ESTIMATES: RACE (TOTAL POPULATION) KANSAS SCHOOL DISTRICTS (2016), https://zenodo.org/record/1170511/files/racial_composition_of_Kansas_school_district_2016.pdf [<https://perma.cc/6MHZ-E6Q4>].

schools.⁵⁰ Theoretically, the program could contribute to equality of educational opportunity by disentangling housing and school attendance.⁵¹

II. TAX CREDIT SCHOLARSHIP PROGRAMS AND THE KANSAS PROGRAM

The first part of this section provides an overview of the tax credit scholarship programs. The second part of this section provides a general introduction to the Kansas Tax Credit Scholarship for Low Income Students Program.

A. Introduction to Tax Credit Scholarship Programs

Tax credit scholarship programs are a form of private school choice.⁵² The programs work by issuing tax credits to taxpayers who make donations to state approved non-profit “scholarship-granting” organizations (SGOs).⁵³ These organizations in turn provide scholarships for students to attend private schools. Thus, the programs use public funds to subsidize education in private schools through the use of “tax expenditures”⁵⁴ rather than the direct government

⁵⁰ KAN. STAT. ANN. § 72-4353 (Supp. 2017) (stating that the act is to provide opportunity to eligible students and their parents).

⁵¹ See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2045–46 (2002) (noting school choice programs may threaten suburban home values as housing becomes delinked from access to quality schools).

⁵² It appears that all programs allow for participating students to apply scholarships to private schools. Some states allow students to apply scholarships toward public schools, if an SGO works with a public school and the public school is willing to accept the student. See, e.g., 24 PA. STAT. AND CONS. STAT. ANN. § 20-2002-B (West 2018).

⁵³ KEVIN G. WELNER, *NEOVOUCHERS: THE EMERGENCE OF TUITION TAX CREDITS FOR SCHOOLING* 6 (2008). These organizations are given a variety of names under different programs. See, e.g., LA. STAT. ANN. § 47:6301(B)(1)(a) (West 2018) (labeling SGOs “school tuition organization”); N.H. REV. STAT. ANN. § 77-G:5 (2018) (labeling SGOs “scholarship organization”); 24 PA. STAT. AND CONS. STAT. ANN. § 20-2002-B (West 2018) (labeling some SGOs “opportunity scholarship organization[s]”).

⁵⁴ See generally CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES* (1999) (discussing use of tax expenditures as subsidies for favored activities or practices). See also James G. Dwyer, *No Accounting for School Vouchers*, 48 WAKE FOREST L. REV. 361, 381 (2013) (noting that a tax credit scholarship program “essentially allows

expenditures used to fund other private school choice programs such as ESAs⁵⁵ and traditional vouchers.⁵⁶ Arizona adopted the first tax credit scholarship program in 1997.⁵⁷ In the 20 years since, 17 additional states have implemented similar programs⁵⁸, most recently

taxpayers to designate use of some of the taxes they owe”); WELNER, *supra* note 53, at 29–32 (discussing tax expenditures in relation to tax credit scholarship programs).

⁵⁵ Education Savings Account programs, or ESAs, are a type of private school choice program where government funds are put directly into an account for qualified participants to use for multiple different types of qualified education expenses. *See e.g.* Schwartz v. Lopez, 382 P.3d 886, 891 (Nev. 2016) (explaining that Nevada’s ESA program, which the court held was unconstitutional, allowed, “public funds to be transferred from the State Distributive School Account into private education savings accounts maintained for the benefit of school-aged children to pay for private schooling, tutoring, and other non-public educational services and expenses.”). James V. Shuls, *Financing School Choice: How Program Design Impacts Issues Regarding Legality and Equity*, 27 KAN. J.L. & PUB. POL 'Y 500, 504 (2018) (explaining that ESAs, “have multiple uses. The funds in an Education Savings Account are deposited into a bank account. The individual can then use that account to purchase private school tuition or a host of other education related services and goods, such as tutoring services.”).

⁵⁶ School voucher programs provide government funded grant to qualified participants for use toward tuition at a qualified and participating private school. *See e.g.* Jackson v. Benson, 578 N.W.2d 602, 609 (Wis. 1998) (explaining that under a Wisconsin voucher program the State sends a, “check to the private school and the parent or guardian,” must “restrictively endorse the check for the use of the private school,” and therefore the State is technically, “required to pay the aid to each participating student's parent or guardian” rather than, “than paying participating schools directly”); Joseph O. Oluwole & Preston C. Green III, *School Vouchers and Tax Benefits in Federal and State Judicial Constitutional Analysis*, 65 AM. U.L. REV. 1335, 1340 (2016) (explaining that school vouchers, “are state-funded scholarships that provide students with the opportunity to attend a private or public school other than their local public school”).

⁵⁷ Stephen D. Sugarman, *Tax Credit School Scholarship Plans*, 43 J.L. & EDUC. 1, 1–2 (2014); *see also* ARIZ. REV. STAT. ANN. § 43-1089 (2012) (noting that the statute was originally added as § 43-1087 by Laws 1997, Ch. 48, § 2).

⁵⁸ ALA. CODE § 16-6D-1 (Supp. 2018) (Alabama Accountability Act of 2013); FLA. STAT. ANN. § 1002.395 (West 2012 & Supp. 2014) (Florida Tax Credit Scholarship Program); GA. CODE ANN. § 48-7-29.16 (West 2009 & Supp. 2013) (Georgia Credit for Qualified Education Expenses); 35 ILL. COMP. STAT. ANN. 40, 1 (West 2017) (Illinois Invest in Kids Act); IOWA CODE ANN. § 422.11S (West 2011 & Supp. 2014) (Iowa School Tuition Organization Tax Credit); IND. CODE ANN. § 6-3.1-30.5-7 (West 2013) (Indiana School Scholarship Tax Credit); KAN. STAT. ANN. § 72-4351 (Supp. 2017) (Kansas Tax Credit for Low Income Students Scholarship Program Act); LA. STAT. ANN. § 47:6301 (Supp. 2014) (Louisiana Credits for Donations to School Tuition Organizations); MONT. CODE ANN. § 15-

Illinois in 2017.⁵⁹ Furthermore, multiple states are currently considering⁶⁰, or have recently considered⁶¹, adopting tax credit scholarship programs; and there has been a recent push for a federal program.⁶²

30-3101 (2016) (Montana Tax Credit for Qualified Education Contributions); N.H. REV. STAT. ANN. § 77-G:1 (Supp. 2017) (New Hampshire Education Tax Credit); NEV. REV. STAT. ANN. § 388D.250 (West 2015) (Nevada Educational Choice Scholarship Program); OKLA. STAT. ANN. tit. 68, § 2357.206 (West Supp. 2014) (Oklahoma Equal Opportunity Education Scholarship Act); 24 PA. STAT. AND CONS. STAT. ANN. § 20-2001-B (West 2018) (Pennsylvania Educational Improvement and Opportunity Scholarship Tax Credits); 44 R.I. GEN. LAWS ANN. § 44-62-1 (West 2007 & West Supp. 2014) (Rhode Island Tax Credit for Contributions to a Scholarship Organization); S.C. CODE ANN. § 12-6-3790 (2018) (South Carolina Educational Credit for Exceptional Needs Children); S.D. CODIFIED LAWS § 13-65-2 (2016) (South Dakota Partners in Education Tax Credit Program); VA. CODE ANN. § 58.1-439.25 (West 2014) (Virginia Education Improvement Scholarship Tax Credits).

⁵⁹ The Illinois program was enacted in 2017. The first school year for which scholarships will be available is the 2018-19 school year. Applications for scholarships opened on January 31, 2018. See Drew Zimmerman, *Applications Open for Private School Scholarship Program*, DAILY CHRON. (Jan. 30, 2018), <http://www.daily-chronicle.com/2018/01/30/applications-open-for-private-school-scholarship-program/a9ip73j/> [<https://perma.cc/5L3W-GTCL>].

⁶⁰ States considering a tax credit scholarship program during the 2018 legislative session include Kentucky and Nebraska. See, e.g., Tim Benson, *Research & Commentary: Tax-Credit Scholarships Would be a Good First Step for School Choice in Kentucky*, THE HEARTLAND INSTITUTE (Jan. 24, 2018), <https://www.heartland.org/publications-resources/publications/research-commentary-tax-credit-scholarships-would-be-a-good-first-step-for-school-choice-in-kentucky> [<https://perma.cc/CC9J-GQKD>] (discussing a Kentucky program that is under consideration); Martha Stoddard, *If Nebraska Legislature Debates School Choice Bill, the Price Tag Could be a Snag*, OMAHA WORLD-HAROLD (Jan. 16, 2018), http://www.omaha.com/news/legislature/if-nebraska-legislature-debates-school-choice-bill-the-price-tag/article_2a462c28-79eb-5cce-a44f-95d21fee4890.html [<https://perma.cc/LX2T-6ZL3>] (discussing a potential Nebraska program currently under consideration).

⁶¹ States considering a program during their 2017 legislative included: Texas (S.B. 2, 85th Leg., 1st Sess. (Tex. 2017)); Wyoming (H.B. 150, 64th Leg., Gen. Sess. (Wyo. 2017)); Missouri (S.B. 32, 99th Gen. Assemb., 1st Reg. Sess. (Mo. 2017)); Idaho (H.B. 234, 64th Leg., 1st Reg. Sess. (Idaho 2017)); Mississippi (H.B. 1703, 2017 Leg., 132d Sess. (Miss. 2017)); Hawaii (S.B. 2606, 29th Leg., Reg. Sess. (Haw. 2018)).

⁶² See, e.g., Sally Ho, *DeVos Says School Vouchers Part of Tax Overhaul Discussions*, ASSOCIATED PRESS (Aug. 11, 2017), <https://www.apnews.com/9b19f16f1a5240f190f2c79f5f41a97c> [<https://perma.cc/KYC5-E2YP>].

B. A Brief Survey of Tax Credit Scholarship Programs

Although tax credit scholarship programs employ the same fundamental framework, there is great variation among existing programs in regards to the specific rules and regulations governing the tax credits, taxpayers, students, schools, and SGOs.⁶³ The specific rules and regulations that a program utilizes may affect the program's operation.⁶⁴ For example, the value of a program's tax credits, in terms of the percent of donations the credit refunds, varies from state to state. These variations may affect the operation of programs since, "the higher the tax credit, the more donations the program is likely to attract."⁶⁵ Many programs allow value credits at 100% of qualified taxpayer donations.⁶⁶ However, other programs value their credit at less than 100%, and the lowest valued credits are valued at only 50% of qualified taxpayer donations.⁶⁷ Moreover, some programs attempt to incentivize taxpayers to commit funds for future donations by issuing higher-valued credits to taxpayers who have made multiyear donation commitments.⁶⁸

Programs also differ in regard to the type of taxes that a credit can be applied against and the class of taxpayers that are permitted to claim a credit. It clearly follows that the more types of taxes that a credit is allowed to be applied against, and the more types of taxpayers who may claim a credit, the larger the potential "pool of donors and donation amounts."⁶⁹ However, the class of taxpayers that may claim

⁶³ See generally Hillel Y. Levin, *Tax Credit Scholarship Programs and the Changing Ecology of Public Education*, 45 ARIZ. ST. L.J. 1033, 1052–61 (2013) (discussing some of the differences between the Alabama, Florida, Louisiana, Indiana, Iowa, Virginia, Pennsylvania, Rhode Island, Oklahoma, New Hampshire, Arizona, and Georgia programs); Sugarman, *supra* note 57 (discussing the various provisions that tax credit scholarship programs can contain, and the possible effects that such provisions can have); WELNER, *supra* note 53, at 39–56 (discussing the Arizona, Pennsylvania, and Florida programs).

⁶⁴ See Sugarman, *supra* note 57, at 4-32 (describing how different design choices may affect the operation of tax credit scholarship programs.).

⁶⁵ *Id.* at 9.

⁶⁶ See, e.g., MONT. CODE ANN. § 15-30-3111 (West 2016) (setting value of tax credit equal to value of donation).

⁶⁷ See OKLA. STAT. ANN. tit. 68, § 2357.206(B)(1) (West 2017); IND. CODE ANN. § 6-3.1-30.5-8 (West 2009).

⁶⁸ See, e.g., 24 PA. STAT. ANN. AND CONS. STAT. ANN. § 20-2005-B (West 2018) (valuing credits at 75% of the value of donation for one-year donations and 90% of the value of donation for two-year donation commitments).

⁶⁹ Sugarman, *supra* note 57, at 12.

a program's tax credits may negatively affect a program's political palatability, legitimacy, and sustainability.⁷⁰ Furthermore, when deciding what taxes the credit can be applied against, states are constrained by their existing tax structure.⁷¹ Therefore, the determination of what type of tax the credit should be allowed for is likely influenced by the local political context and existing state tax laws. Since "there is no best answer here" it is then unsurprising that, "states which have enacted such plans have chosen very different paths."⁷²

Unsurprisingly, states have chosen a variety of approaches in regard to which taxes a scholarship program's tax credits may be applied against. For example, some states may allow only certain businesses to claim program credits,⁷³ and some states may allow only individual taxpayers to claim the credit,⁷⁴ while other states allow both individuals and businesses to claim the tax credit.⁷⁵ Arizona, on the other hand, raises scholarship funds by issuing different tax credits to different types of taxpayers through separate programs.⁷⁶ In Nevada, where there is no individual or corporate income tax, program tax credits may be applied by businesses against the state's payroll tax.⁷⁷

Whether a program allows for taxpayers to claim a federal tax deduction in addition to the state tax credit may have important consequences. Some programs explicitly allow for taxpayers to claim

⁷⁰ For example, allowing the credit to be claimed by families could encourage these families to, "game the system and divert funds to their own children or students." See Sugarman, *supra* note 57, at 10. On the other hand, businesses, "might be vulnerable to political pressures from public school supporters who oppose these tax credit school scholarship plans." See *id.* at 11–12.

⁷¹ Sugarman, *supra* note 57, at 10.

⁷² *Id.* at 12.

⁷³ See, e.g., N.H. REV. STAT. ANN. § 77-G:1 (2018) (allowing the credit to be claimed by a "business organization" or "business enterprise").

⁷⁴ See, e.g., Sugarman, *supra* note 57, at 9 (noting that the Arizona program initially only allowed for individuals to claim credits).

⁷⁵ See, e.g., MONT. CODE ANN. § 15-30-3111 (West 2016) (allowing a corporation or "taxpayer" to claim the credit, with taxpayer being defined as including "any person").

⁷⁶ ARIZ. REV. STAT. ANN. § 43-1089 (2012) (dealing with individuals); ARIZ. REV. STAT. ANN. § 43-1183 (2015) (dealing with corporations).

⁷⁷ NEV. REV. STAT. ANN. § 363A.139 (stating that, "[a]ny taxpayer who is required to pay," the state's payroll tax, "may receive a credit against the tax otherwise due for any donation of money made by the taxpayer to a scholarship organization in the manner provided by this section.").

the state tax credit and a federal tax deduction for the same donation.⁷⁸ Conversely, other programs explicitly prohibit this practice.⁷⁹ This distinction is significant because in some states where taxpayers are allowed to claim the additional federal deduction, donors have been able to “earn a profit” on their donations.⁸⁰ However, a proposed rule by the IRS could end this practice by requiring that, “the amount otherwise deductible as a charitable contribution,” for federal income tax purposes, “must generally be reduced by the amount of the state or local tax credit received or expected to be received.”⁸¹

Most states place a maximum value on the tax credits a taxpayer can claim, and such individual caps on donations vary widely from state to state. At least one state, Virginia, places a minimum value on the tax credits a taxpayer may claim.⁸² On the opposite side of the spectrum, Oklahoma allows for single individuals to claim a maximum credit of \$1,000, for married couples filing jointly to claim a maximum credit of \$2,000, and for any taxpayer that is a legal business entity to claim a maximum credit of \$100,000.⁸³ Some states set individual caps on credits in reference to overall program size; for example, New Hampshire sets the maximum credit a taxpayer may claim at 10 percent of the permitted total value of tax credits that may be issued under the program.⁸⁴ Georgia, on the other hand, caps credits a corporation may claim at, “75 percent of the corporation’s income tax liability.”⁸⁵ Montana has the lowest individual cap on tax credits, allowing for a maximum credit of only \$150.⁸⁶ Many states do not

⁷⁸ See, e.g., LA. STAT. ANN. § 47:6301(A)(1)(a) (2017) (providing that “the credit may be used in addition to any federal tax credit or deduction).

⁷⁹ See, e.g., 35 ILL. COMP. STAT. ANN. 40/10(d) (West 2017) (providing that “no credit shall be taken under this Act for any qualified contribution for which a taxpayer claims a federal income tax deduction).

⁸⁰ See, e.g., Erica L. Green, *In Some States, Donating to Private Schools Can Earn You a Profit*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/politics/in-some-states-donating-to-private-schools-can-earn-you-a-profit.html> [<https://perma.cc/K9BS-SN4>] (noting how in some states, this allows donors to earn a profit on their donations).

⁸¹ Contributions in Exchange for State or Local Tax Credits, 83 Fed. Reg. 43563-01 (proposed Aug. 27, 2018) (to be codified at 26 C.F.R. pt. 1).

⁸² VA. CODE ANN. § 58.1-439.26 (West 2016) (establishing a maximum credit value of \$125,000 and a minimum credit of \$500).

⁸³ OKLA. STAT. ANN. tit. 68, § 2357.206(B) (2017).

⁸⁴ N.H. REV. STAT. ANN. § 77-G:3 (2018).

⁸⁵ GA. CODE ANN. § 48-7-29.16 (West 2018).

⁸⁶ MONT. CODE ANN. § 15-30-3111 (2016).

directly cap the amount of tax credits a taxpayer may claim.⁸⁷ However, such programs often place a cap on the aggregate amount of credits available under the program.⁸⁸ Aggregate caps on the total value of tax credits available under a program have the effect of placing a maximum size, and price tag, on a program.⁸⁹

States vary widely on the size of their aggregate caps. For the most part, more populated states, unsurprisingly, tend to have the highest aggregate caps. For example, Illinois caps the total value of program tax credits at \$75 million or \$100 million, in donations with credits valued at 75% of donation value.⁹⁰ Florida caps total program credits and donations at \$229 million with credits valued at 100% of donation value.⁹¹ Meanwhile, Montana capped the total value of program credits at \$3 million with credits valued at 100% donation value.⁹² At least one state, Louisiana, does not currently cap the total value of credits available under its program.⁹³

Programs also vary by how they determine which students are eligible to receive program scholarships. Many school advocates support tax credit scholarship programs, “on the ground that they can facilitate substantially increased choice by families who now cannot afford private schools.”⁹⁴ As a result, many programs are means-tested, limiting the household income of eligible students to some maximum level.⁹⁵ However, eligibility for other programs is not means-tested.⁹⁶ Another approach a program may take is to require a certain number of scholarships be awarded to students whose eligibility is means tested.⁹⁷ Programs may also use a student’s

⁸⁷ See, e.g., FLA. STAT. ANN. § 1002.395 (West 2018); LA. STAT. ANN. § 47:6301 (2017).

⁸⁸ See Sugarman, *supra* note 57, at 14–15.

⁸⁹ *Id.*

⁹⁰ 35 ILL. COMP. STAT. ANN. 40/10(b) (West 2017).

⁹¹ FLA. STAT. ANN. § 1002.395 (West 2018).

⁹² MONT. CODE ANN. § 15-30-3111(5)(a)(i) (2016).

⁹³ LA. STAT. ANN. § 47:6301 (2017).

⁹⁴ Sugarman, *supra* note 57, at 22.

⁹⁵ See, e.g., 44 R.I. GEN. LAWS ANN. § 44-62-2 (West 2010) (providing that eligible students must be a member of a household with an annual household income of not more than 250% of the federal poverty guidelines).

⁹⁶ See, e.g., GA. CODE ANN. § 20-2A-1(1) (West 2013) (defining “eligible student” without reference to household income).

⁹⁷ See, e.g., N.H. REV. STAT. ANN. § 77-G:2(I)(d) (2018) (requiring at least 40% of scholarships to be awarded to students who qualified for the federal free and reduced-price meal program in the final year they were in public school).

household income to determine program elements such as eligibility and scholarship valuation limits.⁹⁸

Since expanding, “choice opportunities to families” does not require the extension of benefits to “those already attending private schools when they first apply,” and since the goal of many programs is to save states money on education expenses, some states exclude from the definition of eligible students “those already attending private schools when they first apply.”⁹⁹ For example, Virginia requires certain students seeking a scholarship to be enrolled in public school for at least half of the prior school year.¹⁰⁰ However, other programs may not be specifically targeted to students currently attending public schools.¹⁰¹ Others may limit eligible students to those who attend or would attend a low-performing public school.¹⁰² Additionally, some programs may use multiple factors, including income and prior enrollment in a low performing district, when determining student eligibility; including income and prior public-school enrollment at a low-performing school.¹⁰³

Different programs take different positions regarding the maximum value of program scholarships. The value of scholarships, especially in relation to the amount of tuition charged by a participating school, could significantly affect the ability of low-income families to utilize program scholarships.¹⁰⁴ Scholarship values may also affect a program’s goal of saving the state money on education expenses.¹⁰⁵ Depending on the weight given to these goals, programs take multiple approaches in setting scholarship values. Some states tie maximum scholarship amount to the state expenditures

⁹⁸ See, e.g., FLA. STAT. ANN. § 1002.395(3)(b) (West 2010); 35 ILL. COMP. STAT. ANN. 40/5 (2017) (requiring household income not exceed 400% poverty levels for continued student eligibility).

⁹⁹ Sugarman, *supra* note 57, at 29–30.

¹⁰⁰ VA. CODE ANN. § 58.1-439.25 (West 2013).

¹⁰¹ See, e.g., IOWA CODE ANN. § 422.11S (West 2014) (defining eligible student without reference to public school enrollment).

¹⁰² See, e.g., 24 PA. STAT. AND CONS. STAT. ANN. § 20-2002-B (West 2018) (limiting recipients of the Pennsylvania “Opportunity Scholarship” to students who live in the attendance zone of low performing schools).

¹⁰³ See, e.g., KAN. STAT. ANN. § 72-4352(d) (West 2018).

¹⁰⁴ See Sugarman, *supra* note 57, at 32–38.

¹⁰⁵ *Id.*

per pupil.¹⁰⁶ Some states simply establish flat maximums without reference to state spending or tuition charged by private schools.¹⁰⁷ Additionally, some states that establish a flat maximum include provisions to annually increase the maximum scholarship value in reference to inflation.¹⁰⁸ Other program's provisions on scholarship value set scholarship amounts at either a flat maximum or a percentage of state expenditures per pupil, depending on which is higher.¹⁰⁹ Still others set both a maximum scholarship value and maximum average scholarship value.¹¹⁰ While some set only a maximum average scholarship value;¹¹¹ only a few programs set any sort of scholarship minimums.¹¹² Additionally, a small number of states tie maximum or minimum scholarship amounts to an eligible student's household income.¹¹³

¹⁰⁶ See, e.g., VA. CODE ANN. § 58.1-439.28 (West 2016) (setting the maximum scholarship amount at 100% of certain state funds per-pupil provided to the public school the student would otherwise attend).

¹⁰⁷ See, e.g., ALA. CODE § 16-6D-4 (1975) (allowing for maximum grants of \$6,000 to elementary school students, \$8,000 for middle school students, and \$10,000 for high school students).

¹⁰⁸ See, e.g., NEV. REV. STAT. ANN. § 388D.270 (West 2015) (setting the maximum scholarship value at \$7,755, but allowing for increased maximum value as determined in reference to the Consumer Price Index).

¹⁰⁹ See, e.g., OKLA. STAT. ANN. tit. 68, § 2357.206(G)(3)(b) (West 2017) (setting the maximum value of a scholarship at the greater of \$5,000 or 80% of "statewide annual average per-pupil expenditure").

¹¹⁰ See MONT. CODE ANN. § 15-30-3103 (2016) (setting maximum scholarship value at 50% per-pupil average of total public-school expenditures and maximum average scholarship value at 30% of the per-pupil average of total public-school expenditures).

¹¹¹ See, e.g., N.H. REV. STAT. ANN. § 77-G:2(b) (2018) (setting the maximum average scholarship value at \$2,500, without specifying a maximum scholarship value).

¹¹² See, e.g., FLA. STAT. ANN. § 1002.395(11)(a) (West 2018) (providing that scholarship amount shall be for total costs, as long as they do not exceed annual limits under the program).

¹¹³ See, e.g., 35 ILL. COMP. STAT. ANN. 40/40 (West 2017) (providing that, "for eligible students whose household income is less than 185% of the federal poverty level, the scholarship shall be 100% of" the lesser of, "the statewide average operational expense per student among public schools," or, "the necessary costs and fees for attendance at the qualified school." On the other hand, "for eligible students whose household income is 185% or more of the federal poverty level but less than 250% of the federal poverty level, the average of scholarships shall be 75%" of this amount, and, "for eligible students whose household income is 250%

States also vary in their regulation of SGOs. For example, different programs may require SGOs to apply a different percentage of donations to the funding of scholarships.¹¹⁴ Furthermore, programs can vary in terms of the discretion afforded to SGOs in the allocation of scholarships. For example, some programs require SGOs to grant scholarships on a first come first serve basis.¹¹⁵ However, other programs do not specify which order scholarships should be awarded in.¹¹⁶ Programs may also restrict the ability of SGOs to limit the schools to which the SGOs will distribute scholarships for tuition. For example, Nevada's program prohibits SGOs from limiting scholarships to only one school.¹¹⁷ The Montana program prohibited SGOs from limiting scholarships for use at a "particular type" of school.¹¹⁸ Additionally, a few programs require SGOs to undertake a certain amount of community outreach in order to educate the public on the availability of scholarships.¹¹⁹ Conversely, other programs explicitly allow for SGOs to limit their scholarship distributions to certain schools or certain types of schools, while not placing any community outreach requirements on SGOs.¹²⁰ In addition to these regulations, every state requires SGOs to make annual reports containing information about donations or scholarship distributions to a specified state agency.¹²¹

or more of the federal poverty level, the average of scholarships shall be 50%" of this amount.).

¹¹⁴ See, e.g., 35 ILL. COMP. STAT. ANN. 40/5 (2017) (requiring SGOs to use at least 95% of donations for scholarships); S.D. CODIFIED LAWS § 13-65-4 (2018) (requiring SGOs to spend at least 90% of contributions on scholarship awards); 24 PA. STAT. AND CONS. STAT. ANN. § 20-2002-B (West 2018) (requiring "opportunity scholarship organizations" to spend at least 80% of contributions on an "opportunity scholarship program").

¹¹⁵ See, e.g., LA. STAT. ANN. § 47:6301 (2017).

¹¹⁶ See, e.g., N.H. REV. STAT. ANN. § 77-G:5 (2018).

¹¹⁷ NEV. REV. STAT. ANN. § 388D.270(f) (West 2015) (must not limit scholarships to one school).

¹¹⁸ MONT. CODE ANN. § 15-30-3103(1)(b) (2016).

¹¹⁹ See, e.g., LA. STAT. ANN. § 47:6301(c)(xi) (2017) (requiring SGOs to "adequately advertise" the availability of scholarships to the public).

¹²⁰ See, e.g., KAN. STAT. ANN. § 72-4354 (West) (providing that, "if a scholarship granting organization decides to limit the number or type of qualified schools who will receive educational scholarships, the scholarship granting organization shall provide, in writing, the name or names of those qualified schools to any contributor and the state board.").

¹²¹ See, e.g., LA. STAT. ANN. § 47:6301 (requiring SGOs to, "[p]rovide a public report to the Department of Education which contains information regarding all

Finally, states take varying approaches to the regulation of private schools that participate in their programs. Common regulations include provisions that explicitly prohibit certain types of discrimination by private schools.¹²² However, other programs do not contain any explicit prohibitions on discrimination. Additionally, programs place varying requirements on teachers or other school employees at participating private schools.¹²³ However, states also have a wide purview over education related requirements beyond nondiscrimination regulations.

States can vary in terms of accreditation, testing, and accountability requirements that are placed on participating schools, but some states require participating private schools be accredited either by the state public education agency or a state-approved accreditation association. For example, Illinois requires participating private schools to have achieved recognition by the Illinois State Board of Education.¹²⁴ Other programs allow for schools to be accredited by certain national or regional accrediting agencies in lieu of accreditation by the state board of education or similar agency.¹²⁵ Another approach to accreditation is to impose additional requirements on participating schools that are not accredited. For

scholarships awarded or granted in the previous state fiscal year,” as well as, “the total amount of contributions received by the school tuition organization, the total amount of contributions made by each contributor during the previous calendar year, and the social security number or Louisiana taxpayer identification number of each contributor.”).

¹²² See, e.g., ARIZ. REV. STAT. ANN. § 43-1601 (2012) (requiring that participating private schools do not discriminate on the basis of race, color, disability, familial status or national origin).

¹²³ See, e.g., FLA. STAT. ANN. § 1002.421 (West 2018) (requiring private schools to employ or contract with teachers who have at least three years teaching experience or some special expertise and requiring private schools to subject each employee or contracted personnel with direct student contact to a national background screening).

¹²⁴ See, e.g., 35 ILL. COMP. STAT. ANN. 40/5 (West 2017) (providing that a qualified school is defined as, “a non-public school located in Illinois and recognized by the Board pursuant to Section 2-3.250 of the School Code.”); 105 ILL. COMP. STAT. ANN. 5/2-3.250 (West 2016) (providing that, “the status of “Non-public School Recognition” from the State Board of Education,” may, “be obtained by compliance with administrative guidelines and review procedures as prescribed by the State Board of Education.”).

¹²⁵ See, e.g., KAN. STAT. ANN. § 72-4352 (West 2018) (providing that a, “qualified school shall be accredited by the state board or a national or regional accrediting agency that is recognized by the state board for the purpose of satisfying the teaching performance assessment for professional licensure.”).

example, the Montana program required participating private schools to either be accredited, be seeking accreditation, or to inform participating students' parents in writing that the school is not accredited or seeking accreditation.¹²⁶ However, other states have allowed for non-accredited private schools to participate in their programs.¹²⁷

States also vary in the accountability measures that their programs impose on participating private schools. For example, Illinois requires participating private schools to administer assessment tests "in the same manner in which they are administered in public schools."¹²⁸ Illinois also requires participating private schools to "report individual student scores to the custodians of the students" and to "an independent research organization."¹²⁹ This organization must, in turn, "annually report to the Board on the year-to-year learning gains of students receiving scholarships on a statewide basis."¹³⁰ Some programs require participating schools to administer some type of assessment test, although the state's standard assessment tests are not required to be administered. For example, the Montana program required participating private schools to administer a "nationally recognized standardized assessment test or criterion-referenced test."¹³¹ However, some programs do not explicitly require participating schools to administer assessment testing of any type. In fact, a 2017 report by the 74 news organization¹³² found that a majority of then-existing tax credit scholarship programs did not require "participating private schools to administer any sort of standardized exam."¹³³

¹²⁶ MONT. CODE ANN. § 15-30-3102(7)(b) (2016).

¹²⁷ See, e.g., KAN. STAT. ANN. § 72-4352 (West 2018) (providing that prior to July 1, 2020 that participating private schools are not required to be accredited by either the state board or a national or regional accrediting agency).

¹²⁸ 35 ILL. COMP. STAT. ANN. 40/50(2)(B) (West 2017).

¹²⁹ *Id.*

¹³⁰ 35 ILL. COMP. STAT. ANN. 40/45 (West 2017).

¹³¹ MONT. CODE ANN. § 15-30-3102(d) (2016).

¹³² According to their website, the 74 is, "a non-profit, non-partisan news site covering education in America." See *About Us*, THE 74, <https://www.the74million.org/about/> [<https://perma.cc/KY66-Q2KM>].

¹³³ *To Test or Not to Test: As Tax Credit Scholarships Expand, Questions About Accountability and Outcomes*, THE 74 (May 4, 2017), <https://www.the74million.org/article/to-test-or-not-to-test-as-tax-credit-scholarships-expand-questions-about-accountability-and-outcomes/> [<https://perma.cc/YS2A-UZ23>].

C. Tax Credit Scholarship Programs: Legal, Political, and Policy Considerations

Tax credit scholarship programs are similar to voucher programs garnering the labels “voucher-like,”¹³⁴ “neovouchers,”¹³⁵ and “backdoor vouchers;”¹³⁶ however, there are some key differences between vouchers and tax credit scholarships. Legally, tax credit scholarships are perhaps more likely than voucher or ESA programs to be found constitutional under state constitutional provisions. For example, many commentators have argued that tax credit scholarships may be more likely than vouchers to be found constitutional when challenged under Blaine Amendments and similar religious and no-aid clauses.¹³⁷ An example of this in practice occurred in Arizona. Section 10 of Article IX of the Arizona constitution provides that, “[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.”¹³⁸ The Arizona Supreme Court struck down a voucher program under this constitutional provision.¹³⁹ Conversely, the Court upheld a tax credit scholarship program, holding that the tax credit was not an “appropriation of public money” to aid sectarian or private

¹³⁴ See, e.g., Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 FORDHAM URB. L.J. 703, 705 (2015).

¹³⁵ See WELNER, *supra* note 53, at 6.

¹³⁶ See, e.g., Erie Zorn, *Column: Put the Brakes on GOP's Backdoor Voucher Idea*, CHICAGO TRIB. (Aug. 24, 2017), <http://www.chicagotribune.com/news/opinion/zorn/ct-perspec-zorn-education-taxcredit-neovouchers-20170824-story.html> [<https://perma.cc/5VUT-S293>].

¹³⁷ See, e.g., Levin, *supra* note 63, at 1048–49 (noting that tax credit scholarship programs have “consistently” withstood challenges under “state Blaine Amendments.”); Jonathan D. Boyer, *Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine Amendments*, 43 COLUM. J.L. & SOC. PROBS. 117, 117 (2009); William G. Frey & Virginia Lynn Hogben, *Vouchers, Tuition Tax Credits, and Scholarship-Donation Tax Credits: A Constitutional and Practical Analysis*, 31 STETSON L. REV. 165, 190 (2002) (noting that tax credit scholarships avoid the constitutional problems inherent in appropriating tax dollars for use at religious institutions).

¹³⁸ ARIZ. CONST. art. IX, § 10.

¹³⁹ *Cain v. Home*, 202 P.3d 1178, 1185 (Ariz. 2009) (holding that a voucher program violated the Arizona Constitution’s “no aid” clause).

schools for purposes of the state constitution.¹⁴⁰ However, although some state supreme courts have struck down voucher programs for violating their state's Blaine Amendment,¹⁴¹ many courts have upheld voucher programs when challenged under such provisions.¹⁴²

Vouchers have also been struck down under certain educational provisions found in state constitutions. For example, in Florida the state supreme court has held traditional voucher programs unconstitutional under a strict version of a commonly found constitutional provision usually referred to as a "uniformity" clause.¹⁴³ Conversely, a constitutional challenge to the Florida tax credit scholarship program was dismissed by a Florida intermediate appellate court after the court concluded that the challengers lacked standing because, *inter alia*, the tax credit scholarship program did not involve legislative spending and instead involved the legislative tax power, which the Florida uniformity clause does not limit.¹⁴⁴ The holding in the Florida voucher case was a departure from earlier cases in other states where supreme courts upheld voucher programs under similar provisions.¹⁴⁵ Additionally, in cases decided after the Florida

¹⁴⁰ *Kotterman v. Killian*, 972 P.2d 606, 618–20 (Ariz. 1999); *But see* Op. of the JJ. to the Sen., 514 N.E.2d 353, 355 (Mass. 1987) (stating that, "tax subsidies or tax expenditures of this sort are the practical equivalent of direct government grants.").

¹⁴¹ In addition to Arizona states such as Colorado have struck down voucher programs under such provisions. *See Taxpayers for Public Educ. v. Douglas County Sch. Dist.*, 351 P.3d 461, 470 (Colo. 2015), *cert. granted, judgment vacated*, 137 S. Ct. 2327 (2017).

¹⁴² *See, e.g., Oliver v. Hofmeister*, 368 P.3d 1270, 1277 (Okla. 2016); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 207 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602, 611 (Wis. 1998).

¹⁴³ *Bush v. Holmes*, 919 So. 2d 392, 406, 412 (Fla. 2006) (holding that a Florida traditional voucher program was unconstitutional due to violation of the state constitutions education clause which place a "paramount duty" on the state to make "adequate provision" for a "uniform, safe, secure, and high quality system of free public schools").

¹⁴⁴ *McCall v. Scott*, 199 So. 3d 359, 373 (Fla. 1st Dist. App. 2016), *review denied*, SC16-1668, 2017 WL 192043 (Fla. Jan. 18, 2017) (noting that the issue in *Bush v. Holmes* involved whether the legislature, "exceeded its spending authority under article IX, section 1(a) was limited to determining if the Legislature appropriated public funds for use in private schools.").

¹⁴⁵ *See Davis v. Grover*, 480 N.W.2d 460, 463 (Wis. 1992) (holding that a Wisconsin voucher program complied with the state's uniformity clause which required the legislature provide for the establishment of district schools as nearly uniform as possible).

case, state supreme courts have tended to uphold voucher programs when challenged under similar uniformity clauses.¹⁴⁶

Voucher programs have also been struck down under constitutional provisions that govern the control of school instruction or school funds. For example, the Colorado constitution requires that local boards of education “shall have control of instruction in the public schools of their respective districts.”¹⁴⁷ The Colorado Supreme Court struck down a voucher-like program that used locally raised revenue for funding as violating this constitutional provision.¹⁴⁸ In Louisiana, the state’s supreme court struck down a voucher program¹⁴⁹ as violating a provision in the Louisiana constitution that regulates the procedure by which the legislature allocates school funds.¹⁵⁰ Meanwhile, such challenges to Louisiana’s tax credit scholarship program have been non-existent.¹⁵¹

Tax credit scholarship programs have generally been immune to challenges under these types of state constitutional provisions because state supreme courts have concluded that they do not involve appropriations or the use of public money or funds.¹⁵² Additionally,

¹⁴⁶ See, e.g., *Meredith v. Pence*, 984 N.E.2d 1213, 1224 (Ind. 2013) (determining that a voucher program did not violate the Indiana Constitution’s uniformity clause, because unlike the Florida Constitution, but, “[l]ike the Wisconsin Constitution, the Indiana Constitution contains no analogous “adequate provision” clause” in the provision containing the uniformity clause).

¹⁴⁷ COLO. CONST. art. IX, § 15.

¹⁴⁸ See, e.g., *Owens v. Colorado Cong. of Parents, Teachers and Students*, 92 P.3d 933, 943 (Colo. 2004).

¹⁴⁹ See, e.g., *Louisiana Federation of Teachers v. State*, 118 So. 3d 1033, 1050–51 (La. 2013).

¹⁵⁰ See LA. CONST. ANN. art. VIII, § 13 (requiring the legislature to appropriate funds from the “Minimum Education Program” in a manner, “determined by applying” a formula that, “[t]he State Board of Elementary and Secondary Education, or its successor, shall annually develop and adopt.”).

¹⁵¹ See *School Choice Louisiana-Tuition Donation Credit Program*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/louisiana-tuition-donation-credit-program> [<https://perma.cc/YFD4-7BM9>] (noting that, “[n]o legal challenges have been filed” against the Louisiana program).

¹⁵² See, e.g., *Magee v. Boyd*, 175 So.3d 79, 121 (Ala. 2015) (upholding a tax credit scholarship program and distinguishing “appropriations” to private schools, which the Alabama constitution prohibits, and the tax credits available under the program); *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999) (upholding a tax credit scholarship program and distinguishing the program’s tax credits from “public money,” which the Arizona constitution prohibits from being used for religious or private schools); *Gaddy v. Georgia Dept. of Revenue*, 802 S.E.2d 225,

the United States Supreme Court has endorsed this reasoning.¹⁵³ However, while courts have generally concluded that tax credit scholarship programs do not involve government appropriations or public funds, the Montana Supreme Court, in December 2018, struck down a program for violating the Montana constitution's prohibition on "indirect aid" to "sectarian" schools.¹⁵⁴ The court noted that "Montana's no-aid provision is unique from other states' no-aid provisions," because it prohibits, "any direct or indirect appropriation or payment from any public fund or monies," to, "aid any . . . school . . . controlled in whole or in part by any church," and thus imposes, "a broader and stronger prohibition against aid to sectarian schools than other states."¹⁵⁵ Furthermore, the court noted that, "[e]ven other states whose no-aid provisions also contain "indirect" language only prohibit aid in the form of the *direct or indirect taking of money* from the public treasury."¹⁵⁶ Thus, the court distinguished the Montana constitutional provision from similar constitutional provisions in states like Georgia and Florida where appellate and supreme courts have upheld such programs under similar challenges.¹⁵⁷

Politically, tax credit scholarships are much more popular than vouchers among the public.¹⁵⁸ Furthermore, unlike vouchers, tax

230 (Ga. 2017) (dismissing a challenge to a tax credit scholarship program due to lack of standing and distinguishing between program tax credits and, "expenditures of tax revenues or public funds").

¹⁵³ See *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 126–27 (2011) (stating that, "When the Government spends funds from the General Treasury, dissenting taxpayers know that they have been made to contribute to an establishment in violation of conscience. In contrast, a tax credit allows dissenting taxpayers to use their own funds in accordance with their own consciences. Here, the STO tax credit does not extract and spend a conscientious dissenter's funds in service of an establishment.").

¹⁵⁴ *Espinoza v. Montana Dept. of Revenue*, 2018 WL 6521350, ¶ 30 (Mont. Dec. 12, 2018).

¹⁵⁵ *Id.* at ¶ 24.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See, e.g., Matt Barnum, *How to Rile Up Education Debates with One Word*, THE ATLANTIC (Jan. 19, 2018), <https://www.theatlantic.com/education/archive/2018/01/how-to-rile-up-education-debates-with-one-word/550856/> [<https://perma.cc/CG3M-GZ4S>] (noting that support was much higher for "scholarship tax credits" than for school vouchers); Adele Robinson, *Risky Credit: Tuition Tax Credits and Issues of Accountability and Equity*, 11 STAN. L. & POL'Y REV. 253, 260–63 (2000) (noting that tax credits "blunt" many of the difficult political questions surrounding school choice and that

credit scholarships create “institutionalized constituencies” which act to defend tax credit scholarship programs once they are established.¹⁵⁹ Tax credit scholarship programs also benefit from the fact that no one is compelled to support non-public schools whose missions they may disagree with. That is, under a tax credit scholarship program funding is derived from voluntary contributions made by taxpayers; which can be contrasted to voucher programs and ESA programs where funding is derived from taxes that residents are required to pay.¹⁶⁰ Perhaps due to these advantages, tax credit scholarship programs are currently much more widespread than traditional voucher programs.¹⁶¹

Proponents argue that tax credit scholarship programs have multiple positive effects on society.¹⁶² One theorized benefit is that such programs can increase school choice for students, especially for students who would not have otherwise been able to exercise choice.¹⁶³ Proponents of such programs claim that increased school choice will lead to better student outcomes¹⁶⁴, as students are able to

the structure of such programs may allow for greater government support for private schools than would be acceptable under traditional vouchers).

¹⁵⁹ See WELNER, *supra* note 53, at 93 (noting that the long-term survival of tax credit scholarships is enhanced by the institutionalization of a political constituency through the formation of the nonprofit corporations that carry out policy).

¹⁶⁰ See Sugarman, *supra* note 57, at 5 (noting that, “rather than, say, simply an appropriation of state funds,” tax credit scholarship programs depend, “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.”).

¹⁶¹ See, e.g., *id.* at 3 (noting that many more students participate in tax credit scholarship programs than in traditional voucher programs).

¹⁶² See, e.g., *Expanding Tax Credit Scholarships for Low Income Students Program: Hearing on H.B. 2374 Before the Kansas House Education Committee*, 2017 Legis. Sess. (Kan. 2017) (testimony of David Dorsey, Senior Education Policy Analyst Kansas Policy Institute).

¹⁶³ See, e.g., *id.* (“[S]tudents – particularly students in low-income families – find themselves stuck in low performing schools and unable to escape them simply because of their address.”).

¹⁶⁴ See, e.g., David Dorsey, *Low Income Students Are Doing Better in KS Private Schools – School Choice Week*, KAN. POL’Y INST. (Jan. 22, 2018), <https://kansaspolicy.org/low-income-students-are-doing-better-in-ks-private-schools-school-choice-week/> [<https://perma.cc/W2YB-45LB>] (claiming that since low-income students currently enrolled in private schools tend to perform better than low-income students in public school districts, that expanding the tax credit scholarship program would improve outcomes and provide opportunity for all students). Of course, this logic ignores the possibility that the difference in results could be due

escape “failing” public schools¹⁶⁵. Furthermore, the increase in ability to exercise school choice may improve public schools through increased competition.¹⁶⁶ Additionally, tax credit scholarship programs may save the states’ money¹⁶⁷ if donations per scholarship-receiving student is less than the state expends per pupil in public schools.¹⁶⁸

However, it is not entirely clear that tax credit scholarship programs deliver all of these benefits.¹⁶⁹ For example, depending on the number of “switchers,”¹⁷⁰ programs may not lead to much of an

to factors such as private school admission standards or the general tendency for students from households that already emphasize education and are willing to invest additional resources in education. *See* WELNER, *supra* note 53, at 105 (explaining that parents with “the most education, wealth, and involvement in their children’s education” are more likely to exercise active choice and that the effect of a tax credit scholarship policy is “to provide an alternative to a subpopulation skewed toward the best behaved and highest-scoring students”).

¹⁶⁵ *See id.*

¹⁶⁶ *See, e.g.*, Bart Goering, *How to Really Improve Education in Kansas*, WICHITA EAGLE (Sept. 27, 2016), <https://www.kansas.com/opinion/opn-columns-blogs/article104329806.html> [<https://perma.cc/7NU8-LPU3>] (stating that competition would fix Kansas schools, since competition works in the private sector); Cassandra M.D. Hart & David Figlio, *Does Competition Improve Public Schools*, EDUC. NEXT, (Winter 2011), <https://www.educationnext.org/does-competition-improve-public-schools/> [<https://perma.cc/T835-V4GK>] (attributing a slight increase in test scores for students in certain Florida public schools over the 2000 to 2007 time period to the competition created by the Florida tax credit scholarship program).

¹⁶⁷ *Expanding the Tax Credit Scholarships for Low Income Students Program: Hearing on H.B. 2457 Before the Kansas House Education Committee, 2016 Legis. Sess. (Kan. 2016)* (testimony of James Franko Vice President Kansas Policy Institute) (claiming school choice programs and the Kansas program can save taxpayers money).

¹⁶⁸ *See infra* note 174.

¹⁶⁹ For example, some studies have found that students participating in voucher and voucher-like programs performed worse than eligible students who did not participate and continued to attend public schools. *See, e.g.*, CENTER FOR TAX AND BUDGET ACCOUNTABILITY, ANALYSIS OF INDIANA SCHOOL CHOICE PROGRAM 4–6 (2015), R_2015.04.16_CTBA_IN School Voucher Report_FINAL.pdf, <https://www.ctbaonline.org/reports/analysis-indiana-school-choice-scholarship-program> [<https://perma.cc/UP9F-L88A>].

¹⁷⁰ “Switchers” are students that are moving from public school to private school or are entering kindergarten and would be attending public school if not for the subsidized private school tuition. *See* WELNER, *supra* note 53, at 100–02; Kevin Welner, *How to Calculate the Cost or Savings of Tax Credit Voucher Policies*, NAT’L EDUC. POL’Y CTR., 2, <https://nepc.colorado.edu/sites/default/files/NEPC->

increase in the exercise of choice and could be costing states more money than they would otherwise spend.¹⁷¹ Additionally, some tax credit scholarship programs have suffered from lack of transparency, accountability, and oversight.¹⁷² Furthermore, tax credit scholarship programs privatize education policymaking,¹⁷³ which could have harmful effects. Finally, tax credit scholarship programs and other forms of school choice may hurt traditional public schools and the students who are unable to exercise choice.¹⁷⁴ However, each program is unique and should be analyzed on an individual basis.¹⁷⁵

D. Introduction to the Kansas Program

The Kansas program was established and is governed by the tax credit for low-income students scholarship program originally enacted in 2014.¹⁷⁶ The stated purpose of the act is to provide “eligible

PolicyMemo_NeoVouchers.pdf [<https://perma.cc/2TJV-Y8FW>] (explaining how to calculate the fiscal effects of a tax credit scholarship programs).

¹⁷¹ If the number of switchers is less than half of the number of total participants, then the program will lose money compared to if the program had not been in operation. See WELNER, *supra* note 53, at 86.

¹⁷² See, e.g., *A Failed Experiment: Georgia’s Tax Credit Scholarships for Private Schools*, SOUTHERN EDUC. FOUND., 11–22 (2011), <https://files.eric.ed.gov/fulltext/ED535565.pdf>, [<https://perma.cc/RPA7-T8MC>]; Arianna Prothero, ‘*There is no Oversight*’: *Private School Vouchers Can Leave Parents on Their Own*, EDUC. WEEK (Nov. 14, 2017), <https://www.edweek.org/ew/articles/2017/11/15/there-is-no-oversight-private-school-vouchers-can.html> [<https://perma.cc/VCA8-J7WU>]; Carl Davis, *Public Loss Private Gain: How School Voucher Tax Shelters Undermine Public Education*, INST. ON TAX’N AND ECON. POL’Y (May 17, 2017), <https://itep.org/public-loss-private-gain-how-school-voucher-tax-shelters-undermine-public-education/> [<https://perma.cc/EN3U-GMMJ>].

¹⁷³ See, e.g., Dwyer, *supra* note 54, at 381 (noting that tax credit scholarship programs “make decision making” over the allocation of public funds “entirely private”); Levin, *supra* note 63, at 1062–63 (discussing problems that plagued the Georgia tax credit scholarship program).

¹⁷⁴ See, e.g., Jennifer Smith Richards & Juan Perez Jr., *Chicago’s Neighborhood Schools Hurting as Choice Abounds*, CHICAGO TRIB. (Jan. 8, 2016), <http://www.chicagotribune.com/news/ct-chicago-schools-choice-neighborhood-enrollment-met-20160108-story.html> [<https://perma.cc/P2FE-A6E2>] (noting that choice is “hurting” traditional neighborhood schools).

¹⁷⁵ Levin, *supra* note 63, at 1037 (explaining that tax credit scholarship programs “differ fundamentally from one another in form and function”).

¹⁷⁶ The Kansas legislature enacted the program during the 2014 legislative session. See Tax Credit Scholarship for Low Income Students Act, 2014 Kan. Leg. Sess. 836 (codified as KAN. STAT. ANN. § 72-4351 (2014) (amended by Kansas School

students” with an opportunity to attend schools of their parents’ choosing.¹⁷⁷ The Kansas program values tax credits at 70% of donation value.¹⁷⁸ The program appears by implication to allow taxpayers to claim both the state tax credit and a federal tax deduction.¹⁷⁹ Both businesses and individuals may claim the tax credit.¹⁸⁰ The maximum value of credits an individual taxpayer can claim is \$500,000 while no minimum credit is specified.¹⁸¹ The maximum aggregate value of credits issued through the program cannot exceed \$10 million or around \$14.3 million in donations for any one tax year.¹⁸²

Interested candidates must meet the programs stringent qualifications. To be eligible for a scholarship under the program, students must belong to a household with household income that does not exceed 100% of the maximum income permitted to qualify for the federal free lunch program.¹⁸³ Additionally, to be eligible students must live in the attendance zone of a low-performing public school.¹⁸⁴ Student must also have been enrolled in any public school in the school year prior to the year in which a scholarship is first sought.¹⁸⁵ However, if a student is under the age of six, they will be deemed eligible provided that they are eligible to be enrolled in a public school.¹⁸⁶ Once a student is deemed an “eligible student,” they remain eligible to receive a scholarship until they either graduate high school or reach the age of 21.¹⁸⁷

Equity and Enhancement Act, ch. 95, 2017 Kan. Sess. Laws 968, 1070 (codified as KAN. STAT. ANN. § 72-4351 (effective July 1, 2018)).

¹⁷⁷ KAN. STAT. ANN. § 72-4353(a) (West 2015).

¹⁷⁸ KAN. STAT. ANN. § 72-4357 (West 2017).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See KAN. STAT. ANN. § 72-4352(d)(1)(A) (West 2018) (requiring an eligible student to be an “at-risk student”); KAN. STAT. ANN. § 72-5132(c)(1) (West 2018) (defining an “at-risk student” as a student who is eligible for free meals under the national school lunch act).

¹⁸⁴ See KAN. STAT. ANN. § 72-4352(d)(1)(A) (West 2018) (requiring that eligible students are “attending a public school”); KAN. STAT. ANN. § 72-4352(g) (West 2018) (defining public school as “a school that is operated by a school district and is identified by the state board as one of the lowest 100 performing schools”).

¹⁸⁵ KAN. STAT. ANN. § 72-4352(d)(3)(A) (West 2018).

¹⁸⁶ KAN. STAT. ANN. § 72-4352(d)(3)(B) (West 2018).

¹⁸⁷ KAN. STAT. ANN. § 72-4352(d)(1)(B) (West 2018).

While the statute requires eligible students to have been enrolled in a public school during the school year prior to the year a student wishes to receive a scholarship, it does not specify the length of time.¹⁸⁸ Although it is unclear exactly how the statute should be interpreted, it is possible that students who attend private schools could enroll in a public school at the very end of a school year and, despite the short period of time in a public school, such students could potentially receive a scholarship to attend a participating private school the next school year.¹⁸⁹ Many other programs and proposed programs contain explicit language that prohibits those types of practices or sets an exact minimum time period for their prior public-school enrollment requirement.¹⁹⁰ A previous version of the Georgia program contained similarly imprecise language, requiring only prior public-school enrollment.¹⁹¹ Under that version of the Georgia program, private school students who went through the motions of enrolling in a public school, but did not ever attend the public school, were instantly qualified to receive a scholarship.¹⁹² The “loophole” was likely an intended feature of the program by the drafters of the statute.¹⁹³ It is not clear whether the Kansas language is mere oversight, or if it too was meant to create a loophole.¹⁹⁴

¹⁸⁸ KAN. STAT. ANN. § 72-4352 (West 2018).

¹⁸⁹ See *id.*; *A Failed Experiment: Georgia’s Tax Credit Scholarships for Private Schools*, SOUTHERN EDUC. FOUND., 14–17 (2011), <https://files.eric.ed.gov/fulltext/ED535565.pdf>, [<https://perma.cc/RPA7-T8MC>].

¹⁹⁰ See, e.g., GA. CODE. ANN. § 20-2A-1 (West 2013) (requiring eligible students to have been enrolled in a public school for at least 6 weeks); IND. CODE ANN. § 20-51-1-4.3 (West 2017) (specifying that certain eligible students must have been enrolled in a public school in Indiana for at least “two semesters” immediately preceding the first semester for which the individual receives a choice scholarship).

¹⁹¹ H.B. 773, 2008 Ga. Laws 1108 (codified as GA. CODE. ANN. § 20-2A-1 (West 2013) (amended by Act 335, 2013 Ga. Laws 1061) (amending to require eligible students to be enrolled in Georgia public schools for at least six weeks)) (defining eligible student as “a student who is a Georgia is resident enrolled in a Georgia secondary or primary public school).

¹⁹² See *A Failed Experiment: Georgia’s Tax Credit Scholarships for Private Schools*, SOUTHERN EDUC. FOUND., 14–17 (2011), <https://files.eric.ed.gov/fulltext/ED535565.pdf>, [<https://perma.cc/RPA7-T8MC>].

¹⁹³ *Id.*

¹⁹⁴ There is very little information on students participating in the program. See *Tax Credit for Low Income Students Scholarship Program*, KAN. STATE DEP’T OF EDUC., <https://www.ksde.org/Portals/0/School%20Finance/Action%20Items/Legislative%20Report%20January%202018%20%20TCLISSP.pdf> [<https://perma.cc/DRE5-WTD2>].

There exists a potential for tax-subsidized funding per student in private schools to exceed the amount of state funds made available per student in public schools. The maximum scholarship available to students under the program is \$8,000.¹⁹⁵ No minimum scholarship value is specified by the statute.¹⁹⁶ The discretion of SGOs in determining the scholarship value of awards granted to individual students is subject to few limitations. For example, unlike some other programs, SGOs are not required to reference a student's household income when determining scholarship value.¹⁹⁷ The maximum scholarship value is higher than the "Base State Aid Per-Pupil" or "Base Aid for Student Excellence" (BSAPP or BASE) and General Fund Aid per-pupil.¹⁹⁸ The legislature's most recent attempt at producing a constitutional funding formula set base state aid at \$4,000 per pupil.¹⁹⁹ Meanwhile General Fund Total Aid per-pupil was around \$ 6,840 for the 2017-18 school year.²⁰⁰

SGOs are subject to few regulations by the program.²⁰¹ The program requires SGOs to maintain non-profit status.²⁰² SGOs must spend 90% of contributions on scholarship awards.²⁰³ When SGOs receive more than \$50,000 in contributions, they must file a surety bond payable to the state board for the amount equal to total contributions expected to be received for that year, or otherwise demonstrate the SGOs ability to pay an amount equal to expected contributions.²⁰⁴ Additionally, SGOs are required to provide annual

¹⁹⁵ KAN. STAT. ANN. § 72-4353(e) (West 2015).

¹⁹⁶ *Id.*

¹⁹⁷ *See, e.g.*, 35 ILL. COMP. STAT. ANN. 40/40 (West 2017) (requiring SGOs to determine scholarship values with reference to eligible students' household income); *see also* KAN. STAT. ANN. § 72-4354 (West 2015) (containing no provisions to guide SGOs in determining individual scholarship value).

¹⁹⁸ *See infra* notes 115–16.

¹⁹⁹ *See Gannon v. State*, 402 P.3d 513, 522 (Kan. 2017); KAN. STAT. ANN. § 72-5132 (West 2018) (listing BASE aid as \$4,006 for the 2017-18 school year).

²⁰⁰ For the 2017-18 school year, General Fund Aid Total was \$3,275,373,608 and Full Time Enrolment (FTE) was 478,890.1. *See* KAN. STATE DEP'T OF EDUC., GENERAL STATE AID/SUPPLEMENTAL GENERAL STATE AID FOR KANSAS USDS 2017-2018.

²⁰¹ *See, e.g.*, KAN. STAT. ANN. § 72-4354 (West 2015) (regulating SGOs).

²⁰² KAN. STAT. ANN. § 72-4354(a)(3) (West 2015).

²⁰³ KAN. STAT. ANN. § 72-4354(c) (West 2015).

²⁰⁴ KAN. STAT. ANN. § 72-4354(a)(4) (West 2015).

reports containing little valuable information, to the state board.²⁰⁵ Other minor regulations include a prohibition against providing scholarships to students from contributions made by a student's relative.²⁰⁶ While SGOs are prohibited from accepting contributions with the express or implied condition that the contribution be used toward a scholarship for a particular student, there is no prohibition against "suggestions" that contributions be used for a particular student.²⁰⁷ Nor is there a prohibition against accepting funds on the condition that they go to a particular school.²⁰⁸ Notably, SGOs are allowed to limit scholarships to a single school or a particular type of school, provided they inform the state board in writing.²⁰⁹

Private schools that participate in the program are subject to few regulations.²¹⁰ Initially, private schools participating in the program were not required to be accredited.²¹¹ However, a 2017 amendment to the statute, that is effective as of July 2018, requires participating private schools to be accredited by 2020.²¹² Accreditation can be gained through the state board or through a number of regional and

²⁰⁵ KAN. STAT. ANN. § 72-4354(f) (West 2015) (requiring SGOs to submit a report containing the name and address of the SGO, the name and address of each eligible student with respect to whom an educational scholarship was awarded by the SGO, the total number and total dollar amount of contribution received during the 12 month reporting period, the total number and total dollar amount of educational scholarships awarded during the 12-month reporting period, and the total number and total dollar amount of educational scholarships awarded during the 12 month reporting period with respect to eligible students who qualified for the program by meeting the definition of "eligible student").

²⁰⁶ KAN. STAT. ANN. § 72-4354(g)(1) (West 2015).

²⁰⁷ KAN. STAT. ANN. § 72-4354(g)(2) (West 2015); *see also* ARIZ. REV. STAT. ANN. § 43-1603 (West 2018) (permitting SGOs to allow donors to recommend student beneficiaries, but does not allow the organizations to "award, designate, or reserve scholarships *solely*" on the basis of the recommendation) (emphasis added)).

²⁰⁸ KAN. STAT. ANN. § 72-4354 (West 2015).

²⁰⁹ KAN. STAT. ANN. § 72-4354(a)(8) (West 2015).

²¹⁰ To participate in the program, a private school is merely required to notify the state board of its intention to participate. *See* KAN. STAT. ANN. § 72-4352(h) (West 2018).

²¹¹ *See id.*

²¹² KAN. STAT. ANN. § 72-4352(h) (West 2018) (providing that "on or after July 1, 2020, a qualified school shall be accredited by the state board or a national or regional accrediting agency that is recognized by the state board for the purpose of satisfying the teaching performance assessment for professional licensure").

national accreditation associations.²¹³ Unlike some other programs, there is no requirement that participating private schools administer assessment tests for scholarship receiving students.²¹⁴ Private schools are not subject to any provisions that explicitly prohibits discrimination.²¹⁵ The absence of significant regulations over SGO's and private schools participating in the program potentially could allow aspects of the program to operate contrary to public policy.

III. AN ANALYSIS OF THE KANSAS PROGRAM

This section will discuss how the Kansas Program a) diminishes democratic control over public education policy; b) may primarily benefit high and middle-income students at the expense of low-income students; and c) may primarily benefit only certain social groups.

A. *The Kansas Program Diminishes Democratic Control Over Public Education Policy*

The program partially privatizes the policymaking process that determines how public funds are distributed for educational purposes by giving immense decision-making powers to SGOs and participant taxpayers in determining how funds they receive and contribute are utilized.²¹⁶ Furthermore, the use of a tax credit ties ability to participate in the policymaking process to wealth and income.²¹⁷ The high cap on tax credits that individual taxpayers can claim under the program dissuades participation in policymaking processes.²¹⁸ Even taxpayers who desire and have the ability to participate in the program through

²¹³ *Id.*

²¹⁴ *See, e.g.*, 35 ILL. COMP. STAT. ANN. 40/50(2)(B) (West 2017) (requiring participating private schools to administer assessments “in the same manner in which they are administered in public schools”); *see also* KAN. STAT. ANN. § 72-4352 (West 2018) (providing no testing requirements).

²¹⁵ KAN. STAT. ANN. § 72-4352 (West 2018) (providing no provisions regarding discrimination by private schools).

²¹⁶ WELNER, *supra* note 53, at 6 (noting that under tax credit scholarship programs “control over funding decisions is largely delegated” to taxpayer-donors and SGOs).

²¹⁷ *Id.* at 94 (noting that as result of the use of tax credits, “wealthier taxpayers have effective control over which schools- and to some extent, which families- receive” funding).

²¹⁸ *Id.* at 94; *see also* KAN. STAT. ANN. § 72-4357 (West 2017) (stating that, “[i]n no event shall the total amount of contributions for any taxpayer allowed under this subsection exceed \$500,000 for any tax year”).

small donations may have their “voice” drowned out by the voice of taxpayers with the desire and ability to donate large sums of money.²¹⁹ Additionally, the program allows for decision-making power over the distribution of program funds to become concentrated in the hands of as few as 20 high-income taxpayers.²²⁰ Further, participating taxpayer-policymakers are shielded from public scrutiny for their decisions, since the recipients of tax credits are kept confidential under Kansas laws and regulations.²²¹ Thus, taxpayers are incapable of applying public pressure or making appeals to taxpayer-policymakers, no matter how great the taxpayer’s influence or how undesirable the taxpayer’s policies are.²²² In essence, the program replaces a democratic system of policymaking with a plutocratic one.²²³

The policymaking process determining school-level policies can also be characterized as undemocratic.²²⁴ School-level policies are

²¹⁹ WELNER, *supra* note 53, at 94 (noting that wealth determines the amount of “votes” a taxpayer-policymaker has under the privatized policymaking process found in tax credit scholarship programs).

²²⁰ 20 donors claiming the maximum credit available to individual taxpayers would claim all available tax credits under the program. *See* KAN. STAT. ANN. § 72-4357(a)–(c) (West 2014).

²²¹ KAN. STAT. ANN. § 79-3234(b) (West 2014) (providing that “it shall be unlawful” for state officials or employees “to make known in any way” any “particulars set forth or disclosed in any report, return, federal return, or federal return information” required under the act governing income taxation in the state”); 1989 KAN. ATT’Y GEN. OPINION 46 (explaining that the statute prohibits the disclosure of “income or any particulars provided in state or federal income tax returns”). The confidentiality of tax credit recipients under Kansas laws can be contrasted with Missouri law, which provides mechanisms that the identities make tax credit recipients easily ascertainable by the public. *Cf.* MO. REV. STAT. § 135.805(15) (2009) (requiring the department of economic development to make information available for public inspection through the department’s website and the Missouri Accountability Portal).

²²² Unlike in Missouri, where taxpayers are subject to public accountability through the Missouri Accountability Portal. MO. REV. STAT. § 135.805(15) (West 2009).

²²³ *See* WELNER, *supra* note 53, at 94 (noting that tax credit scholarship programs result in a “caricature of direct democracy- with the wealthy entitled to more votes”).

²²⁴ *See, e.g.,* Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1234–35 (2003) (noting that, “the settings for public debate and deliberation may be shrinking as key decisions about schooling, social services, prisons, and health care are made by private groups with public funds. Public control and review--whether through administrative or

also privatized by the program. For example, private schools under the program are subject to very few limitations providing for public oversight or accountability.²²⁵ Furthermore, school-level policymakers cannot be held accountable through mechanisms of democratic control such as school board elections.²²⁶ The decision-making process of private schools is further shielded from public oversight and accountability since there is no requirement for something akin to school board meetings.²²⁷ Further, ability to participate in policymaking at the school level is tied to wealth. Since taxpayers donate money to SGOs, who in turn allocate funding to private schools, both taxpayers and SGOs potentially have the ability to exercise immense influence over the operation of private schools.²²⁸

political processes--diminish as previously public activities fall under private management and control.”).

²²⁵ Robinson, *supra* note 158, at 260 (noting that tax credit scholarship programs, by design, subject private schools to very little government regulation, accountability or oversight); KAN. STAT. ANN. § 72-4351–4357 (West 2014) (providing almost no accountability or oversight measures on participating private schools).

²²⁶ See KAN. STAT. ANN. §§ 25-2001–24 (West 1968) (codifying the “School Election Act” which requires school districts to hold nonpartisan elections).

²²⁷ Cf. KAN. STAT. ANN. § 75-4318 (a) (West 2015) (requiring that “all meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions” of the state “receiving or expending and supported in whole or in part by public funds shall be open to the public and no binding action by such public bodies or agencies shall be by secret ballot”); cf. KAN. STAT. ANN. § 75-4319(c) (West 2017) (prohibiting bodies and agencies subject to the open meetings act from taking binding action during a closed meeting). Although participating schools receiving funds through the program receive public funds through tax expenditures, it is unlikely that the law would be interpreted to require open meetings for participating private schools. See *Kotterman v. Killian*, 972 P.2d 606, 621 (Ariz. 1999) (holding that tax credits do not constitute “public money”); *Magee v. Boyd*, 175 So. 3d 79, 126 (Ala. 2015) (concluding that, “to include the tax credits provided by AAA is contrary to the Alabama Constitution, existing caselaw, and the commonly accepted definition of the term appropriation”); *Gaddy v. Georgia Dept. of Revenue*, 802 S.E.2d 225, 231 (Ga. 2017) (determining “that no public funds are used,” in a tax credit scholarship program).

²²⁸ Through their control over the distribution of program funds, SGOs and taxpayers may be able to influence school-level policies. Specifically, because these programs use a, “tax credit mechanism,” which, “results in the allocation of tax benefits to support those institutions that are most popular with the state’s wealthiest residents,” it is possible that schools seeking government subsidization will adopt policies that are popular with a state’s wealthy residents who donate to tax credit scholarship programs. See WELNER, *supra* note 53, at 94.

Students able to pay full tuition, or students who can make up the difference between the scholarship value and the cost of full tuition, are more likely to be able to influence school officials compared to students who rely solely on financial aid and thus do not bring additional funding to the school.²²⁹ Therefore, low-income students and high-cost students, who provide less marginal funding,²³⁰ are unlikely to exercise as much influence on policy²³¹ compared to high-income and low-cost students. Students who can provide resources in addition to funding equal to full tuition are likely able to exercise the greatest influence on policy. However, in the end, no student is guaranteed recourse if they are unhappy with private school policies.

The program does not provide public control over policies through the market effects of consumer demand.²³² Unlike traditional voucher programs, where parental choice effects policies through the distributional effect of choosing to apply a voucher, and thus funding, to a particular school, the Kansas program is totally unresponsive to parental choice.²³³ Theoretically, schools and closely affiliated

²²⁹ See *id.* (noting that the supply of families “with the financial means to afford the tuition payment above the voucher amount” act to increase demand and bring greater resources to private schools and noting that private schools “cannot be weighed down with students who pay little”).

²³⁰ For example, a higher cost student who provides funding equal to the full cost of tuition would provide less marginal funding, as measured by funds provided minus cost of educating (MF = F minus C), compared to a student who costs less to educate and who provides funding equal to the full cost of tuition.

²³¹ See WELNER, *supra* note 53, at 88 (noting that the supply of students who are less costly to educate effects resources available to private schools and noting that private schools cannot afford to be “weighed down” by students who cost too much to educate).

²³² Resources are allocated in accordance with taxpayer-donor preferences, not student preferences. See Sugarman, *supra* note 57, at 18 (noting that SGOs compete with each other to attract donors); while SGOs have been suggested as a means to “put families on an equal footing” by “not having to compete for the patronage of individual taxpayer donors.” See *id.* However, it is not clear how this works without additional regulations on SGOs, especially when SGOs can limit scholarship grants to a particular school or type of school and taxpayers have complete discretion in choosing among SGOs. See KAN. STAT. ANN. § 72-4354(a)(8) (West 2014) (allowing for SGOs to limit schools or type of schools they will distribute funds to under the program).

²³³ See Patrick J. Wolf & Anna J. Egalite, *The Case for School Vouchers*, in THE WILEY HANDBOOK OF SCHOOL CHOICE 288 (Robert A. Fox & Nina K. Buchanan eds., 2017) (explaining how, in theory, school voucher programs act to distribute resources in reference to parental preferences).

SGOs²³⁴ may have an incentive to limit their acceptance of eligible students, so as to increase funding per-pupil made available to the school.²³⁵ Even if this is not the case, schools have no incentive to attract a large number of students, since the number of scholarship recipients attending a school does not determine the size of the subsidy the school receives through the program.²³⁶ The only “competition” created by the program is the competition between SGOs and their affiliated schools to attract taxpayer donations.²³⁷

B. The Program May Primarily Benefit High and Middle-Income Students at the Expense of Low-Income Students

First, since ability to participate in policymaking is linked to wealth, policies produced under the program are likely to favor wealthy households rather than the general public. The program itself acts to subsidize private schools for all attending students, not just students participating in the program. Since students enrolled in private schools tend to be from higher-income households, the subsidization of private schools with public monies could primarily benefit students from higher income households.

Households with higher income, more education, and more active parents are more likely to participate in any choice program in general.²³⁸ This is true even if the program is means tested, as the most well-off households in the eligible subpopulation are most likely to

²³⁴ Under the Kansas program, SGOs can be set up for the sole purpose of supporting a single affiliated school. *See* KAN. STAT. ANN. § 72-4354(a)(8) (West 2015). Such SGOs have already operated under the Kansas program. *See* KAN. STATE DEP'T OF EDUC., *supra* note 200, at 8 (listing SGOs and their affiliated schools).

²³⁵ WELNER, *supra* note 53, at 88 (noting that schools have a financial incentive to “compete using selective criteria”, that is limited low paying and high-cost students who do not provide marginal benefits to the school).

²³⁶ The level of funding SGOs receive is determined by taxpayer-donors. *See* KAN. STAT. ANN. § 72-4353(c) (West 2015) (providing for taxpayer-donors to participate in the program only through their interaction with SGOs, without reference to student demand for schools supported by the SGOs); *see also* WELNER, *supra* note 53, at 111 (noting that tax credit scholarship policies, “delegate, from elected” officials “to taxpayers, a great deal of control over spending decisions”).

²³⁷ *See* Sugarman, *supra* note 57, at 18.

²³⁸ WELNER, *supra* note 53, at 105.

participate.²³⁹ Under the Kansas program, households that in many contexts are considered middle-income are eligible to receive grants.²⁴⁰ In fact, if the income requirement was the only criteria for eligibility, 40% of all students would qualify.²⁴¹ The Kansas program amplifies the general tendency of greater participation among higher income households since scholarships do not have to cover full tuition costs.²⁴² When the value of the scholarship is less than the full cost of tuition, only those families who can pay additional tuition will be able to participate.²⁴³ Furthermore, additional costs of private school attendance, such as uniforms, textbooks, and transportation, may prevent lower income households from participating, even if given full scholarships.²⁴⁴ The tax credit scholarship program could entice

²³⁹ *Id.* at 105 (noting that even in means tested programs, the highest educated, highest earning, and most active parents tend to participate in active choice programs much more than less well-off households).

²⁴⁰ The Kansas program requires that students applying for a first-time scholarship be eligible for free school lunch. In Kansas, this means that for a student from a household of four to be eligible, the household income must not exceed \$45,510. See Child Nutrition Programs: Income Eligibility Guidelines, 82 Fed. Reg. 17,182-01 (Apr. 10, 2017). According to the Pew Research Foundation, middle-income households are households that earn between 66.6% and 200% of the median income for an area. See Richard Fry & Rakesh Kochhar, *Are You in the American Middle Class? Find Out With Our Income Calculator*, PEW RESEARCH CTR. (Sep. 6, 2018), <http://www.pewresearch.org/fact-tank/2016/05/11/are-you-in-the-american-middle-class/> [<https://perma.cc/3V5L-WXVH>]. In Kansas the median income for a household in 2016 was \$56,810. See UNIVERSITY OF KANSAS INSTITUTE FOR POLICY AND SOCIAL RESEARCH, MEDIAN HOUSEHOLD INCOME, BY STATE, 2010–2016 (2018), <http://www.ipsr.ku.edu/ksdata/ksah/income/9incl.pdf> [<https://perma.cc/C4JX-AKBA>]. Thus, the range for middle-income runs between \$32,919 and \$109,730 for households in Kansas.

²⁴¹ *Expanding the Tax Credit Scholarships for Low Income Students Program: Hearing on H.B. 2374 Before the Kansas H. Education Comm.*, 2017 Leg. Sess. (Kan. 2017) (statement of Mark Tallman, Assoc. Exec. Dir. for Advocacy), <http://kasb.org/wp-content/uploads/2017/04/HB2374inHEd.pdf> [<https://perma.cc/K4WA-5U5K>].

²⁴² KAN. STAT. ANN. § 72-4352(c) (West 2018) (allowing for scholarships to cover only partial tuition).

²⁴³ See, e.g., Camille Phillips, *Middle-class Families Most Likely to Benefit from Illinois Tax Credit Scholarships*, *Expert Says*, ST. LOUIS PUBLIC RADIO (Sept. 22, 2017), <http://news.stlpublicradio.org/post/middle-class-families-most-likely-benefit-illinois-tax-credit-scholarships-expert-says> [<https://perma.cc/9H7J-6HVX>] (discussing a similar Illinois program and noting that students from middle income households who can afford to pay extra tuition will be able to utilize scholarships even if they cover only the partial cost of tuition).

²⁴⁴ See, e.g., WELNER, *supra* note 53, at 105.

middle class families to move into the attendance boundaries of low performing schools;²⁴⁵ however, it is unlikely to provide students from low-income households with a significant increase in school choices.²⁴⁶

The program could also distribute scholarships to students from high-income households, even if household income greatly exceeds the program's requirements.²⁴⁷ Although eligibility initially requires the students to fall under the definition of an "at-risk" student, continued participation does not.²⁴⁸ Thus, as long as a student received funding under the program in the past, they are eligible to continue to receive program funds even if their household's income increases significantly.²⁴⁹

While lower-income households may be unable to participate in the program, the public schools they utilize will likely be harmed by the program.²⁵⁰ When students switch from public to private school using program scholarships, funding is diverted from public schools to private schools.²⁵¹ The public school's fixed costs per student goes up in such circumstances, leaving less funds per student for other expenses like classroom material or tutor programs.²⁵² If a public

²⁴⁵ The program could attract middle class families to central cities since it subsidizes their continued attendance at schools segregated by class and race. This has even been seen as a beneficial feature of tax credit scholarship programs. See Nicole Stelle Garnett, *Affordable Private Education and the Middle Class City*, 77 U. CHI. L. REV. 201, 203–04 (2010).

²⁴⁶ Jeff Bryant, *Who Gains Most from School Choice? Not Low-Income Students of Color*, EDUCATION OPPORTUNITY NETWORK (Sept. 7, 2016), <http://educationopportunitynetwork.org/who-gains-from-school-choice-not-low-income-students-of-color/> [https://perma.cc/L3U3-SX4E].

²⁴⁷ *Id.*

²⁴⁸ KAN. STAT. ANN. § 72-4352(d)(1)(A) (West 2018).

²⁴⁹ *Id.*

²⁵⁰ WELNER, *supra* note 53, at 105 (explaining that, even within a means tested program, "the wealthiest, best educated, and most involved" parents are more likely to exercise choice, and that as they exit the public school system students in public schools are further disadvantaged).

²⁵¹ Kansas state aid to public schools has been determined in reference to "Weighted Full Time Enrollment." As enrollment drops, so does Full Time Enrollment. This causes funding allocated to the school to decrease. See Levy, *supra* note 42, at 1038 (discussing the role weighted enrollment in allocating resources among the public schools).

²⁵² See *Scholarship Tax Credits*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/education/school-choice-scholarship-tax-credits.aspx>

school has stable or falling enrollment levels, rather than rising enrollment levels, they can be significantly harmed by the loss of students who participate in the program.²⁵³ Additionally, the parents who provide the most support for public schools are also the most likely to utilize choice.²⁵⁴ This may harm public schools by removing these parents, and their social and political capital, from the public school system.²⁵⁵

C. The Program May Primarily Benefit Only Certain Social Groups

The program may increase social polarization and inequity by distributing program benefits to students based on a student's membership to a particular social group. Schools could possibly practice a variety of forms of de jure discrimination.²⁵⁶ Unlike some other programs, the Kansas program does not explicitly prohibit SGOs or private schools from practicing any type of discrimination when determining whether to accept a student's application to attend the school or in determining how much in scholarship funding to provide to a student.²⁵⁷ In practice, SGOs are already prohibited from

[<https://perma.cc/3XKQ-9TFJ>] (noting that opponents criticize program because it hurts public schools by raising fixed facility costs per student).

²⁵³ WELNER, *supra* note 53, at 90 (explaining that as students exit public school districts schools may have to close and would likely result in loss of efficiencies of scale).

²⁵⁴ James, *supra* note 10, at 1105 (explaining that the loss of “education connoisseurs” voices will harm poor and minority “school districts most in need of this economic and social capital”).

²⁵⁵ Raquel Aldana, *When the Free-Market Visits Public Schools: Answering the Roll Call for Disadvantaged Students*, 15 NAT'L. BLACK L.J. 26, 31 (1998) (explaining that school choice policies can create “pockets of failure,” in part because the students left behind may have parents who are less involved or less informed).

²⁵⁶ Tax credit scholarship programs may result in de jure or de factor discrimination by SGOs. Regulations could be implemented to prevent such discrimination within tax credit scholarship programs. *See* Sugarman, *supra* note 57, at 20 (noting that programs should take steps to prevent the practice of de jure discrimination on the part of SGOs in their allocation of funds to schools and families); WELNER, *supra* note 53, at 103 (advocating the necessity of such provisions in tax credit scholarship programs that seek to be equitable). Kansas does not contain such a provision requiring the practice of non-discrimination by participating by private schools. *See* KAN. STAT. ANN. §§ 72-435–4357 (West 2014).

²⁵⁷ For example, the Arizona tax credit scholarship program explicitly prohibits participating private schools from discriminating on the basis of race, color, disability, national origin, or familial status. *See* ARIZ. REV. STAT. ANN. §§ 15-

providing scholarships to schools with racially discriminatory policies.²⁵⁸ However, discrimination along other lines such as religious beliefs, familial status, disability, or sexual orientation are generally not prohibited by federal law,²⁵⁹ and thus, may be practiced

891–91.06 (West 2014). The Kansas law contains no such provision. See KAN. STAT. ANN. §§ 72-435–4357 (West 2014).

²⁵⁸ The Kansas program requires SGOs have tax exempt status under IRS Section 501(c)(3). See KAN STAT. ANN. § 72-4354(a)(3) (West 2015) (requiring SGOs to have tax exempt status under 501(c)(3)); see also I.R.C. § 501(c)(3) (defining 501(c)(3) organizations). Private schools that do not have a racially nondiscriminatory policy as to students do not qualify for tax exempt status under 501(c)(3). See Rev. Rul. 71-447, 1971-2 C.B. 230 (stating that, “[a] private school that does not have a racially nondiscriminatory policy as to students does not qualify for exemption,” under 501(c)(3); *Bob Jones Univ. v. United States*, 461 U.S. 574, 584 (1983). Scholarship granting organizations that provided scholarships to schools with racially discriminatory policies would likely not qualify for tax exempt status under 501(c)(3), since it is unlikely, they would be found “charitable under Rev. Rul. 71-447, 1971-2 C.B. 230.” See INTERNAL REVENUE SERVICE, 1985 CONTINUING PROFESSIONAL EDUC.: JOURNAL ACTIVITIES THAT ARE ILLEGAL OR CONTRARY TO PUBLIC POLICY (1985) <https://www.irs.gov/pub/irs-tege/eotopicj85.pdf> [<https://perma.cc/VJQ7-PQGX>] (discussing how the rule would be applied to scholarship trusts).

²⁵⁹ See, e.g., WELNER *supra* note 53, at 44 (noting that absent state legal protections, participating private schools are not prohibited from engaging in “religious discrimination,” and that in contrast to the rules governing most public schools, “neouvoucher laws,” generally allow for schools to reject students based on, “academic performances or behavioral issues”); Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 808 (2007) (noting that, “[c]ourts have generally sided with religious organizations on claims of discrimination based on sexual orientation”); Sam Hotchkiss, *Disputes Between Christian Schools and LGBT Students: Should the Law Get Involved?*, 81 UMKC L. REV. 701, 705 (2013) (noting that, “[b]ans on gender or sexual orientation discrimination in education have not reached the same national effectiveness as bans on racial discrimination,” largely due to ““religious exemptions,” either written into statutes or judicially created, that allow religious organizations to disregard otherwise applicable laws,” and that “sexual orientation discrimination is not explicitly addressed by federal statute and is largely dependent on state and local law”); Wendy F. Hensel, *The Limits of Federal Disability Law: State Educational Voucher Programs*, 44 J.L. & EDUC. 199, 210 (2015) (noting that under federal law, “private schools are not required to admit students with disabilities”); William N. Myhill, *No FAPE for Children with Disabilities in the Milwaukee Parental Choice Program: Time to Redefine A Free Appropriate Public Education*, 89 IOWA L. REV. 1051, 1066 (2004) (noting that,

by schools participating in the Kansas program without fear of consequence. Many qualified private schools are religious in nature and some have already adopted religiously discriminatory policies absent regulation prohibiting such practices.²⁶⁰

Even if schools themselves do not have racially discriminatory policies, the preferences of parents could lead to de facto racial segregation under such programs.²⁶¹ Furthermore, since religious organizations tend to be racially segregated, de facto discrimination could occur due to the affiliation of SGOs and private schools with certain religious institutions or organizations.²⁶² If participating schools that are affiliated with organizations that predominately or disproportionately serve a single racial group, then program benefits are likely to be disproportionately distributed primarily to that racial group.²⁶³ Thus, even where scholarships are distributed on the basis of religious affiliation alone, racial segregation is a likely result.

“[a]lthough children with disabilities may be entitled to tuition scholarships, there are no guarantees that private choice schools will admit them”).

²⁶⁰ See Sugarman, *supra* note 57, at 20 (noting that regulations need to be incorporated into tax credit scholarship programs, in order to prevent de jure and de facto discrimination by schools participating in tax credit scholarship programs); WELNER, *supra* note 53, at 103 (proposing that anti-discrimination provisions be included in such programs since qualified schools are otherwise likely to practice discrimination).

²⁶¹ See, e.g., WELNER, *supra* note 53, at 24 (discussing racial segregation that often results from choice programs).

²⁶² See, e.g., Michael Lipka, *Many U.S. Congregations are Still Racially Segregated, but Things are Changing*, PEW RESEARCH CTR. (Dec. 8, 2014) <http://www.pewresearch.org/fact-tank/2014/12/08/many-u-s-congregations-are-still-rationally-segregated-but-things-are-changing-2/> [<https://perma.cc/9GAM-GQUR>]; Diana Jean Schemo, *Study Finds Church Schools Racially Segregated*, N.Y. TIMES (June 27, 2002) <http://www.nytimes.com/2002/06/27/us/study-finds-church-schools-rationally-segregated.html> [<https://perma.cc/WYV5-79VP>] (“Private religious schools, particularly Roman Catholic ones, are more racially segregated than public schools. . .”). The more religious affiliation influences students and their parents school choice, the more intense the segregate tendencies of vouchers will be. Robert K. Vischer, *Racial Segregation in American Churches and its Implications for School Vouchers*, 53 FLA L. REV. 193, 223 (2001). Since religious affiliation is used by some participating schools in the Kansas program to determine whether a student can be admitted to the school or what tuition a student will be charges, religious affiliation likely influences the choices made by families that participate in the program. See *infra* notes 179–180 (providing examples of religious based discrimination in the private school admissions process).

²⁶³ The Kansas program likely benefits schools that disproportionately serve students of a particular race. For example, Catholic schools that participate in the

Discrimination on the basis religious affiliation appears to be common under the program. Some Christian schools that participate in the Kansas program require church membership in order for a student to enroll the school.²⁶⁴ Other participating schools provide a tuition discount to students whose households belong to the church.²⁶⁵ Since scholarships do not have to cover the full cost of tuition, these options are much more affordable to church members and may effectively exclude non-members from benefiting from the program.²⁶⁶ Additionally, SGOs may market the scholarships only toward students belonging to an affiliated church, meaning that these families are potentially the only households with significant knowledge of the program.²⁶⁷

program tend to serve a higher percentage of white students and a much lower percentage of Black students relative to the racial composition of the community. For example, in the 2017–18 school year only around 2% of the student population in schools operated by the Kansas City Catholic Diocese was Black. *See* KAN. STATE DEP'T OF EDUC., 2017–2018 STATE HEADCOUNT ENROLLMENT BY DISTRICT, GRADE, RACE, AND GENDER (ALL SCHOOLS) (2018). The Diocese operated schools in Topeka, Shawnee, Seneca, Roeland Park, Prairie Village, Paola, Overland Park, Ottawa, Olathe, Marysville, Lenexa, Leawood, Leavenworth, Kansas City, Emporia, Bucyrus, and Atchison. *See Find Your School*, ARCHDIOCESE OF KANSAS CITY IN KANSAS, <https://www.archkck.org/schools/find-your-school> [<https://perma.cc/V7PC-WNSK>]. According to data from the 2010 Census, the Black population of these communities accounted for 10% of the total population. *See generally* U.S. CENSUS BUREAU, CENSUS (2010).

²⁶⁴ For example, Central Christian Academy, a “qualified school” in Wichita, requires both parents or guardians in a potential student’s home to give “clear testimony of faith in Jesus Christ” as part of its admissions process. Testimonies must be both written on the application and verbally shared in an admissions interview. Additionally, to gain admission, an applicant’s family is required to regularly attend and be actively involved in an “evangelical, Bible-centered church.” *See Admission Criteria*, CENTRAL CHRISTIAN ACADEMY (WICHITA, KANSAS), <http://www.ccalions.org/admission-criteria/> [<https://perma.cc/78BQ-J8TQ>].

²⁶⁵ For example, Christ the King Parish School in Kansas City, Kansas charges over \$1,500 more in yearly tuition to non-parishioners compared to parishioners. *See Schedule of Fees and information for 2016–17*, CHRIST THE KING PARISH SCHOOL (KANSAS CITY, KANSAS), <https://ctkkck.eduk12.net/other?Item=Admissions> [<http://perma.cc/3WE8-KKWB>].

²⁶⁶ *See* KAN. STAT. ANN. § 72-4352(c) (West 2018) (allowing for scholarship values to be less than tuition and other costs).

²⁶⁷ Sugarman, *supra* note 57, at 20 (noting that how SGOs make their available scholarships known to the community may result in de facto discrimination against students who do not belong to a religious institution that is affiliated with the

Since schools and SGOs can refuse admission to students and distribute scholarship funds based on religious and ideological affiliation; the program promotes the sorting of students on the basis of religion or ideology.²⁶⁸ This may lead to greater political polarization, as curricula may become more radical and politically or ideologically charged.²⁶⁹ Additionally, allocating educational resources on the basis of religious or ideological affiliation will likely promote educational inequality.²⁷⁰ Public schools are a physical and institutional manifestation of “we” and the shared interests of the People.²⁷¹ Public schools act as a unifying force on America’s increasingly diverse society.²⁷² Public schools have traditionally been

SGO). See *Kansas Tax Credit Scholarship for Low Income Students Program*, CATHOLIC EDUCATION FOUNDATION, <https://www.cefks.org/sites/default/files/pdf/School%20Office%202018.pdf> [<https://perma.cc/RC7D-4M8G>] (providing an example of SGO marketing).

²⁶⁸ See *supra* notes 175–77.

²⁶⁹ For examples, some Christian school textbooks teach conceptions of American identity that are exclusionary and likely promote intolerance towards other racial, religious, or political groups. Bob Jones University Press and A Beka are two major publishers of such textbooks. See Frances R. A. Paterson, *Building a Conservative Base: Teaching History and Civics in Voucher Supported Schools*, 82 PHI DELTA KAPPAN 150 (2000). Beka and Bob Jones University Press textbooks are used by schools that participate in the Kansas program. See *Welcome to Overland Christian Schools*, OVERLAND CHRISTIAN SCHOOLS, http://overlandchristian.org/wp-content/uploads/2008/09/pr-booklet_web.pdf [<https://perma.cc/L8GU-NBUQ>]. Many of the program’s approved accrediting associations advertise Bob Jones University Press textbooks. See, e.g., *Member Benefits*, ASSOCIATION OF CHRISTIAN TEACHERS AND SCHOOLS, <http://www.actsschools.org/Benefits.html> [<https://perma.cc/A2QQ-FBJ7>] (offering “Curriculum Discounts” on Bob Jones University Press textbooks); see also *Recognized K-12 Accrediting Agencies*, KAN. STATE DEP’T OF EDUC., <http://www.ksde.org/Agency/Division-of-Learning-Services/Teacher-Licensure-and-Accreditation/Licensure/Recognized-K-12-Accrediting-Agencies> [<https://perma.cc/QWS8-BF58>].

²⁷⁰ See MARTHA MINOW, IN BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK 135 (2010).

²⁷¹ Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare As We Knew It*, 49 DUKE L.J. 493, 495 (1999) (noting that school choice risks “diminishing the sense of ‘we’, the collective to which everyone in the country should feel connected or responsible”).

²⁷² See Joel Kotkin, *The Changing Demographics of America: The United States Population Will Expand by 100 Million Over the Next 40 Years. Is This a Reason to Worry?*, SMITHSONIAN.COM (Aug. 2010) <https://www.smithsonianmag.com/travel/the-changing-demographics-of-america-538284/> [<https://perma.cc/QS83-3J4V>] (explaining how the declining birthrates in the American born population,

a concern for all citizens, even for those who did not utilize them.²⁷³ Further, like the current jurisdictional fragmentation of school districts, fragmentation of the school system along social²⁷⁴ and ideological²⁷⁵ grounds will likely lead to greater polarization.²⁷⁶ Politically polarized social groups, sorted into separate homogenous schools, are unlikely to share educational resources in an equitable manner.²⁷⁷

coupled with relatively high rates of immigration, is rapidly changing the demographics of the United States); MINOW, *supra* note 271, at 496.

²⁷³ MINOW, *supra* note 271, at 496.

²⁷⁴ Of course, public schools already tend to be segregated by social group (i.e. race or socioeconomic status). However, segregation by social group is somewhat constrained since it technically operates on the basis of political geography. A household with sufficient resources could most likely move to nearly any school district in the county. However, regardless of the amount of resources they possess, a family that practices Catholicism, Judaism, Islam, or other religion could not send their children to a school like Central Christian Academy in Wichita. *See generally supra* note 36.

²⁷⁵ BENJAMIN JUSTICE & COLIN MACLEOD, *HAVE A LITTLE FAITH: RELIGION, DEMOCRACY AND THE AMERICAN PUBLIC SCHOOL* 140 (2016) (discussing curriculum, published by Accelerated Christian Education, that included materials that teach that racial segregation is desirable and that homosexuality is a learned behavior); Charles L. Glenn, *Protecting and Limiting School Distinctiveness: How Much of Each?*, in *SCHOOL CHOICE THE MORAL DEBATE* 146, 148–49 (Alan Wolfe ed., 2009) (discussing how religious private schools may teach intolerance and promote a repressive understanding of “the good life”); Charles L. Venegoni & David J. Ferrero, *A Regulated Market Model: Considering School Choice in the Netherlands as a Model for the United States*, in *EDUCATING CITIZENS: INTERNATIONAL PERSPECTIVES ON CIVIC VALUES AND SCHOOL CHOICE* 368, 372 (Patrick J. Wolf & Stephen Macedo eds., 2004) (noting that a positive civic orientation may not endure in schools of choice without strong safeguards); Mark Gradstein & Moshe Justman, *The Melting Pot and School Choice*, 89 J.P. ECON. 871, 872 (2005) (noting that social polarization may increase under voucher programs if the content of private schools’ curriculum is not properly regulated).

²⁷⁶ *Supra* notes 182–83.

²⁷⁷ Along the lines of the fragmentation analogy above, populations that utilize suburban school districts tend to be more politically powerful than those utilizing urban school districts, and their relative political influence has usually resulted in public policy that acts to concentrate educational resources in suburban school districts. *See generally* SCOTT M. ROULIER, *SHAPING AMERICAN DEMOCRACY: LANDSCAPES AND URBAN DESIGN* (2017) (noting the concentration of wealth in suburban areas and the resulting political influence of suburban populations); Clarissa Rile Hayward, *Making Interest: on Representation and Democratic Legitimacy*, in *POLITICAL REPRESENTATION* 111, 131 (Ian Shapiro et al. eds., 2009) (noting that suburban whites have an interest in avoiding the sharing of educational resources, and instead try to avoid, rather than addressing, low performing urban school

Since taxpayer and SGO policymaking determine the distribution of funds, students who desire a school that taxpayers and SGOs have not supported will not benefit from the program.²⁷⁸ The options for a religious education through the program are limited to those groups who can attract taxpayer or SGO funding.²⁷⁹ This may result in wealthier and higher-population religious groups receiving funding while less wealthy religious groups are forced to rely solely on private funding.²⁸⁰ This seems to be the case in Kansas, where funds are primarily directed toward Catholic schools, instead of toward schools affiliated with, for example, Judaism or Islam.²⁸¹ A non-religious education is likely to be totally unavailable to families participating in the program.²⁸² No such non-religious schools have received funding through the program.²⁸³ Additionally, even maximum scholarships under the program do not cover the full cost of tuition at most of the state's non-religious schools.²⁸⁴

districts and the effects on the less economically advantaged populations they serve).

²⁷⁸ See KAN. STAT. ANN. § 72-4353(b) (West 2015) (giving taxpayer-donors the power to determine how funds are distributed between participating SGOs, regardless of student preferences for such education).

²⁷⁹ SGOs could raise funds through solicitations, which would favor well-resourced and organized SGOs who have the ability to market to wealthy individuals that approve of the SGOs mission. See Sugarman, *supra* note 57, at 19 (noting that SGOs could play an important role in soliciting donations). Since SGOs under the Kansas program tend to be affiliated with a particular religious sect, the ability to market and number of wealthy donors who agree with the school's mission would likely be a function of that religious sect's wealth. See KAN. STATE DEP'T OF EDUC., *supra* note 200, at 8 (listing SGOs and their affiliated schools).

²⁸⁰ See WELNER, *supra* note 53, at 95 (noting that the private policymaking process embedded within tax credit scholarship programs results in the allocation of tax benefits to support those institutions that are most popular with the state's wealthiest residents).

²⁸¹ All SGOs that received funding for the 2017–18 school year were affiliated with religious, Christian and Catholic private schools. See KAN. STATE DEP'T OF EDUC., *supra* note 200, at 2 (listing SGOs and their affiliated schools); see also "They Drew A Circle That Shut Me in": *The Free Exercise Implications of Zelman v. Simmons-Harris*, 117 HARV. L. REV. 919, 920 (2004) (noting that school choice programs may leave, "religious nonconformists" with no, "religiously palatable means of exercising" choice).

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Tuition and Fees 2017-2018*, TOPEKA COLLEGIATE SCHOOL, http://www.topekacollegiate.org/editoruploads/files/Tuition_and_Fees_2017-2018.pdf [<https://perma.cc/VH4H-UZT4>].

Finally, schools may have an incentive to not admit students from certain social groups based on the higher-average cost of educating such students.²⁸⁵ For example, students who belong to certain cultural-linguistic groups may be unattractive to private schools if such students are not proficient in the English language.²⁸⁶ The factors discussed in Section III, when considered in the aggregate, demonstrate a clear disparity that urges the consideration of out of the box solutions, such as will be discussed in Section IV.

IV. POLICY ALTERNATIVES

This section will discuss alternatives to the existing policy, such as: a) the possibility of reforming the program; b) other available forms of school choice; and c) how public school systems might be strengthened.

A. *Reforming the Program?*

The more a program regulates participating schools, the less likely private schools will be willing to participate.²⁸⁷ If participating schools were required to admit all students like public schools are, it is likely that private schools would be less willing to participate.²⁸⁸ Requiring scholarship values to cover tuition would result in much fewer students receiving scholarships and may result in less participating private schools.²⁸⁹ Many of these reforms would negate many of the supposed benefits that tax credit scholarship programs provide.²⁹⁰

²⁸⁵ WELNER, *supra* note 53, at 88.

²⁸⁶ See Sugarman, *supra* note 57, at 40 (noting some private schools may be poorly staffed to deal with non-English speakers).

²⁸⁷ See Robinson, *supra* note 158, at 259–60 (noting private school advocates are weary of “intrusive” government regulations).

²⁸⁸ See Sugarman, *supra* note 57, at 40 (noting the more control schools retain over admissions, the more likely existing private schools will participate in the program and that private schools may be unwilling or unable to deal with certain high-needs students).

²⁸⁹ WELNER, *supra* note 53, at 103 (noting that the downside of requiring grants to cover the full cost of tuition is that such a provision, “reduces the number of vouchers made available and also would likely reduce the portion of private schools that would enroll vouchered students”).

²⁹⁰ See Robinson, *supra* note 158, at 259–60. Many advocates of school choice make the argument that school choice advances religious freedom or pluralism. However, reforms imposing more regulation on participating private schools could act to lessen any of the positive effects school choice programs may have on

However, tax credit scholarships are an effective policy for directing public educational resources and tax benefits to politically favored groups.²⁹¹

religious freedom. *See, e.g.*, Michele Estrin Gilman, *Fighting Poverty with Faith: Reflections on Ten Years of Charitable Choice*, 10 J. GENDER RACE & JUST. 395, 396 (2007) (noting that, “many religious leaders fear that accepting government money would lead to increased bureaucratization of churches, church dependence on government funding, and government interference with religious practices”); David M. Powers, *The Political Intersection of School Choice, Race, and Values*, 60 ALA. L. REV. 1051, 1068 (2009) (noting that, “the religious liberty movement naturally does not desire to open up private Christian schools to government scrutiny and regulation”).

²⁹¹ Political leaders view tax expenditures as a way to distribute public money to their favored constituencies or actives. *See* WELNER, *supra* note 53, at 30–31. Tax expenditures subsidize private sector social goods or welfare, which primarily benefits the providers and recipients of the private welfare. *See id.* at 11 (noting that tax expenditures are often defended on the grounds that they subsidize “third-party” welfare, providers in the private sector”). Additionally, under progressive tax regimes, like the Kansas income tax, tax expenditures provide the largest financial benefits to citizens who make the most income. *See* CHRISTOPHER G. FARICY, WELFARE FOR THE WEALTHY: PARTIES, SOCIAL SPENDING, AND INEQUALITY IN THE UNITED STATES, 12 (noting that “[t]ax expenditures regressively distribute income by reducing tax rates more for those who pay higher marginal tax rates than for households with lower marginal rates”); *see also* KAN. STAT. ANN. § 79-32,110 (2017) (establishing a progressive income tax and therefore listing different marginal tax rates for different levels of income, with the marginal tax rising when taxpayer income rises above the listed thresholds). The Kansas program distributes money to Christian schools, providing benefits to the recipients of the program’s private-sector welfare benefits, which are Christian households and the welfare providers, which are Christian institutions. High income households or businesses and Christian households and organizations are major constituencies of the Republican party. *See, e.g.*, *Religious Landscape Study: Evangelical Protestants*, PEW RESEARCH CTR. (May 12, 2015), <http://www.pewforum.org/religious-landscape-study/religious-tradition/evangelical-protestant/> [https://perma.cc/JZ4Y-RHGF] (showing that Evangelical Protestants tend to be affiliated with the Republican Party); *Independents Take Center Stage in Obama Era: Party Affiliation and Composition*, PEW RESEARCH CENTER (May 21, 2009), <http://www.people-press.org/2009/05/21/section-1-party-affiliation-and-composition/> [https://perma.cc/5JH3-4HSE] (noting that high income households tend to be affiliated with the Republican party). Catholics are less likely to identify as Republican compared to Evangelicals. *Religious Landscape Study: Evangelical Protestants*, PEW RESEARCH CTR. (May 12, 2015), <http://www.pewforum.org/religious-landscape-study/religious-tradition/evangelical-protestant/> [https://perma.cc/JZ4Y-RHGF]; *Religious Landscape Study: Catholics*, PEW RESEARCH CTR., (May 12, 2015), <http://www.pewforum.org/religious-landscape-study/religious-tradition/catholic/> [https://perma.cc/2VR7-67YP]. However,

B. Other Forms of School Choice?

School choice is likely ineffective at improving educational outcomes or equality of educational opportunity. The “choice” available under school choice programs is often “coerced” decision.²⁹² Students, disproportionately and in many areas mostly minority, are forced to choose between low-performing public schools being drained of resources and whatever options are available under the school choice program.²⁹³ School choice programs shift the risk of school failure from society to individuals and families.²⁹⁴ In doing so, school choice programs allow for structural inequities to be ignored and go unaddressed.²⁹⁵ Additionally, school choice programs may always result in stratification and inequities as the most effective advocates for public schools, higher-educated parents and “education connoisseurs” are more likely to utilize choice.²⁹⁶ Better educated and more socially connected parents are also more likely to choose the best performing schools.²⁹⁷ Thus, even when income is controlled, choice is unlikely to contribute to an equitable public school system. Furthermore, school choice may contribute to polarization and

Catholics who utilize private schools are disproportionately Republican compared to the entire Catholic population. See THOMAS HUGHSON, *CONNECTING JESUS TO SOCIAL JUSTICE: CATHOLIC CHRISTOLOGY AND PUBLIC THEOLOGY* 66 (2013) (noting Catholic Republicans attend Catholic schools more than Catholic Democrats). Additionally, Republicans and conservatives often favor tax expenditures over direct expenditures, because, “they do not accept the equivalence” between these two types of government expenditures. See HOWARD, *supra* note 53, at 3.

²⁹² See James, *supra* note 10, at 1085–88.

²⁹³ See Mark Dynarski, *On Negative Effects of Vouchers*, BROOKINGS INSTITUTION (May 26, 2016), <https://www.brookings.edu/research/on-negative-effects-of-vouchers/> [<https://perma.cc/J9C5-7QD8>].

²⁹⁴ See, e.g., Minow, *supra* note 271, at 496 (noting school choice allows “recipients and providers” to “retreat from a sense of the collective good” and may result in citizens coming “to see schooling and caring for the poor as outside their sphere of concern”).

²⁹⁵ See James, *supra* note 10, at 1085.

²⁹⁶ See James, *supra* note 10, at 1104–05 (noting “marginalized minority parents” are less likely to have the necessary information for making wise school choices and that those students who do not exit are left behind in public schools, which are rapidly declining as a result of the exit of better educated and more socially connected families); Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 *GEO. J. POVERTY L. & POL'Y* 1, 8 (2008) (noting decision making is affected by a decider’s social status and personal connections).

²⁹⁷ See James, *supra* note 10, at 1104–05.

discrimination by allowing social groups to segregate themselves into more socially and ideologically homogenous schools.²⁹⁸

C. Strengthening the System of Public Schools

Looking to the ideologies of market fundamentalism²⁹⁹ and consumerism³⁰⁰ are unlikely to provide solutions that the system of public schools requires.³⁰¹ At best, such policies could lead to slightly improved schools for some students.³⁰² Due to America's ideological shift toward market fundamentalism and the embrace of neoliberal policies by the majority of politicians in both major political parties, the school policy debate has shifted focus away from policies that can help improve the public schools for all students.³⁰³ Perhaps the best policy to address inequities within the system of public education would be to direct more resources to schools that are fully embedded within the system and that badly need such resources.³⁰⁴ Reforms, such as changes to assessment testing, which could give teachers more flexibility in the classroom, could be effective at improving student outcomes.³⁰⁵ Other reforms, like greater regionalism in school district

²⁹⁸ See Minow, *supra* note 271, at 496 (noting the potential for school choice policies to cause “the retreat” of recipients and providers of schooling into homogeneous groups).

²⁹⁹ See FRED L. BLOCK & MARGARET R. SOMERS, *THE POWER OF MARKET FUNDAMENTALISM, KARL POLANY'S CRITIQUE* 3 (2014) (defining market fundamentalism as the “quasi-religious certainty expressed by contemporary advocates of market self-regulation”).

³⁰⁰ See Minow, *supra* note 271, at 495 (noting school choice converts “public expenditures for public purposes into individualized consumer choices”).

³⁰¹ See CENTER FOR TAX AND BUDGET ACCOUNTABILITY, *ANALYSIS OF INDIANA SCHOOL CHOICE PROGRAM* (2015).

³⁰² See WELNER, *supra* note 53, at 105–06; Levin, *supra* note 63, at 1064 (noting that, “there may be negative (or positive) externalities for those” students who do not receive tax credit scholarships, including, “those who remain in public schools or who attend private schools without receiving SSO scholarships”).

³⁰³ See *supra* note 216.

³⁰⁴ Increases in state funding to low-income school districts significantly improves performance in those districts and results in a narrowing of the gap between students from low-income and higher-income school districts. Bruce D. Baker, *Evaluating the Recession's Impact on State School Finance Systems*, 22 *EDUC. POL'Y ANALYSIS ARCHIVES* 4 (2014).

³⁰⁵ See generally *PENCILS DOWN: RETHINKING HIGH-STAKES TESTING AND ACCOUNTABILITY IN PUBLIC SCHOOLS* (Wayne Au, Melissa Bollow Temple eds., 2012) (providing overview of problems associated with high stakes testing and suggesting possible reforms to make testing fairer and more accurate in relation to student outcomes).

governance, could possibly allow for a more equitable allocation of resources across public schools; especially in metropolitan areas.³⁰⁶ Greater regional cooperation in affordable housing policy could also allow for more equity in public school systems.³⁰⁷ Additionally, “systems based”³⁰⁸ reforms, such as programs to build overall “teaching capacity,”³⁰⁹ have been successful in other countries and would likely be successful here, too.³¹⁰

V. CONCLUSION

Like many other states, the Kansas public-school system is plagued by structural inequities caused by historical and contemporary discriminatory policies. The Kansas Tax Credit Scholarship for Low Income Students Program is not a viable policy for promoting greater equity within the Kansas public school system. School choice policies in general are unlikely to lead to improved aggregate student outcomes or equality in educational opportunity. Markets, consumerism, and competition are great when applied in proper circumstances. The provision of the most important public good within our society is likely not a proper circumstance.³¹¹ Policies aimed at improving the

³⁰⁶ See generally Angela Glover Blackwell, *It Takes A Region*, 31 FORDHAM URB. L.J. 1303, 1306 (2004) (discussing regionalism and the problems that are found in metropolitan areas that regionalism policies could address); see also Erika K. Wilson, *Toward A Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1468–78 (2014) (proposing an “Equitable Federated Regionalism” framework to address problems in metropolitan area public education systems).

³⁰⁷ Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 846 (2011) (discussing the Gautreaux Assisted Housing program in the Chicago Metropolitan Area, which assisted low income families in moving to middle-class suburbs).

³⁰⁸ A systems-based approach aims to improve results across the entire system. On the other hand, school choice improves results only for those who exit the system and choose a high performing school. See Michale Fullan, *Seminar Series 204: Choosing the Wrong Drivers for Whole System Reform* (2011), <https://edsources.org/wp-content/uploads/old/Fullan-Wrong-Drivers11.pdf> [<https://perma.cc/CVE3-SCN7>].

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ See Aldana, *supra* note 255, at 36 (“[T]he market theory of school choice is in direct competition with educational equity.”); Minow, *supra* note 271, at 496 (noting a privatized education system is likely to be insufficient to “promote the public purposes of social cohesion, equal opportunity, and respect for religious and

state's system of public schools should be pursued. Policies seeking to provide public education through stratified markets should be avoided. Instead of creating quasi-public-school systems that exist side-by-side with the already existing public-school system, efforts at reform should be directed at the already established school system.

ethnic diversity"); *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002, 2002–03 (1996) (noting that, “though school choice reforms may stimulate innovation and improve the average quality of schools, they also risk creating pockets of failure – public schools in economically depressed areas that retain only the most disadvantaged students, that have difficulty attracting qualified teachers, that lack adequate funding, and that serve a body of uninvolved parents and guardians. Even if a competitive education market ultimately weeds out deficient schools, until those schools go out of business, students will be deprived of an adequate education.”).