Catholic University Law Review

Volume 63
Issue 2 *Winter 2014*

Article 5

6-24-2014

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Cover Page Footnote

Associate Dean for Academic Affairs and Associate Professor of Law, Ave Maria School of Law. I would like to thank Dylan Marck for research support. In addition, I would like to thank Professor Kelly Mullally, whose comments on prior work encouraged me to examine more fully the implications of tax credits for school scholarship organizations. All errors are, of course, my own.

WINNING THE CROWD: HARNESSING TAXPAYER CHOICES TO IMPROVE EDUCATIONAL QUALITY

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Ralph Waldo Emerson once wrote that "[a] mob is a society of bodies voluntarily bereaving themselves of reason and traversing its work. The mob is man voluntarily descending to the nature of the beast."[1] Emerson's words echo a common view of the inherent inefficiencies of tasking groups with generating innovative solutions to complex problems. Such a view is premised on the idea that the group will inevitably suppress effect on its wisest member, or, at best, will cause the wisest member to reach his solution in a much more inefficient manner than if that member had simply been asked to solve the problem alone. What if, however, the group was not inferior to the individual because it was a group, but simply because it was not effectively designed to capitalize on the expertise of each individual member? What if such a group could be redesigned so that the solution it produced was superior to any solution that any individual member could generate alone? Recent research indicates that groups can indeed produce superior solutions if they are designed to function as "wise crowds."[2] Not all crowds are wise, but data repeatedly shows that solutions generated by a crowd meeting the criteria of a wise crowd are much more likely to be correct than the solutions produced by other decision-making mechanisms.[3]

Although crowd wisdom is often applied to corporate organizations, it can also be applied to policy choices in democratic societies.[4] Admittedly, crowd wisdom is not as naturally applicable to policy decisions because one choice is not always quantifiably superior to another choice. Nevertheless, even if

1. R. W. EMERSON, *Compensation*, *in* ESSAYS 75, 98 (Boston, James Munroe & Co. 1841).

2. *See* JAMES SUROWIECKI, THE WISDOM OF CROWDS 270 (2004) ("Choosing candidates and making policy in a democracy are not . . . cognition problems and so we should not expect them to yield themselves to the wisdom of the crowd.").

3. *Id.* at 10.

4. *Id.* at 270 ("There's no reason to believe that crowds would be wise in most situations but suddenly become doltish in the political arena.").

demonstrating the superiority of one policy choice is difficult, there is no reason to think that removing policy choices from the democratic process produces worse outcomes.[5] Trying to make policy choices with a mechanism designed to harness crowd wisdom has the potential to provide greater decisional advantages than the standard democratic process, to the extent that certain policy choices are subject to quantifiable, outcome-based comparisons.

One logical policy area in which to apply crowd wisdom is educational policy, which currently exhibits a host of competing ideas for the best mechanism to improve student outcomes. These competing ideas can be seen in the wide variety of schools that compete for resources to implement their approaches. Public schools, charter schools, magnet schools, International Baccalaureate programs, secular private schools, religious private schools, home schooling, and other models all offer unique approaches to education. Even within these types of schools, different educational teaching philosophies abound. Although some schools unquestionably achieve better outcomes for their students than others, educational policy analysts do not agree on the best method by which to measure the quality of any particular school because of the many factors involved in educating students.[6] In other words, some schools are likely better than others, but separating strong schools from weak schools is difficult. Employing crowd wisdom may provide a better solution to this problem. Because there are so many competing educational models and so many variables that influence the success of educational programs, the information needed to determine which programs work for which communities is likely spread over a

5. *See id.*

6. Theresa Perry, *The Historical and Contemporary Foundations for Robert Moses's Call to Make Quality Education a Constitutionally Guaranteed Right*, *in* QUALITY EDUCATION AS A CONSTITUTIONAL RIGHT vii, xi (Theresa Perry et al. eds., 2010) ("We don't have an agreement of what constitutes quality education, nor does there seem to be a clear pathway to a constitutional amendment guaranteeing quality education."). For example, the amount of money spent on education is likely an imperfect proxy for measuring educational quality because

> low-spending states have a disproportionate share of poor, minority, and LEP children whose educational needs are only roughly taken into account by applying pupil weights to spending data. Student demographics, parental education and income, and other aspects of family background undoubtedly play a role in explaining performance disparities across states. Moreover, states vary in how they spend education funds, in their degree of intrastate finance equity, in the standards they set for teachers and students, and in the policy and regulatory environment they establish for schools and districts on matters ranging from collective bargaining to assessments and accountability. All of these factors likely bear on the efficacy of education spending and complicate the relationship between resources and results.

Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2077–78 & n.116 (2006) (citing several studies and articles that comment on the relationship between resources and student outcomes). Although the relationship between resources and outcomes is imperfect, devoting increased resources to schools that rank in the lower margins of educational outcomes would likely have a positive effect. *See id.* at 2078–82. The complicated host of factors driving differences in educational outcomes likely explains disparities both among different states and within states themselves.

diverse population. In addition, despite the disagreement about what constitutes educational quality, success can be measured with test scores, college placement, and lifetime earnings. Accordingly, although educational quality is, in many respects, the type of difficult policy choice that may not benefit from crowd wisdom as much as a decision with a clear solution, many measures of educational success are quantifiable and educational quality policy can benefit from crowd wisdom principles.

In order to apply crowd wisdom to educational policy choices, a mechanism must be in place to harness crowd wisdom and use it to improve educational quality. The most common mechanism used to channel crowd wisdom in the United States is the democratic process. However, this is an imperfect method of applying crowd wisdom to policy choices because it is difficult to reflect the many competing solutions to a policy problem on a ballot.[7] Although one obvious solution is simply to empower the electorate to make more policy on a referendum basis, it is not ideal because mobilizing the voting apparatus for an election is inherently costly and time consuming, thus preventing innovative ideas from quickly emerging and testing themselves in the policy marketplace. Rather, a more responsive mechanism to harness crowd wisdom exists, in the form of tax incentives.

This Article proposes that tax incentives are an effective way of channeling crowd wisdom to improve educational quality. Specifically, the Article focuses on a new type of tax incentive with which several states have experimented: tax credits for contributions to organizations that fund scholarships and innovative educational programs. Part I discusses the defining characteristics of a wise crowd. Part II then explains why tax credits are the best mechanism for applying crowd wisdom to educational policy decisions. Next, Part III considers school scholarship tax credit programs and illustrates how they can be most effectively used to create an appropriate mechanism for harnessing crowd wisdom. Finally, the Article concludes that school scholarship tax credit programs should be expanded in a modified form because they are an effective mechanism for harnessing crowd wisdom and provide many of the benefits inherent in other school choice programs without as much controversy.

I. ACHIEVING CROWD WISDOM RATHER THAN MOB MENTALITY: THE CHARACTERISTICS OF A WISE CROWD

Before proposing a mechanism through which crowd wisdom and state tax credits will improve educational quality, it is necessary to define the conditions in which a crowd-based decision is superior to an individualized or centralized decision. Simply tasking a crowd—rather than an individual—with making a

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7. *See* Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 393 (1998) (noting that referendums are effective in determining whether the electorate affirmatively or negatively favored a particular proposition, but are not effective in determining how a particular policy choice should be implemented).

decision does not guarantee a superior result; in fact, a crowd could produce a vastly inferior result.[8] For a crowd to qualify as a wise crowd, it must possess four characteristics: (1) diversity of opinion based on individual members' private information; (2) independence, in that each member of the crowd must be able to form his judgment without influence from other crowd members; (3) decentralization, in that crowd members must be able to specialize base their opinions on local knowledge; and (4) aggregation, in that there must be some mechanism for the members to reach a collective decision from their individual judgments.[9] Crowds possessing all four of these characteristics are likely to make better decisions than individuals[10] because, assuming the crowd is large enough, individual errors will cancel each other out in the decision-making process.[11] Fleshing out the requirements of each of these four characteristics is helpful to understand how a wise crowd is formed.

A. Diversity

A wise crowd requires diversity, "not in a sociological sense, but rather in a conceptual and cognitive sense."[12] The best form of crowd diversity occurs on multiple levels: a diverse group of ideas, a diverse group of decision-makers to choose among those ideas, and a diverse group of funding sources for those ideas.[13] Although this type of diversity does not guarantee that every idea will be successful, it does create an environment in which successful ideas are more likely to emerge and that unsuccessful ideas are removed from the marketplace relatively quickly.[14] Of course, this type of diversity is much easier to achieve in large groups.[15] A critical component of crowd diversity is that the members of the group must possess some level of information relevant to making a good decision, although each member need not have the same amount of information.[16] Indeed, if the members of a group do have varying degrees of

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8. SUROWIECKI, *supra* note 2, at xix.

9. *Id.* at 10.

10. A superior decision is not guaranteed one hundred percent of the time; rather, it is simply more likely that a wise crowd will make a decision superior to that of an individual. *See id.* at 34–35.

11. *Id.* at 10. Once the errors have been cancelled out, only the crowd's collective information remains. *Id.* However, "even with the errors canceled out, it's possible that a group's judgment will be bad. For the group to be smart, there has to be at least some information in the 'information' part of the 'information minus error' equation." *Id.*

12. *Id.* at 28.

13. *See id.* When such diversity exists, "the chances that at least someone will take a gamble on a radical or unlikely idea obviously increases." *Id.*

14. *See id.* at 28–29.

15. *See id.*

16. *Id.* at 31. Although choosing group members who possess at least some degree of useful information is ideal for a wise crowd, determining exactly who should be in a particular group is so difficult that it is generally better to simply select the group randomly; spending time trying to determine precisely who should be in the group usually is a wasted effort. *See id.* at 276.

information, this group should produce better results than two individuals with high intelligence and large amounts of information.[17] Finally, it is beneficial if there is an incentive system in place to encourage group members to focus on achieving the best outcomes.[18]

B. Independence

In order for the group to be wise, the members must also have the ability to make individual evaluations as free as possible from the influence of the other group members.[19] Independence is necessary because "[t]he more influence we exert on each other, the more likely it is that we will believe the same things and make the same mistakes."[20] The most effective way to achieve independence in a group is to require the members make decisions simultaneously, or as close to simultaneously as possible, rather than in sequence.[21]

C. Decentralization

The third essential characteristic to a wise crowd is decentralization, which, combined with specialization, maximizes the benefits of different, informed points of view.[22] Decentralization is critical to harnessing group members' innate knowledge that cannot easily be communicated to other members.[23] This tacit, specialized knowledge is critical because the individuals closest to a problem likely possess superior knowledge for solving the problem than a centralized authority.[24] Decentralization indicates that crowd wisdom is most effective if an organization or entity allows local problems to be addressed at the local level rather than at a centralized level.[25] This can produce an overall more effective organization that embodies the sum of these individualized solutions, as opposed to top-down solutions imposed throughout the organization.[26]

Although decentralization fosters an environment in which specialists can apply their unique, independent perspectives toward solving a problem, it is not

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17. *See id.* at 31.

18. *See id.* at 20. Interestingly, these incentives do not necessarily need to be financial nor do they necessarily need to be large in order to achieve the desired effect. *Id.* at 279–80. Determining the appropriate incentive level can nevertheless be difficult so that the incentive does not distort behavior towards an solution away from the ideal one. *Id.* at 280.

19. *Id.* at 42–43.

20. *Id.* at 42. When independence breaks down, a group may "become individually smarter but collectively dumber." *Id.*

21. *Id.* at 64.

22. *See id.* at 71 (explaining that specialization "increases the scope and the diversity of the opinions and information in the system").

23. *Id.*

24. *Id.* (noting that the concept of decentralization and its benefit to problem solving dates back to ancient Athens).

25. *See id.* at 211–12.

26. *See id.* at 212.

particularly efficient.[27] Without some process to aggregate the group members' various solutions, there is a risk that valuable information will not be disseminated to or valued by the rest of the group.[28] A decentralization system without a mechanism to mitigate this inefficiency will not necessarily be more advantageous than a centralized one.[29]

D. Aggregation

In order to address the inefficiencies inherent to a decentralized system, a wise crowd requires a centralizing mechanism to aggregate the individual judgments of the group into a final decision.[30] Without aggregation, a group that satisfies the first three conditions of a wise crowd *may* achieve the solution proposed by the smartest, best-informed member of the group, but that result is not certain.[31] However, with an aggregating mechanism in place, the group's collective solution is more likely to be superior to even the smartest individual group member's solution.[32]

II. HARNESSING THE CROWD TO IMPROVE EDUCATION: BALLOTS, VOUCHERS, DEDUCTIONS, OR TAX CREDITS?

If crowd wisdom is to be applied to educational policy choices, there are several competing mechanisms that could be employed to harness it. The simplest choice is to subject policy options to the democratic voting process. In the alternative, crowd wisdom could be channeled by allowing the crowd to direct public funding to different educational programs through the use of voucher systems or tax incentives. The use of tax incentives, specifically tax credits, is the best mechanism by which to satisfy the requirements of a wise crowd.

A. Tax Incentives Are a Better Mechanism for Harnessing Crowd Wisdom Than Ballot-Based Voting

If harnessing crowd wisdom requires discerning the preferences of an electorate, it is tempting to accomplish this by transferring policy choices from government officials to the public through the referendum process. However, succumbing to this temptation ignores a mechanism that can better accomplish this goal. Tax incentives, described as using "taxes as ballots," can be much more effective than ballot-based voting in channeling the electorate's various

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27. *See id.* at 72–73.

28. *Id.* at 71–72.

29. *See id.* at 74 ("[A] decentralized system can only produce genuinely intelligent results if there's a means of aggregating the information of everyone in the system.").

30. *See id.* at 74–75.

31. *Id.* at 75.

32. *Id.*

policy preferences.[33] Tax incentives are not necessarily a viable option for determining policy in areas in which legislatures are highly unlikely to cede their authority to the public.[34] However, in areas in which citizens have better information than the government, incentivizing citizens to express their individual preferences through tax incentives rather than through a ballot initiative increases the likelihood that parties with superior information allocate funding toward preferential policy outcomes.[35]

In the policy areas that benefit more from local knowledge, a properly structured tax incentive also has the benefit of better satisfying the requirements of a wise crowd. Such a tax incentive enhances diversity because many different organizations can compete for taxpayer contributions, thus expanding the range of available policy options.[36] In addition, tax incentives can strengthen decentralization if they are tailored to incentivize taxpayers to express their policy preferences at the regional level.[37] Tax incentives can also serve as an aggregating mechanism if they are structured to incentivize contributions to organizations that can help centralize taxpayer preferences.

Admittedly, tax incentives, if structured incorrectly, could also make a crowd less wise. Diversity could suffer if only certain taxpayers are able to take advantage of the tax incentive. For example, taxpayers who do not itemize their deductions are not eligible to take a charitable deduction and thus are discouraged from using the tax incentive.[38] In addition, if a tax incentive is structured to give a greater incentive to taxpayers with more resources, any

33. Levmore, *supra* note 7, at 387–89 (analyzing the benefits of tax incentives as a vehicle for democratizing policy choices in the specific context of charitable deductions).

34. *Id.* at 427 ("[I]t would be startling to find direct democracy of any kind with respect to the question of where to build new military bases, when to offer exemptions from antitrust law, or the extent to which patent and copyright monopolies ought to be extended.").

35. *Id.* at 427–28. For example:

> Voters across the country are unlikely to be well informed about my local hospital or your university, so a conventional exercise in direct democracy would not delegate decisionmaking to better informed parties. However, alumni of your university and citizens of my local community might be fairly well informed about their respective organizations.

Id.

36. Tax incentives also better satisfy the independence prong. Taxpayers have much less information about other taxpayers' use of tax incentives than they do about other voters' voting preferences because the media does not regularly release polling data about tax incentives. Without this data, taxpayers are free to exercise their own independent judgment. Although the increase in independence is likely not as significant as the increase in diversity, improvements on independence could nevertheless contribute to making the crowd wiser.

37. *See* Brian H. Jenn, *The Case for Tax Credits*, 61 TAX LAW. 549, 562 (2008) (noting that the decision to make a charitable contribution, which makes the taxpayer eligible for a tax incentive, may depend on where the taxpayer lives).

38. *Id.* ("[T]axpayers who do not itemize their deductions at all because the standard deduction exceeds the total value of the deductions they could itemize effectively have no 'vote' over the use of government resources. Their gifts to charity generate no rebate at all from the government.").

advantages may be counteracted by the corresponding decrease in the overall size of the pool of decision-makers. This would negate the benefits of having a highly diverse crowd that possesses degrees of information to make decisions.[39] However, properly structuring the tax incentive to reach as many taxpayers as possible addresses many of these concerns.

B. Tax Incentives Are a Better Mechanism for Harnessing Crowd Wisdom Than Vouchers and Correct Inherent Problems That Have Made Voucher Systems Controversial

Tax incentives are also a better mechanism for generating diverse approaches to education. Voucher systems operate by using public money to give students the choice of attending a private school instead of a public school. Proponents of voucher systems tout them as a way of improving education by increasing competitiveness between public and private schools.[40] Critics argue that these systems actually accomplish the opposite by weakening the public school system—because vouchers shift funds and high-achieving students into private schools—and by creating a system in which students become trapped in deteriorating public school systems that do not have a realistic chance of improvement.[41] Furthermore, critics point out that the private schools that receive voucher-supported students are primarily religious, which causes a transfer of public funds for religious education and potentially violates the Establishment Clause.[42] Even voucher programs that are tailored to pass constitutional scrutiny are problematic[43] because state Blaine Amendments

39. *But see* Levmore, *supra* note 7, at 406 (arguing that objections to harnessing voter preferences regarding charitable deductions through tax incentives "may be overcome for some by the substantial 'voter turnout' that is induced by the tax deduction scheme, and by the fact that the government may need all the help it can get in monitoring and choosing among hospitals, schools, social welfare agencies, and the like").

40. Jonathan D. Boyer, *Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine Amendments*, 43 COLUM. J.L. & SOC. PROBS. 117, 120 (2009) (noting that proponents also argue that voucher programs promote consumer choice and enhance parents' rights to determine the best way to educate their children).

41. *See* Ralph D. Mawdsley, Commentary, *State Tax Credits for Private Education: The Arizona Experience in* Kotterman v. Killian, 136 EDUC. L. REP. 647, 654–55, 659–60 (1999); *see also* Boyer, *supra* note 40, at 120.

42. *See* Boyer, *supra* note 40, at 120. The use of public funds is a critical component of voucher programs because private funds alone are insufficient to fund them. Mawdsley, *supra* note 41, at 654–55. However, voucher programs that use public funds are subject to attack on the grounds that they violate the Establishment Clause by advancing religion. *See* 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, 166, 168–71 (2002) (discussing *Commissioner for Public Education & Religious Liberty v. Nyquist* and *Sloan v. Lemon*, two companion cases that established that voucher systems do not violate the Establishment Clause if they offer students the option to attend either public or private schools).

43. For a voucher program to have the best chance of surviving a constitutional challenge, it must offer the same aid to both public and private school students, which can be accomplished by providing vouchers for public school students to attend other public schools as well as private

prevent them from becoming a national solution.[44] Blaine Amendments, which were added to many state constitutions in the late nineteenth century to reflect anti-Catholic sentiments, prohibit the allocation of state funds to religious schools.[45]

Tax credits and tax deductions are more likely to survive Blaine Amendment challenges than voucher programs.[46] Unlike voucher programs, which involve the direct transfer of public funds to religions schools, refundable tax credits and tax deductions benefit religious schools indirectly because public money is transferred to individual taxpayers, who have already chosen to spend their money to fund religious schools.[47] Tax credit scholarship programs, with which

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schools. *See* Frey & Hogben, *supra* note 42, at 177 (discussing the Supreme Court jurisprudence surrounding the constitutionality of voucher programs); Nicole Stelle Garnett, *Affordable Private Education and the Middle Class City*, 77 U. CHI. L. REV. 201, 217–18 (2010) (noting that *Zelmon v. Simmons-Harris*, 536 U.S. 639, 653–64 (2002) likely resolved this issue definitively at the federal level by holding that religiously neutral scholarship programs were constitutionally permissible, even if the practical effect was that most beneficiaries chose religious education).

44. *See, e.g.*, Frey & Hogben, *supra* note 42, at 182–83; Garnett, *supra* note 43, at 217–18; Terry M. Moe, *Beyond the Free Market: The Structure of School Choice*, 2008 BYU L. REV. 557, 577 (2008).

45. *See* Boyer, *supra* note 40, at 118; Moe, *supra* note 44, at 577.

46. Boyer, *supra* note 40, at 145–47. Similarly, tax deductions and credits generally will survive federal Establishment Clause challenges, provided that similar deductions or credits are provided to families of students who attend public schools. Frey & Hogben, *supra* note 42, at 183–84 (citing Mueller v. Allen, 463 U.S. 388, 394–403 (1983)) ("This different treatment of tax deductions is consistent with basic Establishment Clause principles because a true tax deduction or credit reduces taxes, rather than paying out public money obtained from other taxpayers.").

47. Boyer, *supra* note 40, at 146. However, this argument could theoretically be challenged by applying tax expenditure theory to argue that these types of tax deductions or credits really do constitute the direct expenditure of public funds. Tax expenditure theory, first proposed by Professor Stanley Surrey, posits "that tax credits, deductions, and exemptions are similar to direct governmental expenditures because they provide special benefits to favored individuals and result in higher tax rates for all other individuals." Christopher A. Bishop, Comment, *Revisiting Article I, Section 5 of the Oregon Constitution: The Application of* Priest v. Pearce *and an Evaluation of the Oregon School Tax Credit*, 38 WILLAMETTE L. REV. 427, 468 (2002). The primary criticisms of this theory are that: (1) it rests on the mistaken assumption that all property fundamentally belongs to the government and that the government simply refrains from taking what rightfully belongs to it when it allows a tax expenditure or deduction; (2) when the government chooses to enact a tax deduction or credit, it is choosing to omit certain entities or transactions from the tax base; and (3) the theory rests on the premise that there is an ideal level of taxation, departures from which must be viewed as tax expenditures. *Id.* (quoting Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 996–99 (1999)).

Tax expenditure theory, if applied to Establishment Clause or Blaine Amendment challenges, could potentially put tax deductions and credits on the same footing as vouchers, in that both would be considered government spending. *Id.* at 468–69 ("While some scholars have argued that the tax expenditure theory be applied to Establishment Clause jurisprudence, others reject this theory. Furthermore, scholars and state courts alike have recognized that the U.S. Supreme Court has yet to apply this theory when interpreting the Establishment Clause."). However, there is considerable tension among the U.S. Supreme Court justices as to whether tax expenditure theory should be applied to these types of cases, with a bare majority currently holding that tax credits are not the equivalent of government expenditures. *See* Edward Shaoul, Comment, Arizona Christian School taxpayers receive credits or deductions for contributing to organizations that then award scholarships, provide even better insulation to Blaine Amendment challenges.[48] Public funding is separated from the religious organization by at least two levels of decision-makers—the taxpayer and the organization that awards the scholarships—thus making it harder to argue that the public is directly funding the religious organization.[49]

C. Credits Are a Better Mechanism for Harnessing Crowd Wisdom Than Deductions

Once policymakers decide to attempt to harness crowd wisdom with tax incentives, they must determine the best way to structure the incentives. This requires them to choose between two fundamental types of tax incentives: partial credits and deductions.[50] Although deductions and credits can often be structured to yield the same economic results—at least with regard to taxpayers in the same tax bracket[51]—there are critical differences between the two structures that can influence which approach is better for a particular policy goal. Understandably, each approach has both advantages and disadvantages, and the preferred mechanism will likely depend on the specific policy goals.

One of the most significant differences between deductions and credits is that deductions are more valuable to taxpayers in higher tax brackets, whereas credits have the same value to all taxpayers, regardless of their tax bracket.[52] Consequently, deductions are the better option in situations in which the goal is to measure the income to be taxed, while credits are better used in situations in which the primary goal is to incentivize certain behaviors because they provide

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Tuition Organization v. Winn*: Reconsidering* Flast*'s Exception to the Rule Against Taxpayer Standing and Establishing the Tax Credit Distinction*, 89 DENV. U. L. REV. 305, 311 (2011).

48. *See, e.g.*, Garnett, *supra* note 43, at 217–18 (comparing, for example, Arizona's school scholarship tax credit program, which survived a constitutional challenge, and a limited voucher program, which was invalidated on Blaine Amendment grounds). Several states have authorized these types of tax incentives for school tuition organizations. *See infra* Part III.A.

49. Boyer, *supra* note 40, at 146–47; *see also* Frey & Hogben, *supra* note 42, at 186. Furthermore,

> tax credits for [school tuition organization] contributions are often designed specifically to test this illusive boundary of indirectness, as they require a number of entities to participate in the creation of an elaborate chain of financial exchanges. Employing such an elaborate design presents a strong opportunity for school-choice advocates to test the bounds of indirectness that Blaine Amendment jurisprudence is grappling with.

Boyer, *supra* note 40, at 146–47.

50. Full credits (as opposed to partial ones) are not as viable of a policy choice because they create a costless mechanism of directing government funds that could cause potential recipients to compete so aggressively for these funds that true individual preferences might be distorted or masked. *See* Levmore, *supra* note 7, at 409–11. Attaching a cost to a vote could cause the voter to take his vote more seriously. *Id.* at 411.

51. *See id.* at 414 ("[I]n most cases, a less-than-full credit can be offered as a perfect substitute for a tax deduction.").

52. *Id.*

equal incentives to all taxpayers.[53] For example, the federal tax incentive to encourage charitable donations could be structured as a deduction (because a potential policy goal is to measure taxable income after taxpayers make charitable contributions) or as a credit (because the potential purpose of the incentive is to encourage charitable giving).[54] The number of taxpayers that claim a deduction for donations to religious organizations may have tipped the scales in favor of structuring the incentive as a deduction.[55] If a tax incentive significantly benefits religious organizations, structuring the incentive as a deduction rather than as a credit may help to avoid constitutional challenges by allowing the government to argue that it is simply measuring taxable income rather than directly incentivizing contributions to religious organizations.[56]

A significant advantage of credits—as long as they are refundable—is that they affect a much broader tax base than deductions because many taxpayers have no income tax liability and therefore do not benefit from deductions.[57] Indeed, tax credits are most efficient if offered at the lowest possible rate and to the broadest possible group because the utility of consumption diminishes at higher income levels.[58] Although increasing the tax base eligible for the incentive could also be accomplished with an "above-the-line" deduction (for which all tax filers are eligible) or a "below-the-line" deduction (for which only deduction itemizers are eligible), this mechanism is still inferior to a credit for reducing the inequitable benefits received by taxpayers based solely on their tax bracket.[59]

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53. *Id.*; *see also* Jenn, *supra* note 37, at 570 (noting that deductions offer different incentives for different types of taxpayers).

54. Levmore, *supra* note 7, at 415.

55. *See id.*

56. *See id.*

57. Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 24, 28–29 (2006) ("Unlike other forms of tax incentives, a uniform refundable credit is not related to a household's marginal tax rate and provides cash payments to qualifying households even if they owe no income tax."); *see also* Frey & Hogben, *supra* note 42, at 184; Adele Robinson, *Risky Credit: Tuition Tax Credits and Issues of Accountability and Equity*, 11 STAN. L. & POL'Y REV. 253, 257–58 (2000). The refundable nature of the tax credit is key, especially if the incentive is designed to serve a policy goal in which taxpayers with little to no tax liability are significantly interested beneficiaries or contributors. Batchelder et al., *supra*, at 54; *see also* Jenn, *supra* note 37, at 571.

58. Jenn, *supra* note 37, at 574.

59. *See id.* at 572. Horizontal equity—the equitable norm requiring similar treatment for similarly situated individuals—is a significant concern because a weakening of horizontal equity can have negative effects on taxpayer morale. *See id.* at 563. Interestingly, deductions provide incentives not only to taxpayers at different income levels, but also to taxpayers located in different geographic locations because certain regions have higher itemization rates than others. *See id.* at 571–72.

Additionally, refundable credits structure tax incentives in a more economically efficient manner than deductions.[60] However, these advantages rest on the assumption that taxpayer responsiveness to tax incentives does not vary based on income level.[61] If this assumption is incorrect, deductions may be a more efficient incentive mechanism because they can easily be structured to create different incentives across income ranges.[62] Furthermore, providing differential incentives through deductions could theoretically promote economic efficiency because taxpayers with higher incomes produce greater positive externalities by engaging in the incentivized behavior.[63] This argument justifies structuring the tax incentive for charitable donations as a deduction rather than as a credit, thereby creating greater incentive for high-income taxpayers to make charitable donations than for lower-income taxpayers.[64] Because it is nearly impossible to measure where and how such systematic variations occur—assuming that they occur at all—the potential efficiency benefits of deductions remain largely theoretical.[65] Therefore, credits remain the more practical choice for maximizing efficiency.

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60. Batchelder et al., *supra* note 57, at 47–49 (arguing that "uniform refundable credits are generally the most efficient way to structure individual income tax incentives" because these credits minimize economic deadweight loss by reducing the number of large errors that occur in favor of a higher frequency of smaller errors); *see also* Jenn, *supra* note 37, at 574 ("A tax incentive that applies uniformly across taxpayers of all different statuses has the further efficiency advantage that it generally minimizes the expected error in the application of the incentive."); Deborah M. Weiss, *Tax Incentives Without Inequity*, 41 UCLA L. REV. 1949, 1973–74 (1994) (explaining that tax law prefers credits to deductions "primarily in those provisions that are social welfare measures rather than tax incentives"). However, credits complicate the tax code and "can undermine fairness in the distribution of tax burdens." Robinson, *supra* note 57, at 254, 258–59. Deductions could at least theoretically improve efficiency by reducing individual marginal tax rates and, therefore, the deadweight cost of taxation. However, because current marginal tax rates are lower and flatter than they have been in the past, it is unclear if deductions actually generate these potential efficiency benefits. Jenn, *supra* note 37, at 569.

61. *See* Batchelder et al., *supra* note 57, at 27–28 & n.16; Jenn, *supra* note 37, at 575.

62. Batchelder et al., *supra* note 57, at 27–28 & n.16; Jenn, *supra* note 37, at 575–76. Of course, for those differential incentives to function as intended, taxpayers must be aware of their marginal tax rate, which is far from guaranteed. Jenn, *supra* note 37, at 580.

63. Jenn, *supra* note 37, at 576.

64. *See* Levmore, *supra* note 7, at 427–28 ("Some large contributors will be especially well informed, as members of governing boards, or simply because they investigate before 'investing.'"). *But see* Jenn, *supra* note 37, at 562 (arguing that the charitable deduction is fundamentally undemocratic because it gives undue influence to taxpayers in higher tax brackets solely because they have higher incomes). Deductions may also be inequitable because each dollar contributed by a taxpayer in a higher tax bracket directs a larger share of government resources than a dollar contributed by a taxpayer in a lower tax bracket. *Id.*

65. *See* Jenn, *supra* note 37, at 576–77 ("Ultimately, to presume that a tax incentive could be tailored to follow the contours of income-based variations in behavioral responses would seem to be an exercise in technocratic hubris.").

III. DESIGNING AN EDUCATIONAL TAX CREDIT TO HARNESS CROWD WISDOM

Having concluded that tax incentives are preferable to vouchers and that tax credits are generally preferable to deductions, the next step is to determine how a tax credit should be structured to benefit from crowd wisdom. Several states have implemented educational tax credit programs that serve as helpful examples in the attempt to structure such a credit.[66] Although these programs differ from state to state, most of the programs provide credits to taxpayers for contributions made to school scholarship organizations. These organizations then award money to students to assist them in attending private schools, thereby providing greater insulation from Establishment Clause and Blaine Amendment challenges than other forms of educational tax incentives and vouchers.[67] This enhanced protection from state and federal constitutional challenges allows school scholarship organization tax credit programs to be much more flexible in their design than voucher programs.[68] For example, to prevent claims of religious discrimination, some voucher programs require private schools to accept students without regard to admissions standards.[69] School scholarship organization tax credits programs do not impose this type of restriction, which

66. The Friedman Foundation maintains a summary of scholarship tuition organization related legislation on its website. *See School Choice Programs*, FRIEDMAN FOUND. FOR EDUC. CHOICE, www.edchoice.org/school-choice/school-choice-programs.aspx (last visited Mar. 7, 2014).

67. *See supra* Part II.B. (discussing why tax incentives generally are superior to vouchers for withstanding Establishment Clause and Blaine Amendment challenges); *see also supra* notes 48–49 and accompanying text (discussing why school scholarship tax credits stand on firmer state and federal constitutional grounds than even other educational tax incentives).

School scholarship organization credits are also be on stronger footing with respect to state education clause and tax uniformity constitutional challenges. *See* Garnett, *supra* note 43, at 218–19 (quoting Bush v. Holmes, 919 So. 2d 392, 405 (Fla. 2006)) (noting that the Florida Supreme Court held that a state voucher program violated the Florida's education clause, which required the state to maintain a "uniform, efficient, safe, secure, and high quality system of public education"); *see also* Nicole Stelle Garnett, *A* Winn *for Educational Pluralism*, 121 YALE L.J. ONLINE 31, 33–36 (2011), http://yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/a-winn-for-educational-pluralism/ (pointing out that Arizona upheld a similar tax credit program).

Finally, school scholarship organization credits do not exacerbate horizontal tax inequity or economic inefficiency as significantly as direct credits or deductions, which treat taxpayers with similar income levels differently solely based on their decision to send their children to private schools. Robinson, *supra* note 57, at 258. School scholarship organization credits avoid this problem because the different treatment is based on the taxpayer's decision to contribute to a school scholarship organization without regard to whether the taxpayer actually chose to enroll a child in a private school. Furthermore, school scholarship organizations are more economically efficient because they are less likely to incentivize behavior that the taxpayer is already undertaking, regardless of the potential tax benefit. *But see* Vada Waters Lindsey, *The Vulnerability of Using Tax Incentives in Wisconsin*, 88 MARQ. L. REV. 107, 113 (2004) (arguing that school scholarship credits can still weaken both horizontal and vertical equity).

68. Frey & Hogben, *supra* note 42, at 186–87.

69. *Id.*

encourages schools with more rigorous admissions criteria to participate.[70] As a result, school scholarship organization tax credits better harness crowd wisdom by ensuring that a diverse group of schools participates in the program.

A. Overview of School Scholarship Organization Credit Programs

1. Alabama

Beginning with tax year 2013, Alabama offers a tax credit for contributions made during the tax year to school scholarship granting organizations.[71] The credit is limited to no more than the lesser of fifty percent of the taxpayer's tax liability or $7,500 per individual taxpayer or married couple filing jointly.[72] Corporate taxpayers may also claim a credit up to fifty percent of their tax liability for the year.[73] The state caps the total amount of credits it issues at $25 million.[74] Unused credits can be carried forward for three years.[75] Scholarship granting organizations then make awards to qualifying low-income and middle-class public school students to assist them in attending either a private school or another public school that is performing at a higher level than the student's current school.[76] Donations to scholarship granting organizations cannot be earmarked for particular students.[77]

2. Arizona

Arizona provides a tax credit (initially $500 for individuals and $1,000 for married couples filing jointly), adjusted for inflation, as well as an additional supplementary credit under its "switcher" program, for contributions to school tuition organizations.[78] Any remaining balance of the credit can be carried forward for five years if the taxpayer does not use it within the taxable year in

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70. *Id.*

71. ALA. CODE § 16-6D-9(a)(1) (LexisNexis Supp. 2013). Alabama also provides an individual tax credit directly to parents to fund moving their children from failing public schools to either non-failing public schools or private schools. *Id.* § 16-6D-8(a)(1).

72. *Id.* § 16-6D-9(a)(2).

73. *Id.* § 16-6D-9(a)(3).

74. *Id.* § 16-6D-9(a)(3).

75. *Id.* § 16-6D-9(a)(4).

76. *Id.* § 16-6D-4.

77. *Id.* § 16-6D-9(b)(1)(n).

78. ARIZ. REV. STAT. ANN. § 43-1089 (2006 & Supp. 2012); *id.* § 43-1089.03 (Supp. 2012). In 2014, the caps were $528 for individuals and $1,056 for married taxpayers filing jointly. *Arizona – Original Individual Income Tax Credit Scholarship Program*, FRIEDMAN FOUND. FOR EDUC. CHOICE, http://www.edchoice.org/School-Choice/Programs/Personal-Tax-Credits-for-School-Tuition-Organizations.aspx (last visited Apr. 14, 2014). In 2014, the caps for the supplementary "switcher" credit were $525 for individuals and $1050 for married taxpayers filing jointly, although the taxpayers may not use the "switcher" credits until they exceed the caps under the original credit. *Arizona – "Switcher" Individual Income Tax Credit Scholarship Program*, FRIEDMAN FOUND. FOR EDUC. Choice, http://www.edchoice.org/School-Choice/Programs/-Switcher--Individual-Income-Tax-Credit-Scholarship-Program.aspx (last visited Apr. 14, 2014).

which he made the contribution.[79] The taxpayer cannot designate the donation for his own benefit, the benefit of a dependent, or the benefit of a specific student.[80] Similarly, school tuition organizations cannot limit scholarships to recipients at only one school.[81]

Corporate taxpayers may also be eligible for income and premium tax credits for contributions to school tuition organizations.[82] Although many of the limitations on corporate tax credits are similar to the limitations on individual tax credits,[83] corporate credits are limited primarily at the aggregate level.[84] Specifically, they are awarded on a first-come, first-served basis, with an aggregate limitation initially of $10 million (increased twenty percent per year beginning in 2007) for donations to school tuition organizations serving traditional schools and $5 million for donations to school tuition organizations serving schools for the disabled or the displaced.[85]

3. Florida

Florida grants a credit against a variety of taxes for contributions to eligible scholarship funding organizations.[86] Although the credits are generally one hundred percent tax credits, Florida imposes specific limitations on the calculation and amount of the credit, depending on the type of tax that is being credited.[87] The credit is distributed on a first-come, first-served basis is capped state-wide initially at $140 million per fiscal year, although the state will increase the cap if the amount of the credits awarded approaches it.[88] Unused credits can be carried over with state approval.[89]

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79. *Id.* § 43-1089(D) (Supp. 2012).

80. *Id.* § 43-1089(F) (Supp. 2012). Taxpayers may not circumvent this provision by entering into agreements with other taxpayers to reciprocally designate their respective donations for the benefit of each other's dependents. *Id.* However, taxpayers, are permitted to make recommendations regarding student beneficiaries. *Id.* § 43-1603(B)(3) (Supp. 2012).

81. *Id.* § 43-1603(B)(2) (Supp. 2012).

82. *See id.* §§ 20-224.07 (Supp. 2012), 43-1183 (Supp. 2012), 1184 (Supp. 2012).

83. *Compare id.* § 20-224.07, *and id.* § 43-1089 (Supp. 2012), *with id.* § 43-1183, *and id.* § 1184.

84. *Id.* §§ 43-1183, 1184.

85. *Id.* §§ 43-1183(c), 1184(c). In 2014, the total aggregate cap was $35.8 million per year for the low-income corporate tax credit. *Arizona – Low-Income Corporate Income Tax Credit Scholarship Program*, FRIEDMAN FOUND. FOR EDUC. CHOICE, http://www.edchoice.org/School-Choice/Programs/Corporate-Tax-Credits-for-School-Tuition-Organizations.aspx (last visited Apr. 14, 2014).

86. *See* FLA. STAT. ANN. §§ 211.0251 (West 2011), 212.1831 (West 2011), 220.1875 (West Supp. 2012), 561.1211 (West Supp. 2012), 624.51055 (West Supp. 2012).

87. *Id.* §§ 211.0251, 212.1831, 220.1875, 561.1211, 624.51055.

88. *Id.* § 1002.395(5) (West 2012). In 2014, the statewide cap was $286.25 million per year. *Florida – Florida Tax Credit Scholarship Program*, FRIEDMAN FOUND. FOR EDUC. CHOICE, http://www.edchoice.org/School-Choice/Programs/Florida-Tax-Credit-Scholarship-Program.aspx (last visited Apr. 14, 2014).

89. *Id.* § 1002.395(5)(c).

The scholarship funding organizations provide scholarships to students who cannot afford private school or must attend public schools outside of their districts or lab schools.[90] These scholarships are awarded on a first-come, first-served basis, although students already receiving the scholarships receive priority.[91] Scholarships cannot be restricted for use at a specific school or for the benefit of the children of the owners or operators of scholarship funding organizations or eligible private schools.[92] Additionally, there are limits on the amount of money that a scholarship funding organization can award to a particular student, which vary depending on the year, the type of scholarship, and the student's household income.[93]

4. Georgia

Georgia allows individuals donating to student scholarship organizations to take a credit of the lesser of $1,000 ($2,500 for married taxpayers filing jointly) or the amount donated, but individuals who are members, shareholders, or partners of pass-through entities can claim a credit up to $10,000 of the taxes they pay in their capacity as members or partners.[94] Corporations receive a credit of the lesser of seventy-five percent of their income tax liability or the amount donated.[95] Unused portions of the credit can be carried forward for five years.[96] Credits are awarded on a first-come, first-served basis, and there is an aggregate statewide cap for the credits, originally set at $50 million and adjusted for inflation until January 1, 2018.[97] Taxpayers claiming the credit may not direct their donation to one of their dependents.[98] Any Georgia public school student is eligible to receive benefits, which they must use for tuition and fees at private schools.[99]

5. Indiana

Indiana provides a credit equal to fifty percent of the amount that a taxpayer contributes to a school scholarship granting organization.[100] Unused credits

90. *Id.* § 1002.395(3) (West 2012 & Supp. 2012), 1.002.395(6)(d) (West 2012).

91. *Id.* § 1002.395(6)(e)–(f) (West 2012).

92. *Id.* § 1002.395(6)(g) (West 2012).

93. *Id.* § 1002.395(12) (West 2012 & Supp. 2012).

94. GA. CODE ANN. § 48-7-29.16(b) (2009 & Supp. 2012).

95. *Id.* § 48-7-29.16(c) (2009 & Supp. 2012).

96. *Id.* § 48-7-29.16(e) (2009 & Supp. 2012).

97. *Id.* § 48-7-29.16(f) (2009 & Supp. 2012). For 2014, the cap was $58 million. *Georgia – Qualified Education Expense Tax Credit*, FRIEDMAN FOUND. FOR EDUC. CHOICE, http://www.edchoice.org/School-Choice/Programs/Private-School-Tax-Credit-for-Donations-to-Student-Scholarship-Organizations.aspx (last visited Apr. 14, 2014).

98. *Id.* § 48-7-29.16(d) (2009 & Supp. 2012).

99. *Id.* §§ 20-2A-1 (2012), 48-7-29.16(a) (2009 & Supp. 2012).

100. IND. CODE ANN. §§ 6-3.1-30.5-7, 6-3.1-30.5-8 (LexisNexis Supp. 2012).

cannot be carried over or refunded.[101] The total amount of tax credits that can be awarded during the state's fiscal year is capped statewide at $7.5 million.[102] Scholarship granting organizations make awards to students who cannot afford private school tuition.[103] The organizations may not limit scholarship availability to students of a single participating school.[104] Interestingly, Indiana requires participating schools to instruct students with specific curriculum and in national and cultural values.[105]

6. *Iowa*

Iowa awards a tax credit of sixty-five percent of the amount of the taxpayer's total contribution to a school tuition organization that provides private school tuition grants to students from low-income families.[106] Unused credits can be carried forward for five years.[107] For spouses, part-year residents, and nonresidents, the amount of the credit depends on the source of the income.[108] The contributing taxpayer may not direct the contribution to one of his dependents or to any other specific student.[109] There is a statewide cap of $12 million on the total amount of credits that can be awarded.[110] The amount of tax credit certificates that each school tuition organization can issue is based on the number of students enrolled in participating private schools.[111]

7. *Louisiana*

Louisiana provides a tax credit for up to the total amount of a taxpayer's donation to a school tuition organization, provided that the donation is actually used to fund a private school scholarship for a qualifying student.[112] Donations cannot be earmarked to provide scholarships for specific students or schools, but donations can be earmarked for students with disabilities.[113] The number of students at any one school receiving scholarships from a school tuition organization may not exceed twenty percent of the school's total enrollment.[114]

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101. *Id.* § 6-3.1-30.5-9 (LexisNexis Supp. 2012).

102. *Id.* § 6-3.10-30.5-13 (LexisNexis Supp. 2012).

103. *Id.* § 20-51-3-5(a) (LexisNexis Supp. 2012).

104. *Id.* § 20-51-3-5(b) (LexisNexis Supp. 2012).

105. *Id.* § 20-51-4-1(f) (LexisNexis Supp. 2012).

106. IOWA CODE § 422.11S(1), (5) (West 2011 & Supp. 2013). Iowa also provides a credit of twenty-five percent of the first $1,000 spent for tuition or textbooks for dependents—a contribution need not be made through a school tuition organization—as long as the tuition and textbooks are not designed to inculcate religious belief. *Id.* § 422.12(1)(b), (2)(b) (West 2011 & Supp. 2013).

107. *Id.* § 422.11S(3) (West 2011 & Supp. 2013).

108. *Id.* § 422.11S(4) (West 2011 & Supp. 2013).

109. *Id.* § 422.11S(2)(b).

110. *Id.* § 422.11S(7) (West 2011 & Supp. 2013).

111. *Id.* § 422.11S(7)(b).

112. LA. REV. STAT. ANN. § 47:6301(A)(1) (Supp. 2013).

113. *Id.* § 47:6301(A)(3) (Supp. 2013).

114. *Id*. § 47:6301(B)(2)(c) (Supp. 2013).

If more eligible students apply than there are number of scholarships, the school must use a random selection process.[115] However, certain groups, such as siblings of enrolled students and students who are attending other private schools on scholarship, will receive preference.[116] The program also gives first priority to students from the poorest performing public schools.[117]

8. New Hampshire

New Hampshire permits certain business entities to claim a credit against the state's business profits tax or business enterprise tax equal to eighty-five percent of its contributions to a scholarship organization.[118] No business can receive more than ten percent of the total credits awarded state-wide.[119] The business entity may not direct its contribution to a specific student or nonpublic school.[120] There is an initial statewide cap of $3.4 million of total tax credits that can be awarded on a first-come, first-served basis in the first year of the program, although a mechanism exists to increase this cap after the first year of the program.[121] Although the program reduces funding for school districts with students receiving scholarships, the program established a stabilization grant mechanism to ensure that school districts do not experience a significant reduction in revenue.[122] The scholarship organizations award scholarships to qualifying students to assist them in paying private school tuition (except in certain special education situations) or for transportation to public schools that are outside of the student's district and ineligible to receive adequate education grant payments.[123]

9. Oklahoma

Oklahoma provides a credit for fifty percent of contributions made to a scholarship granting organization or an educational improvement grant organization, capped at $1,000 for individuals ($2,000 for married taxpayers filing jointly) and $100,000 for corporate taxpayers.[124] The credit increases to seventy-five percent of a contribution to an educational improvement organization if the taxpayer commits to contributing the same amount for two

115. *Id.*
116. *Id.* §§ 47:6301(B)(2)(a)(iii) (Supp. 2013).
117. *Id.* § 47:6301(B)(2)(a)(iv) (Supp. 2013).
118. N.H. REV. STAT. ANN. § 77-G:3 (LexisNexis Supp. 2012).
119. *Id.*
120. *Id.*
121. *Id.* §§ 77-G:4(I)–(II) (LexisNexis Supp. 2012), 77-G:5(II)(b) (LexisNexis Supp. 2012).
122. *Id.* §§ 77-G:7(I) (LexisNexis Supp. 2012), 77-G:8(I) (LexisNexis Supp. 2012).
123. *Id.* § 77-G:2(I)(a) (LexisNexis Supp. 2012).
124. OKLA. STAT. ANN. tit. 68, § 2357.206(B)(1) (West Supp. 2012), (C)(1) (West Supp. 2012).

consecutive years.[125] Taxpayers can carry forward unused tax credits of either type for three years.[126]

There is a statewide cap of $1,750,000 for the total amount of tax credits awarded to individuals each year, and an additional $1,750,000 cap for tax credits awarded to corporate taxpayers, for contributions to scholarship granting organizations.[127] For tax credits awarded for contributions to educational improvement grant organizations, there is a $1,500,000 statewide cap for all taxpayers.[128] If it appears that the caps will be exceeded, the state Tax Commission will establish proportionate shares of the credits so that the total amount of credits awarded stay within the statewide caps.[129] If one of the tax credit pools has not been exhausted, the remaining funds can be added to another tax credit pool that has been exhausted.[130]

Scholarship granting organizations make private school tuition grants to students who cannot afford private schools or to special needs students.[131] Educational improvement grant organizations provide grants to public schools to develop innovative or advanced academic programs outside of the normal curriculum or early childhood educational programming.[132]

10. Pennsylvania

Pennsylvania provides a tax credit to business entities for seventy-five percent of the amount contributed to a scholarship organization or educational improvement organization, capped annually at $750,000 per business entity.[133] The percentage increases to ninety percent if the business entity commits to contributing the same amount for two consecutive years.[134] Pennsylvania also provides a one hundred percent tax credit to business entities for the first $10,000 contributed to pre-kindergarten scholarship organizations and ninety percent of the remaining contributions, capped annually at $200,000 per business entity.[135]

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125. *Id.* § 2357.206(C)(2) (West Supp. 2012). Other limits still apply even to the increased percentage. *Id.*

126. *Id.* § 2357.206(J) (West Supp. 2012).

127. *Id.* § 2367.206(B)(2)(b) (West Supp. 2012).

128. *Id.* § 2367.206(C)(3)(a) (West Supp. 2012).

129. *Id.* § 2367.206(G)(2)(c) (West Supp. 2012).

130. *Id.* § 2367.206(H)(1) (West Supp. 2012).

131. *Id.* § 2357.206(F)(1)–(2) (West Supp. 2012).

132. *Id.* § 2357.206(F)(12), (14) (West Supp. 2012).

133. 72 PA. CONS. STAT. ANN. § 8705-F(a) (West Supp. 2013).

134. *Id.* § 8705-F(b) (West Supp. 2013).

135. *Id.* § 8705-F(c) (West Supp. 2013).

The total amount of tax credits that can be awarded is capped statewide at $100 million.[136] Unused tax credits cannot be carried forward.[137]

Educational improvement organizations make grants to public schools for the development of innovative or advanced educational programs that are not part of the traditional curriculum.[138] For example, pre-kindergarten scholarship organizations make grants to pre-kindergarten-aged children for tuition at schools that offer pre-kindergarten programs.[139] Scholarship organizations make grants to eligible students, including disabled students, for tuition at any school in Pennsylvania.[140] Pennsylvania has also allocated an additional $50 million for a similar tax credit for contributions to a scholarship organization that provides scholarships to financially deserving students and to students in low-achieving school districts to attend private schools, in an effort to remove students from schools that fail to achieve sufficiently positive educational outcomes.[141]

11. Rhode Island

Rhode Island allows a tax credit for seventy-five percent of the amount a business entity contributes to a scholarship organization, and a ninety percent credit if the business entity commits to contribute at least eighty percent of the first year's donation for a second consecutive year.[142] A business entity cannot receive more than $100,000 credits annually, and unused credits cannot be carried forward.[143] Credits are awarded on a first-come, first-served basis, and there is a statewide aggregate cap of $1.5 million per fiscal year.[144] Scholarship organizations provide private school tuition grants to elementary or secondary school students who may otherwise struggle to afford private school.[145] Scholarships cannot be directed to only one specific school.[146]

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136. *Id.* § 8706-F(a) (West Supp. 2013). At least $60 million must be applied to tax credits for contributions to scholarship organizations ($8,000,000 of which can be dedicated to pre-kindergarten scholarship programs), and at least $30 million must be applied to tax credits for contributions to educational improvement organizations. *Id.*

137. *Id.* § 8706-F(d) (West Supp. 2013).

138. *Id.* § 8702-F (West Supp. 2013).

139. *Id.*

140. *Id.* The grant program is discontinued once the student graduates from high school. *See id.*

141. *See id*. §§ 8701-G.1–8712-G.1 (West Supp. 2013).

142. R.I. GEN. LAWS § 44-62-1, -4 (2010). The ninety percent credit is available even if the second year's contribution falls below the first year's contribution, so long as the second year's contribution is at least eighty percent of the amount of the first year's contribution. *Id.* § 44-62-4(e)(3).

143. *Id.* § 44-62-5 (2010).

144. *Id.* § 44-62-3(b) (2010).

145. *Id.* § 44-62-2 (2010).

146. *Id.* § 44-62-2(7).

12. South Carolina

South Carolina recently enacted a more limited school scholarship organization program. The program took effect in January 2014 and permits individuals and corporate entities to claim nonrefundable tax credits for up to sixty percent of their total tax liability.[147] Taxpayers may not designate specific schools or children as the beneficiaries of their contributions.[148] Credits are awarded on a first-come, first-served basis, with a statewide cap of $8 million annually.[149]

The scholarship funding organization may award grants of the lesser of the total tuition cost or $10,000 for expenses related to enrolling "exceptional needs" students in private schools.[150] A scholarship funding organization is not permitted to make grants for the benefit of a single school.[151]

13. Virginia

Virginia provides a credit against various types of taxes for contributions made to a scholarship foundation.[152] The state will credit sixty-five percent of the total donation made to a scholarship foundation, so long as the donation exceeds $500.[153] Credits are only awarded for the first $125,000 in donations per individual in a taxable year, but credits are unlimited for business entities.[154] Credits are awarded on a first-come, first-served basis, and there is a statewide cap of $25 million.[155] Unused credits can be carried forward for five years.[156] The scholarship foundations make awards to students who would otherwise struggle to afford private schooling or to disabled students.[157] Scholarship foundations cannot limit awards to students of only one school.[158]

B. Evaluation of School Scholarship Organization Credit Programs

1. Arguments Opposing School Scholarship Organization Credit Programs

One argument against school scholarship organization credits is that they generally are not implemented with corresponding accountability regulations on

147. H. 3710, § 1.85, 120th Gen. Assemb. (S.C. 2013).

148. *Id.* § 1.85(B)(2).

149. *Id.* § 1.85(D)(1).

150. *Id.* § 1.85(D)(1)(c).

151. *Id.* § 1.85(A)(7)(d).

152. VA. CODE ANN. § 58.1-439.26(A) (2013) (providing credits against the individual income tax, corporate income tax, bank franchise tax, insurance license tax, and license tax on certain utilities).

153. *Id.*

154. *Id.*

155. *Id.* § 58-1-439-26(B) (2013).

156. *Id.* § 58-1-439-26(B)(2).

157. *Id.* § 58-1-439.28(C) (2013).

158. *Id.*

private schools.[159] One area that is often left unregulated is the tuition private schools may charge. Because scholarship organization credits seek to make private education more affordable, private schools likely consider the scholarships when setting tuition.[160] Tuition is thus artificially higher than it would otherwise be; the scholarship simply provides a state subsidy to private schools without making them more affordable.[161]

Accountability within the credit program itself is another concern.[162] Direct, public educational expenditures are typically subject to yearly reviews for reauthorization and re-appropriation of funds, which forces a regular evaluation of the return on the investment.[163] On the other hand, tax credits often receive minimal review after they are enacted and therefore do not benefit from regular inspections of their progress and effectiveness.[164]

Opponents of school scholarship organization credits also attack them on tax policy grounds. Some commentators argue that using credits to encourage quality education potentially violates principles of vertical and horizontal equity.[165] Horizontal equity is weakened because similarly situated taxpayers are not necessarily taxed equally, and vertical equity is weakened because lower-income taxpayers may not have the means to take full advantage of the tax credits in the same manner as higher-earning taxpayers.[166]

School scholarship organization credit programs are also criticized for furthering the inequities based on income, race, and disability that already exist between public and private schools.[167] Rather than improving the public educational system as a whole, these tax credits merely increase public funding of private schools in a manner that is more palatable to the public than direct government expenditures.[168] Furthermore, minority groups are disadvantaged

159. Robinson, *supra* note 57, at 254.

160. Frey & Hogben, *supra* note 42, at 184–85.

161. *See id.*

162. Robinson, *supra* note 57, at 259–60.

163. *Id.* at 259.

164. *Id.* ("Random audits will not provide a valid picture of the quality of education or student achievement. The use of tax expenditures rather than a direct program yields a patchy record as opposed to a comprehensive, qualitative review for education policy decisions.").

165. Lindsey, *supra* note 67, at 113.

166. *Id.* at 113–14; *see also* Deborah Katz Levi, Comment, *Tuition Tax Credit Proposals in Utah—Their Constitutionality and Feasibility*, 2005 UTAH L. REV. 1047, 1075 (2005) (reporting that the primary beneficiaries of many of these credits—both in terms of the ability to take the tax credit and in receiving scholarships from the organizations—tend to be high-income individuals whose dependents are already enrolled in private schools).

167. Robinson, *supra* note 57, at 262.

168. *Id.* at 263–64 ("The coupling of public education extracurricular expenses with credits for private school costs is a rhetorical, political flourish. After-school music lessons, a computer at home, or even tutoring can enhance educational achievement, but they are not tantamount to systemic reforms. Extracurricular activities are meant to enhance the regular school day, and do not address significant reform issues. . . ."). This effect is particularly noticeable in states like Arizona that have provided more significant tax incentives to encourage enrollment in private

because, even with the credits, access to private schools remains income dependent and thus favors white families.[169] Additionally, students with disabilities frequently cannot take advantage of credit programs because private schools often do not have the resources or expertise to effectively educate severely disabled students.[170] Finally, providing incentives for students to attend private schools may cause the best students to leave the public school system, which exacerbates the overall decline in quality of public schools.[171]

2. Arguments Favoring School Scholarship Organization Credit Programs

Some of the arguments in favor of school scholarship organization credit programs are similar to those in favor of voucher programs. For example, some argue that school scholarship credit programs can improve educational quality by forcing public and private schools to compete for tax credit dollars.[172] Public schools will also be forced to improve to prevent parents from seeking out scholarships to send their children to private schools.[173] Another argument in favor of credit programs that resembles arguments for voucher programs is that the credits mitigate the "double taxation" problem, whereby parents pay for private school tuition while simultaneously supporting public schools through property tax payments.[174]

Proponents of school scholarship organization credit programs also argue that credit programs are superior to voucher programs because they are often designed to reach a more economically diverse group of students.[175] While voucher programs are usually structured to benefit only low-income students,

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schools than the ones that they provide to encourage contributions to public educational programs. *See id.* at 263.

169. *See id.* at 263 (commenting on the relationship between income, race, and private education).

170. *Id.* at 264.

171. Garnett, *supra* note 43, at 221.

172. *See* MATTHEW LADNER, FRIEDMAN FOUND. FOR EDUC. CHOICE, FLORIDA'S LESSONS FOR INDIANA K-12 REFORM 13 (2009), *available at* http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/387/IN%20v.%20Fl%20study%200909_red%20and%20blue.pdf; David Figlio & Cassandra M.D. Hart, *Does Competition Improve Public Schools*, EDUC. NEXT, Winter 2011, at 74, 80 ("[T]he increased competitive pressure public schools faced following the introduction of Florida's Tax Credit Scholarship Program led to general improvements in their performance. . . . The gains occur immediately . . . implying that competitive threats are responsible for at least some of the estimated effects."); Lindsey, *supra* note 67, at 113; *see also generally* GREG FORSTER & CHRISTIAN D'ANDREA, FRIEDMAN FOUND. FOR EDUC. CHOICE, AN EMPIRICAL EVALUATION OF THE FLORIDA TAX CREDIT SCHOLARSHIP PROGRAM (2009), *available at* http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/383/FL%20Poll%200709.pdf (detailing the impact of the Florida credit program on the quality of both public and private education).

173. *See* Lindsey, *supra* note 67, at 113 ("Tax credits will empower parents to penalize schools that are performing below par and force them to become competitive or fail.").

174. *Id.*

175. *See* Garnett, *supra* note 43, at 216.

school scholarship organization credit programs are frequently designed either without income limitations or with limitations that still allow middle-class families to participate.[176] By diversifying the pool of potential recipients, school scholarship organizations pressure schools to tailor their management and educational practices to attract as many students as possible.[177] Furthermore, by increasing the pool of potential recipients, the credit programs inevitably increase the pool of potential donors as well. This diversification of potential donors helps to both support existing schools and encourage new schools to open.[178] Finally, credit programs appear to be legally viable, as evidenced by their successful implementation in several states.[179]

3. Arguments Favoring School Scholarship Organization Credit Programs Outweigh Arguments Opposing School Scholarship Organization Credit Programs

If the arguments in favor of school scholarship organization credit programs do not outweigh the arguments against them, it is difficult to argue that credit programs are nevertheless worth pursuing as a mechanism of harnessing crowd wisdom.[180] Fortunately, the arguments favoring school scholarship organization credits outweigh the opposing arguments because the opposing arguments can be discredited by careful design of credit programs.

Accountability concerns are perhaps the most easily addressed. School scholarship credit programs already have significant regulatory oversight provisions in place,[181] although more may be necessary to prevent fraud and

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176. *Id.* at 216–17. This argument has only developed recently, as early critiques of school scholarship organization credits characterized them as primarily benefitting low-income families. *See* H. Lillian Omand, Note, *School Choice Legislation: A Supply-Side Market Effects Analysis*, 20 J.L & POL. 77, 89 (2004).

177. *See* Garnett, *supra* note 43, at 216.

178. *Id.*

179. *See id.* at 217 (arguing that this multi-state implementation "suggests that the model is able to overcome the public choice impediments to any educational choice proposal"); *supra* Part III.A. (describing the successful programs implemented by several states).

180. Although crowd wisdom is an important consideration in evaluating a policy choice, it is difficult—although perhaps not impossible—to argue that the benefits of crowd wisdom support adopting a policy if it would otherwise be harmful. Crowd wisdom is an important consideration, but exaggerating its importance does not justify its use. In complex policy debates, rarely is one factor so important as to be completely dispositive of the issue.

181. States have imposed detailed regulatory oversight requirements on school scholarship organization credit programs, including certification requirements, reporting obligations, and, in some instances, pre-approval of scholarship awards. *See, e.g.*, ALA. CODE § 16-6D-9(b) (LexisNexis Supp. 2013); ARIZ. REV. STAT. ANN. § 43-1184(D) (Supp. 2012); FLA. STAT. ANN. § 1002.395(6)–(11) (West 2012 & Supp. 2012); GA. CODE ANN. § 20-2A-2–7 (2012); IND. CODE ANN. § 20-51-3 (LexisNexis Supp. 2012); IOWA CODE ANN. § 422.11S(5)(c) (West 2011 & Supp. 2013); LA. REV. STAT. ANN. § 47:6301(B)(1)(c) (Supp. 2013); N.H. REV. STAT § 77-G:5 (LexisNexis Supp. 2012); OKLA. STAT. ANN. tit. 68, § 2357.206(F)(7) (West Supp. 2012); 72 PA. CONS. STAT. ANN. §§ 8703-F, 8704-F (West Supp. 2013); R.I. GEN. LAWS § 44-62-2–3 (2010); VA. CODE ANN. § 58.1-439.28 (2013); H. 3710, § 1.85, 120th Gen. Assemb. (S.C. 2013).

abuse.[182] If necessary, legislatures or applicable regulatory state agencies can add additional oversight measures until accountability is no longer a plausible ground for criticizing credit programs.[183]

Additionally, although horizontal and vertical equity problems cannot be eliminated entirely, they can be mitigated. Horizontal equity problems can be reduced if more schools, including public schools, are eligible to receive funding from scholarship organizations. For example, both Oklahoma and Pennsylvania provide credits for contributions to organizations that fund innovative public school programs and to organizations that award scholarships.[184] Horizontal equity problems can be reduced even further if scholarship organizations also provide funding to innovative *private* school programs.[185] Although similarly situated taxpayers would still not be taxed in an identical manner,[186] inequity would be reduced because benefits would flow to both public and private school students. Vertical equity problems can be reduced by making the tax credits refundable, which would enable all taxpayers to take advantage of them, regardless of income level.[187]

Finally, the fear that school scholarship tax credit programs will divert badly needed public resources and highly capable students from the public school system is not as significant as critics may suggest. The easiest solution is to cap the total amount of credits that can be awarded, as many states have already done.[188] Credit programs can also be designed to provide credits for contributions to innovative public school programs, like in Oklahoma and

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182. *See* S. EDUC. FOUND, A FAILED EXPERIMENT: GEORGIA'S TAX CREDIT SCHOLARSHIPS FOR PRIVATE SCHOOLS 14–22 (2011), *available at* http://southerneducation.org/getattachment/7d5e36c6-8976-4c86-92c5-fca74ddb3530/A-Failed-Experiment-Georgia-s-Tax-Credit-Schol-(1).aspx; Omand, *supra* note 176, at 93 ("While no voucher program has yet to be enacted without a strong slate of regulations on private schools, tax credit programs seem to be a much weaker magnet for regulation."); Ryan Gabrielson & Michelle Reese, *Private School Credits Rife with Abuse*, MESA TRIBUNE, Aug. 2, 2009, at A4.

183. *Cf.* Lindsey, *supra* note 67, at 115 (explaining that Wisconsin increased regulatory oversight of a voucher program to address accountability concerns).

184. *See* OKLA. STAT. ANN. tit. 68 § 2357.206(B)(1), (C)(1), (F)(12), (14) (West Supp. 2012); 72 PA. CONS. STAT. ANN. § 8702-F (West Supp. 2013).

185. *See infra* Part III.C. (discussing the application of crowd wisdom principles to encourage private schools to create better educational programs).

186. Differences could arise based on the taxpayer's decision to contribute to a school scholarship organization or based on the school the student attends.

187. *See* Omand, *supra* note 176, at 87 (explaining that refundable credits can solve vertical equity problems, but noting that the solution is not perfect because "refundable tax credits are really vouchers with a different administrative mechanism"). Making the credit refundable would require changing many current programs because most states have opted for carry-forwards of unused credits rather than refundable credits. *See supra* Part III.A. Phase-outs of the credit at higher income levels could also reduce vertical equity concerns, but this would reduce the crowd wisdom benefits. *See* Lindsey, *supra* note 67, at 113–14.

188. *See supra* Part II.A. (describing various state credit programs).

Pennsylvania.[189] Of course, including public schools in scholarship credit programs does not guarantee that taxpayers will contribute to public schools to the same degree that they contribute to private schools. Nevertheless, fewer public resources are diverted from public schools under these programs than one may think, in large part because the programs often grant credits against state income taxes and public schools are typically funded by local property taxes.[190] Furthermore, property tax revenues comprise a smaller portion of overall public school funding today than in the past, primarily because of desegregation efforts and judicial decisions regarding funding equity.[191] Finally, any negative effects arising from a decrease in school funding may be offset by a corresponding decrease in enrollment.[192] A decrease in enrollment, particularly if it comprises mostly high-achieving students, cannot be blamed entirely on the increased availability of private schools. In the absence of affordable private education in cities, families of high-achieving students are unlikely to live in cities in the first place.[193]

C. A Proposed Structure for School Scholarship Tax Credit Programs to Maximize Crowd Wisdom

Because the arguments in favor of school scholarship organization tax credits generally outweigh the arguments against them, it is worth considering whether they are also a viable way of using crowd wisdom to improve educational quality. Although some states have come closer than others in creating a credit that could effectively harness crowd wisdom, it is unlikely that any state has designed its credit program with this goal in mind. Therefore, the programs' design must be modified in order to benefit from crowd wisdom. School scholarship organization tax credits designed to tap into crowd wisdom must be modeled to manipulate the pool of people claiming the credits—the "crowd"—to satisfy each of the four characteristics of a wise crowd.[194] Furthermore, to use crowd wisdom to justify the use of school scholarship organization tax credits, the programs must be structured to ensure that the crowd is wiser than it

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189. *See supra* note 184 and accompanying text (describing the structure of the Oklahoma and Pennsylvania credit programs).

190. *See* Garnett, *supra* note 43, at 219–20 (noting that the resource diversion argument would be more powerful if school scholarship organization tax credits were extended at the local level and taken against property taxes). Of course, the argument can be made that, because public schools are often funded primarily by property taxes, credits against state income taxes reduce resources available for non-educational government services. *See* Omand, *supra* note 176, at 87.

191. Garnett, *supra* note 43, at 220 (arguing that any decrease in tax revenue would likely be felt more by city governments than public schools because school districts are often separate entities for tax purposes).

192. *See id.*

193. *Id.* at 221.

194. *See* SUROWIECKI, *supra* note 2, at 10 (listing the four characteristics of a wise crowd: (1) diversity, (2) independence, (3) decentralization, and (4) aggregation); *see also supra* Part I (describing the four requirements).

would be if it expressed its preferences through balloting or another existing tax incentive, such as charitable deductions.

1. Diversity

In order to maximize diversity, a school scholarship organization tax credit should be designed to maximize both the number of taxpayers eligible to claim the credit and the number of activities that qualify a taxpayer to claim the credit. Maximizing the number of eligible taxpayers is relatively straightforward. The credit should be a refundable, so that taxpayers at all income levels can claim it if they engage in a qualifying activity. In this sense, refundable credits are superior charitable deductions because charitable deductions are not available to all taxpayers. Additionally, both corporate and individual taxpayers should be permitted to claim the credits in order to further expand the crowd. In states that do not impose either individual or corporate income taxes, the credit could be applied against sales taxes or property taxes.[195] Capping the amount of tax credits that can be awarded is not ideal from a diversity perspective because such a cap closes the crowd to new members once the caps are reached. Nevertheless, state fiscal realities and the concern that unlimited credits would distort taxpayer behavior likely necessitate caps in some form.[196]

School scholarship organization credits should be designed to allow the organizations to make awards to a variety of individuals and organizations to maximize the number of qualifying activities. This will provide a wider array of choices to the crowd than would typically be available at the ballot box. Organizations should also be permitted to make awards to assist individual students in attending the schools of their choice, regardless of whether the schools are public or private. Some school scholarship organization credit programs already authorize this type of award.[197] Enabling students to attend schools of their choice incentivizes the crowd to contribute to organizations that send students to schools that the crowd perceives as achieving better educational outcomes. However, awarding scholarships to individual students does not alone sufficiently maximize the choices available to the crowd. For example, although individual scholarships make both public and private schools viable choices for the crowd, they also cause schools to focus on competing for students rather than on competing with each other systematically to create more educational options for the crowd to consider. This leaves a significant gap in the range of options available to the crowd.

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195. *See* Garnett, *supra* note 43, at 220. Even though property tax credits would likely need to be handled at the city or municipal level, it would not be overly difficult to design a city or municipal tax credit that would be similar to the types of credits that exist at the state level.

196. *See* Levmore, *supra* note 7, at 409–11.

197. *See supra* Part II.A (noting that Alabama, Florida, New Hampshire, and Pennsylvania allow for individual awards).

To further increase the number of qualifying activities, organizations should be permitted to make direct awards to both public and private schools.[198] Oklahoma and Pennsylvania are good models for this type of program. Both states grant credits for contributions to school scholarship organizations, which make awards to students as well as to educational improvement organizations, which in turn fund innovative public school programs.[199] This is an excellent step toward maximizing diversity, but it should be expanded to allow awards for innovative programs in all types of schools, including public, private, religious, and secular schools.[200] Including religious schools is inevitably controversial because of the potential Establishment Clause and Blaine Amendment issues. However, including religious schools is unlikely to invalidate the programs because the transfer of public funds is much more indirect than in voucher programs.[201] Moreover, including religious schools is critical to maximizing the range of options available to the crowd. If private schools must be incentivized to develop innovative programs to attract the resources of the crowd, religious schools must be eligible to receive awards because many private schools are religious.[202]

2. Independence

School scholarship organization tax credit programs also satisfy the independence requirement of a wise crowd. Admittedly, there are no discernible advantages from an independence perspective to these programs over other mechanisms of enhancing crowd wisdom. Nevertheless, school scholarship organization programs promote independence because taxpayers generally make

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198. In addition to increasing the number of qualifying activities, allowing direct contributions to schools to fund innovative programs could increase the pool of potential donors by attracting taxpayers who are not interested in funding individual student scholarships, but who are interested in funding unique educational programs.

199. *See supra* note 184 and accompanying text (describing the structure of the Oklahoma and Pennsylvania credit programs).

200. Making awards available to public, private, religious, and secular schools under the same criteria is arguably preferable from a constitutional standpoint to providing significantly more incentives for awards to students to attend private schools, are often religious. *See* Frey & Hogben, *supra* note 42, at 187–89 (comparing Pennsylvania's program with Arizona's and arguing that Pennsylvania's inclusion of public schools reduces the potential for successful constitutional challenges).

201. *See supra* notes 46–49 and accompanying text (comparing the constitutional validity of credit programs and voucher programs).

202. *See* STEPHEN P. BROUGHMAN, NAT'L CTR. FOR EDUC. STATISTICS & NANCY L. SWAIN, U.S. CENSUS BUREAU, CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES 2 (2013), *available at* http://nces.ed.gov/pubs2013/2013316.pdf (reporting that eighty-six percent of private schools were religiously affiliated as of July 2013). The majority of private schools are religiously affiliated because "public schools offer a nonreligious education for free, and nonreligious private schools have a difficult time competing with that. Religious private schools offer something the public schools cannot offer, which is why there are so many of them. . . . In effect, to exclude religious schools is to eliminate most choice." Moe, *supra* note 44, at 577.

their choices privately, without knowledge of other taxpayers' choices.[203] Even if tax credit programs do not increase independence, they are an overall superior choice for harnessing crowd wisdom they satisfy and bolster the other elements of a wise crowd.

3. Decentralization

School scholarship tax credit programs also vastly enhance decentralization. Tax credit programs are better suited to directing resources to solve educational problems at a local and regional level than a centralized allocation of resources at the national, state, or even municipal level. Because tax credit programs are ideally structured as state or local tax credits (as opposed to federal credits), they provide an opportunity for states to incentivize their taxpaying crowds to focus their choices on options that are designed to enhance educational quality and that ideally will address the particular educational needs of the states' citizens. Because scholarship organizations will be forced to compete at the state and local levels for funds, the competing organizations that will emerge will have a further decentralizing effect. These organizations will likely wish to attract contributions from taxpayers who can easily be reached through inexpensive local marketing and outreach. Accordingly, to accomplish this goal, the organizations will likely direct taxpayer contributions to schools that meet the educational needs of a particular region.

4. Aggregation

Finally, school scholarship organization tax credit programs have the ability to effectively aggregate individual taxpayers' choices for the benefit of the crowd. However, an additional mechanism is necessary to aggregate the choices of the school scholarship organizations. Admittedly, this is not as easy as with other areas that benefit from crowd wisdom, like stock prices, in which the stock market provides the aggregating mechanism.[204] One possible aggregating mechanism involves the scholarship organizations themselves. When a scholarship organization makes an award to support an individual an innovative program at a particular school, it could be required to provide a written statement to a centralized agency indicating why it made that particular award. That agency could establish a detailed but limited set of justifications, and the awarding organization could elect one—or several—reasons. The centralizing agency could then track the schools that receive the most funding and, more importantly, the reasons for which they received that funding. The agency could

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203. Of course, no choice is completely private. Taxpayers may disclose their choice to each other, or they may hear a public announcement from an organization about the number of donations that it receives. However, this lack of perfect independence is not fatal, as many other decision-making processes operate successfully without absolute independence. *See* SUROWIECKI, *supra* note 2, at 91 (stating that independence does not require isolation, but rather "relative freedom from the influence of others").

204. *See id.* at 74.

then publish a list ranking funding justifications. This list would be enormously valuable to schools because it would give them a much better sense of the priorities that the crowd places on particular facets of schools.[205] Although it is an admittedly crude mechanism compared to the stock market, a centralized agency would still provide a critical counterbalance to the credit programs' decentralizing effects would enable credit programs to effectively harness crowd wisdom.

IV. CONCLUSION

Although educational policy decisions involve balancing complex factors that make finding a demonstrably correct decision difficult, crowd wisdom can be applied to these decisions to produce better outcomes. Tax credits are a better mechanism for harnessing crowd wisdom than the potential alternatives, such as direct democratic action or voucher programs. Specifically, tax credits for contributions to school scholarship organizations satisfy all of the requirements of a wise crowd and can channel the crowd's solutions into policy preferences that could improve the educational system as a whole. These programs are still in their infancy in the states that have initiated them, and the few existing programs likely were not been explicitly designed to maximize the benefits of crowd wisdom. Accordingly, although credit programs are a good starting point for the discussion of how tax credits can be used to harness crowd wisdom in educational policy, some of their characteristics should be redesigned with the explicit goal of harnessing crowd wisdom in mind. Doing so would add a significant benefit to a tax credit program that already effectively addresses the problems inherent to other school choice programs. By improving educational policy choices, the wise crowd would literally be helping its future members become even wiser.

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205. A list reporting only the schools that receive the most funding would not be nearly as helpful. It is possible that some schools have only one or two strengths and consequently may only attract funding from taxpayers and organizations who value those characteristics. These schools would not be reported on a list of schools that receive the most funding. However, others may also value those one or two characteristics, and they could be valuable to the crowd. The crowd will only discover these schools if the agency ranks all contributions.