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## A Winn for Educational Pluralism

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NICOLE STELLE GARNETT

## A *Winn* for Educational Pluralism

Over the past decade, scholarship tax credit programs, like the one at issue in *Arizona Christian School Tuition Organization v. Winn*,<sup>1</sup> have emerged as a popular education policy tool. While details vary by state, scholarship tax credit programs allow individuals or corporations (and in some cases, including Arizona, both) to receive a state income tax credit for donations to charitable organizations—called “scholarship tuition organizations” in Arizona—that provide scholarships for children to attend private schools. Currently, seven states—Arizona, Florida, Georgia, Indiana, Iowa, Pennsylvania, and Rhode Island—have such programs in place. During the 2010-2011 school year, the scholarship organizations participating in these programs awarded nearly \$290 million through over 123,000 scholarships.<sup>2</sup> With two exceptions, scholarship tax credit programs exclusively target low-to-moderate-income students. For example, in Florida—the state with the largest scholarship tax credit program in the nation—eligibility is limited to students qualifying for free or reduced-price lunches, and scholarships are disproportionately awarded to Latino and African-American students.<sup>3</sup> And the most recent evidence suggests that even the non-means-tested tax credit program at issue in *Winn*—Arizona’s individual scholarship tax credit program—disproportionately benefits low-

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1. 131 S. Ct. 1436 (2011).

2. ALLIANCE FOR SCH. CHOICE, HOPE FOR AMERICA’S CHILDREN: SCHOOL CHOICE YEARBOOK 2010-11, at 12 (2010), available at <http://www.allianceforschoolchoice.org/UploadedFiles/Home/School%20Choice%20Yearbook%202010-11.pdf>.

3. FLA. OFFICE OF INDEP. EDUC. & PARENTAL CHOICE, FLORIDA TAX CREDIT SCHOLARSHIP PROGRAM: FEBRUARY QUARTERLY REPORT 3 (2011), available at [http://www.floridaschoolchoice.org/Information/CTC/quarterly\\_reports/ftc\\_report\\_feb2011.pdf](http://www.floridaschoolchoice.org/Information/CTC/quarterly_reports/ftc_report_feb2011.pdf).

income kids.<sup>4</sup> Thus, scholarship tax credit programs help open the doors of high-quality private schools to thousands of children of modest means who might otherwise languish in failing public schools.

Scholarship tax credit programs have the potential to make an even greater impact on the educational landscape. In many states, the scholarship organizations participating in the existing programs could, by law, raise more money than they currently do. For example, in 2009, Arizona's Corporate School Tuition Organization Tax Credit raised \$7 million less than the \$14.4 million maximum allowed for the program;<sup>5</sup> in 2010, Georgia's scholarship tax credit program attracted \$25 million less in donations than the \$50 million allowed by state law;<sup>6</sup> and Indiana's program garnered only \$435,050 in donations in the first year of its operation, despite state law allowing \$5 million.<sup>7</sup> And the Arizona program at issue in *Winn*—which provides a credit against individual state income tax burdens—is not capped at all. Last year, the program attracted \$52 million in donations to scholarship organizations, an amount that is clearly only a fraction of the total tax dollars that might be allocated to scholarships by taxpayers.<sup>8</sup> Moreover, not only do the fiscal caps on the existing programs tend to increase each year, but a number of other states are poised to adopt new programs, including New Jersey, Oklahoma, and Ohio.<sup>9</sup>

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4. See Vicki E. Murray, *An Analysis of Arizona Individual Income Tax-Credit Scholarship Recipients' Family Income, 2009-10 School Year 6* (Harvard Kennedy Sch. Program on Educ. Policy & Governance, Working Paper No. 10-18, 2010), available at [http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG10-18\\_Murray.pdf](http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG10-18_Murray.pdf). Arizona's Corporate Scholarship Tax Credit Program is means-tested. ALLIANCE FOR SCH. CHOICE, *supra* note 2, at 39.
  5. See *id.* at 38, 39.
  6. See *id.* at 44.
  7. See *id.* at 45.
  8. See *id.* at 38; see also ALLIANCE FOR SCH. CHOICE, *SCHOOL CHOICE YEARBOOK 2008-09*, at 38 (2009), available at [http://www.allianceforschoolchoice.org/UploadedFiles/ResearchResources/Yearbook\\_02062009\\_finalWEB.pdf](http://www.allianceforschoolchoice.org/UploadedFiles/ResearchResources/Yearbook_02062009_finalWEB.pdf) (reporting that the program attracted over \$54 million in donations in 2008 to 2009).
  9. See John Mooney, *Feelings Run High as Opportunity Scholarship Act Moves to the Assembly*, N.J. SPOTLIGHT (Feb. 3, 2011), <http://www.njspotlight.com/stories/11/0202/2314>; Steve Olafson, *Oklahoma Passes Tax Credit for Private School Scholarships*, REUTERS (Apr. 26, 2011, 8:39 PM), <http://www.reuters.com/article/2011/04/27/us-oklahoma-private-schools-idUSTRE73Q03920110427>; Press Release, School Choice Ohio, Tax Credit Scholarship Bill Passes Out of Ohio Senate Committee (Apr. 14, 2011), available at <http://www.prnewswire.com/news-releases/tax-credit-scholarship-bill-passes-out-of-ohio-senate-committee-119865274.html>. Virginia's House of Delegates passed a bill to establish a scholarship tax credit program, but the

The Supreme Court's 2002 decision in *Zelman v. Simmons-Harris* should have eliminated all doubts about the constitutionality of scholarship tax credits.<sup>10</sup> Indeed, the underlying claim in *Winn*—that Arizona's scholarship tax credit program violated the Establishment Clause because the scholarship-distribution policies of private recipients of charitable contributions were not religion-neutral<sup>11</sup>—bordered on frivolous. The claim, if taken seriously, would call into question the constitutionality of large portions of the Internal Revenue Code (as well as numerous state income tax codes) since undoubtedly the activities of many recipients of tax-free charitable donations are not religion-neutral. (Consider, for example, whether the Hillel Foundation violates the Establishment Clause by focusing its efforts on Jewish students.) The Ninth Circuit's opinion<sup>12</sup> taking the claim seriously was therefore both lawless and utterly befuddling.

Opponents of school choice undoubtedly relished the Ninth Circuit's adventure, but their victory proved a pyrrhic one. In fact, the *Winn* plaintiffs' decision to challenge Arizona's scholarship tax credit program may well be one of the great tactical blunders in constitutional litigation history. While the defendants surely would have welcomed a clear statement rejecting the underlying Establishment Clause argument in *Winn*, the decision rejecting the claim on standing grounds represents a far more sweeping victory for educational choice. The Supreme Court's holding—that *Flast v. Cohen*'s exception to the no-taxpayer-standing rule is inapplicable in the tax-credit context<sup>13</sup>—forecloses many of the Establishment Clause nuisance suits that inevitably follow the enactment of a new school choice program. *Winn* also may embolden litigation-phobic state legislators to embrace scholarship tax credits. And it most certainly provides ammunition for school choice

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measure failed in that state's Senate Finance Committee. The bill's sponsor has pledged to revive the proposal next year. Olympia Meola, *Senate Panel Votes Down Tax Credits for Private School Scholarships*, RICHMOND TIMES-DISPATCH, Feb. 16, 2011, <http://www2.timesdispatch.com/news/virginia-politics/2011/feb/16/tdmain07-senate-panel-votes-down-tax-credits-for-p-ar-846026>.

10. 536 U.S. 639 (2002) (rejecting an Establishment Clause challenge to school voucher program).
11. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440-41 (2011).
12. *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002).
13. *Winn*, 131 S. Ct. at 1447 (holding that the Arizona tax credit “does not visit the injury identified in *Flast*”); cf. *Flast v. Cohen*, 392 U.S. 83, 105-06 (1968) (holding that “a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power”).

proponents who constantly face political opponents insistent on convincing policy makers and courts that school choice is unconstitutional. In other words, *Winn* clears a constitutional path for a dramatic expansion in school choice in the United States, a path likely to be paved in many states by scholarship tax credits.

Scholarship tax credits have injected new life into the school choice movement (and new resources into the private education sector) at an opportune time—that is, at a time when educational opportunities are desperately needed and educational pluralism is seriously threatened. Today, while the diversity of the secular school sector is blossoming thanks to an explosion in charter schools over the past two decades, the religious sector is diminishing. The primary, but not exclusive, driver of this trend is the rapid disappearance of Catholic schools from the educational landscape. More than 1600 Catholic schools, most of them located in urban neighborhoods, have closed during the last two decades.<sup>14</sup> Dozens more close each year, and many hundreds more labor under the strains of mounting costs, declining enrollments, and competition from charter schools.<sup>15</sup> Thus, one way that scholarship tax credits may accomplish their goal of expanding educational opportunities for the poor is simply by helping to sustain the very schools that have long provided a high-quality education, especially in America's inner cities—that is, urban Catholic schools. Beginning with James Coleman's seminal work, decades of research has demonstrated Catholic schools' immense contributions to the common good. Inner-city Catholic schools in particular have long outperformed public schools at the difficult task of educating poor minority students.<sup>16</sup> Furthermore, my own research with Margaret Brinig links Catholic school closures in Chicago both to increased disorder and crime and to reduced levels of neighborhood social cohesion, findings that we believe strongly support the conclusion that Catholic schools' benefits extend beyond the students that they serve. These schools are important generators of social capital in urban neighborhoods—social capital that is being eroded as they

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14. See Richard W. Garnett, *Treasure A.C.E.*, NAT'L REV. ONLINE (Sept. 10, 2008, 6:00 AM), <http://www.nationalreview.com/articles/225595/treasure-c-e/richard-w-garnett>.
  15. See Peter Meyer, *Can Catholic Schools Be Saved?*, EDUC. NEXT, Spring 2007, at 12, 16-18, available at [http://educationnext.org/files/ednext\\_20072\\_12.pdf](http://educationnext.org/files/ednext_20072_12.pdf).
  16. See James S. Coleman, *Quality and Equality in American Education: Public and Catholic Schools*, 63 PHI DELTA KAPPAN 159 (1981); Derek Neal, *The Effects of Catholic Secondary Schooling on Educational Achievement*, 15 J. LAB. ECON. 98 (1997); Paul E. Peterson, *A Courageous Look at American High Schools: The Legacy of James Coleman*, EDUC. NEXT, Spring 2010, at 24, 33, available at [http://educationnext.org/files/ednext\\_20102\\_24.pdf](http://educationnext.org/files/ednext_20102_24.pdf).

gradually disappear from the urban landscape.<sup>17</sup> There is evidence that scholarship tax credit programs have helped stem the tide of Catholic school closures and enabled Catholic schools to compete with tuition-free charter schools, thereby preserving all of these important benefits.<sup>18</sup>

But the benefits of scholarship tax credits extend far beyond Catholic schools. Funds generated by scholarship tax credits support students at a wide variety of secular and religious schools. This year in Florida, scholarship tax credits assisted students at nearly 1100 secular and religious schools; in Arizona at 370; and in Pennsylvania at 275.<sup>19</sup> While it is difficult to demonstrate causation, the trends (and anecdotal evidence) strongly suggest that scholarship tax credits also have enabled new schools, both religious and secular, to open in a number of states, thereby enhancing the diversity of educational options available to students who desperately need them.<sup>20</sup> And, as I have previously argued, by increasing the affordability and diversity of educational options available in cities, scholarship tax credits may also enable cities to retain the young parents who all too frequently flee to suburbs and their high-performing public schools.<sup>21</sup>

Much of the Supreme Court's Establishment Clause canon was developed in the context of—and was animated by anxiety about—programs extending

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17. See Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 NOTRE DAME L. REV. 887 (2010); Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools and Broken Windows* (Notre Dame Law Sch., Legal Studies Research Paper No. 10-04, 2011), available at <http://ssrn.com/abstract=1564254>.
  18. See Matthew Ladner, *The Impact of Charter Schools on Catholic Schools: A Comparison of Programs in Arizona and Michigan*, 11 CATH. EDUC.: A J. OF INQUIRY & PRAC. 102 (2007), available at <http://ejournals.bc.edu/ojs/index.php/catholic/article/view/995/1199>; Sherry Anne Rubiano, *Arizona's Catholic Schools Flourishing: Big Enrollments Buck Downturn Seen Elsewhere*, ARIZ. REPUBLIC, May 11, 2008, <http://www.azcentral.com/arizonarepublic/local/articles/0511edcatholic0511.html>.
  19. ALLIANCE FOR SCH. CHOICE, *supra* note 2, at 38, 41, 53.
  20. See D. Aileen Dodd, *Georgia's Catholic Schools Are Hoping To Expand*, ATLANTA J.-CONST., Feb. 2, 2010, <http://www.ajc.com/news/georgias-catholic-schools-are-288469.html>; David Salisbury, *School Choice Can Help States Meet Budget Challenges*, FOXNEWS.COM (Feb. 4, 2003), <http://www.foxnews.com/story/0,2933,77541,00.html>; Anya Sostek, *Diocese Opens First School Since 1960s*, PITTSBURGH POST-GAZETTE, Sept. 5, 2007, <http://www.post-gazette.com/pg/07248/814625-52.stm>; Letitia Stein, *Parents Snap Up School Vouchers*, ORLANDO SENTINEL, Apr. 3, 2002, [http://articles.orlandosentinel.com/2002-04-03/news/0204030321\\_1\\_school-vouchers-new-private-schools-schools-for-students](http://articles.orlandosentinel.com/2002-04-03/news/0204030321_1_school-vouchers-new-private-schools-schools-for-students).
  21. Nicole Stelle Garnett, *Affordable Private Education and the Middle Class City*, 77 U. CHI. L. REV. 201 (2010).

public resources to religious schools, especially Catholic schools.<sup>22</sup> At least since the American bishops began to demand a fair share of public education funds in the mid-nineteenth century, opponents have believed that Catholic schools posed a threat to American democracy.<sup>23</sup> In 1875, for example, Speaker of the House James G. Blaine proposed an amendment to the U.S. Constitution prohibiting the public funding of “sectarian schools.” While Blaine’s amendment failed by four votes in the Senate, thirty-three states subsequently incorporated similar prohibitions into their constitutions, either voluntarily or as a condition of entering the union.<sup>24</sup> More than a century later, *Flast* ensured that the federal courts would review virtually every governmental effort to assist students in religious schools according to rules that shared an intellectual and political pedigree with James Blaine.<sup>25</sup> The plaintiffs in *Flast* challenged, on Establishment Clause grounds, certain applications of Title I and Title II of the Elementary and Secondary Education Act of 1965 – a federal statute that funds (and continues to fund) educational services and materials for low-income children, including those enrolled in religious schools. That anti-Catholic sentiment persisted in the minds of some Justices deciding *Flast* is made clear in Justice Douglas’s concurring opinion. After analogizing the Title I and Title II programs to state efforts to avoid desegregation decrees, Douglas warned that “[t]he mounting federal aid to sectarian schools is notorious, and the subterfuges numerous,” and cited as support an explicitly anti-Catholic editorial describing how “clerics” and “priests” hoped to divert funds from facially neutral student aid programs for “sectarian” purposes.<sup>26</sup>

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22. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 288–91, 300–20 (2001).

23. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 219–29 (2002); JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 151–56 (1999).

24. Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657 (1998); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117 (2000).

25. See Jeffries & Ryan, *supra* note 22, at 297–318. For a thorough discussion of the influence of anti-Catholicism on the development of Establishment Clause doctrine, see HAMBURGER, *supra* note 23, at 449–92.

26. *Flast v. Cohen*, 392 U.S. 83, 113 & n.9 (1968) (Douglas, J., concurring). Douglas’s comment was, remarkably, not the most anti-Catholic one emanating from the Supreme Court on the day that *Flast* was decided. On the contrary, in a companion decision, the Court upheld a New York law permitting public school districts to lend secular textbooks to students in parochial schools. Justice Hugo Black dissented, darkly predicting that:

The same powerful sectarian religious propagandists who have succeeded in securing passage of the present law . . . can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their

These scare tactics left deep marks in American law and on the American psyche. Indeed, a case can be made that scholarship tax credits themselves are a product of the success of those scare tactics. Scholarship tax credits emerged in the late 1990s as an alternative to controversial school voucher programs. Proponents believed that tax credits would be both more politically palatable than vouchers and more likely to clear state constitutional hurdles, especially the “Little Blaine” Amendments described above, which today represent the most substantial legal hurdle to school choice.<sup>27</sup>

Over the past three decades, as state legislatures have gradually extended public assistance to students attending private schools on a religion-neutral basis—and courts have come to reject legal challenges to these efforts with some consistency—American education policy finally has begun to embrace authentic educational pluralism. *Winn* allows policymakers the constitutional space to promote further this pluralism through scholarship tax credits. This is, despite the handwringing of the dissenting Justices, a victory for civil society.

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particular brand of religion. And it nearly always is by insidious approaches that the citadels of liberty are most successfully attacked.

Bd. of Educ. v. Allen, 392 U.S. 236, 251-52 (1968) (Black, J., dissenting) (internal footnote omitted).

27. See, e.g., Mark Tushnet, *Vouchers After Zelman*, 2002 SUP. CT. REV. 1, 15-18.