

Tax Benefits and Fairness in K–12 Education

LINDA SUGIN*

This Article examines the tax law’s subsidies for inequality and segregation in primary and secondary education, analyzing the federal charitable deduction and education savings plans, and state tax credits for education. It argues that the tax system diverts funds from traditional public education into private education, fostering economic, racial, religious, and political separation. The tax law also operates to increase resource inequality within public education by subsidizing schools that affluent children attend. In a novel analysis, the Article contends that the jurisprudence around the charitable deduction for education—though longstanding—is legally incoherent, and argues that no deduction should ever be allowed for parental payments to schools their children attend, whether designated as tuition or gifts.

Although the tax law cannot fully solve the problems plaguing primary and secondary education, it is important to recognize the ways that benefits delivered through the tax law encourage and subsidize segregation and stratification in childhood education, along multiple dimensions—socioeconomic, racial, political, and religious. Tax benefits operate to delegate substantial control over childhood education to private organizations and individuals, undermining the civic role of public education. Along with many other areas of the law, the tax law could better promote democratic values in education.

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INTRODUCTION

Times have been tough for public education in the United States lately.¹ Discord over COVID-19-related policies around school closures, mask mandates, and vaccine requirements have led to protests, violence, and recalls of elected officials.² The situation has gotten so bad that the Federal Bureau of Investigation (FBI) is now monitoring school board meetings.³ Parents, teachers, and public officials have also been warring with one another about sexuality and racism, arguing over how much children learn about LGBTQ issues and the American legacy of slavery.⁴ Federal and state policies, including tax policy, have been nudging families away from public schools, encouraging families to retreat into their polarized corners, an alarming trend for American democracy.

This Article discusses how the tax law encourages and subsidizes inequality and segregation in primary and secondary education. By analyzing both federal and state tax law, it assesses the growing problems across the country that are proliferated by tax benefits for K–12 education. In a novel analysis, it challenges the accepted legal distinction between tuition and non-tuition payments under the charitable deduction, arguing that the line drawn under current law is legally incoherent. This Article concludes that both federal and state tax law could better promote democracy and equality in primary and secondary education by discontinuing tax-based subsidies that benefit all private schools and public schools in affluent communities.

¹ See The Daily, *The School Board Wars, Part 1*, N.Y. TIMES (Nov. 16, 2021), <https://www.nytimes.com/2021/11/16/podcasts/the-daily/school-boards-mask-mandates-crt-bucks-county.html?searchResultPosition=2>; Katie Reilly, *Culture Wars Could Be Coming to a School Board Near You*, TIME (Mar. 23, 2022, 6:00 AM), <https://time.com/6159177/school-board-elections-covid-19-critical-race-theory/>.

² See Margaret Talbot, *The Increasingly Wild World of School-Board Meetings*, NEW YORKER (Oct. 8, 2021), <https://www.newyorker.com/news/daily-comment/the-increasingly-wild-world-of-school-board-meetings>.

³ See Anya Kamenetz, *A Look at the Groups Supporting School Board Protesters Nationwide*, NPR (Oct. 26, 2021, 6:02 AM), <https://www.npr.org/2021/10/26/1049078199/a-look-at-the-groups-supporting-school-board-protesters-nationwide> [<https://perma.cc/J2EH-A5V9>].

⁴ See Sarah Schwartz, *Lawmakers Push to Ban '1619 Project' from Schools*, EDUC. WEEK (Feb. 3, 2021), <https://www.edweek.org/teaching-learning/lawmakers-push-to-ban-1619-project-from-schools/2021/02>; Jonathan Edwards, *School Board Meeting Cut Short as Protests Over LGBTQ Books Grow Unruly*, WASH. POST (Oct. 12, 2022, 6:03 AM), <https://www.washingtonpost.com/nation/2022/10/12/dearborn-school-board-meeting-shutdown/>.

A. PUBLIC SCHOOL IS AN ESSENTIAL CIVIC INSTITUTION

Publicly funded and operated K–12 education is a central American institution. Ninety percent of American children attend public schools,⁵ making public elementary and secondary education one of the most commonly shared experiences of American children. Although a public education is not guaranteed by the U.S. Constitution, every state operates public schools, all state constitutions guarantee that children receive a free public education,⁶ and no child can be excluded from public schooling.⁷ Education spending is often the single biggest item in state and local budgets,⁸ reflecting the centrality of public education to the functions of those governments.

The structure of K–12 education is the product of both federalism and the separation of church and state under the Constitution. Because the Constitution does not explicitly or implicitly give jurisdiction over education to the federal government, education in the United States is primarily a state and local matter.⁹ Schools are mostly regulated and financed by states and localities, with a small percentage of funding and control provided by the federal government.¹⁰ The federal Department of

⁵ According to the National Center for Education Statistics, out of 56.3 million students enrolled in primary and secondary school in 2019, 5.7 million attended private school—about 10% of children in the United States. See *Projected Number of Participants in Educational Institutions, by Level and Control of Institution: Fall 2019*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d20/tables/dt20_105.10.asp?current=yes [<https://perma.cc/9WMH-AKBK>] (last visited Feb. 19, 2023).

⁶ The language in state constitutions varies. See SCOTT DALLMAN & ANUSHA NATH, EDUCATION CLAUSES IN STATE CONSTITUTIONS ACROSS THE UNITED STATES 1 (2020), <https://www.minneapolisfed.org/~media/assets/articles/2020/education-clauses-in-state-constitutions-across-the-united-states/education-clauses-in-state-constitutions-across-the-united-states.pdf?la=en> [<https://perma.cc/9QNH-DC7H>].

⁷ See *Plyler v. Doe*, 457 U.S. 202, 215, 230 (1982) (holding that excluding undocumented immigrant children from public education violates equal protection).

⁸ See NAT'L ASSOC. OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT 3 (2017), https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/State_Expenditure_Report_Fiscal_2015-2017_-S.pdf [<https://perma.cc/F8JX-JCY7>] (“[In] general fund spending, elementary and secondary education remains the largest category in fiscal 2017, representing 35.4 percent of general fund expenditures.”). For a tabular overview, see Nat'l Assoc. of State Budget Officers, *State Spending by Function as a Percent of Total Expenditures*, BALLOTPEDIA, https://ballotpedia.org/State_spending_by_function_as_a_percent_of_total_expenditures [<https://perma.cc/E37U-T49Q>] (last visited Feb. 19, 2023) (listing data from FY 2015).

⁹ The Tenth Amendment of the U.S. Constitution provides that any power not delegated to the federal government or prohibited to the states is reserved for the states. U.S. CONST. amend. X.

¹⁰ *Public School Revenue Sources*, NAT'L CTR. FOR EDUC. STAT. (May 2022), <https://nces.ed.gov/programs/coe/indicator/cma/public-school-revenue> [<https://perma.cc/6NY7-5BG3>] (“In school year 2018–19, elementary and secondary public school revenues totaled \$795 billion in constant 2020–21 dollars. Of this total, 8 percent, or \$63 billion, were from federal sources. Some 47 percent, or \$371 billion, were

Education establishes limited policies and identifies issues requiring national attention, but it does not exercise direct “control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system.”¹¹ Localities have the most control over public schools through local school boards,¹² which are elected by communities and can impose curriculum requirements and policies in the school district.¹³ States adopt a variety of requirements for public schools, which differ from one another.¹⁴ Federal money is disbursed through discretionary grants and programs that are targeted to low-income students.¹⁵ That funding comes with strings attached, such as educational standards¹⁶ and desegregation efforts.¹⁷ Private schools that do not receive federal funding are subject to limited federal restrictions, but they may not discriminate on the basis of race if they want to qualify as charities for federal tax purposes and thereby receive deductible contributions.¹⁸

Private education is mostly religious education. The Constitution mandates a separation between church and state. Under the First Amendment, no state may establish religion,¹⁹ so religion is not allowed to be practiced in public schools. Because of this prohibition, families seeking a religious education must send their children to private schools. Of the 10% of children who do not attend public schools, about 80% enroll at religious

from state sources and 45 percent, or \$361 billion, were from local sources.”) (footnotes omitted).

¹¹ See 20 U.S.C. § 3403(b).

¹² In its state education laws or codes, the legislature will establish the state education agency and a system of local educational agencies (LEAs). An LEA is “a public board of education or other public authority legally constituted within a State for either administrative control or direction of . . . public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State.” 20 U.S.C. § 1401(19)(A).

¹³ School boards are one of the most local and specialized forms of representative government. See, e.g., *About School Boards and Local Governance*, NAT’L SCH. BDS. ASS’N, <https://www.nsba.org/About/About-School-Board-and-Local-Governance> [<https://perma.cc/9SQZ-K5FB>] (last visited Feb. 19, 2023).

¹⁴ For example, states have age and enrollment requirements, assessment and accountability requirements, and staff qualification standards. See, e.g., *State Education Practices (SEP)*, NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/programs/staterreform/index.asp> [<https://perma.cc/RQ8L-TUFV>] (last visited Feb. 19, 2023).

¹⁵ See, e.g., *Office of Discretionary Grants & Support Services*, DEP’T OF EDUC. OFF. OF ELEMENTARY & SECONDARY EDUC. (Nov. 2, 2022), <https://oese.ed.gov/offices/office-of-discretionary-grants-support-services/> [<https://perma.cc/3CWL-57VV>] (discussing grants for specific educational programming); KYLE D. SHOHFI & JESSICA TOLLESTRUP, CONG. RSCH. SERV., R44477, DEPARTMENT OF EDUCATION FUNDING: KEY CONCEPTS AND FAQ 7 (2019) (discussing funding based on variables related to student need).

¹⁶ See 20 U.S.C. § 6311(b) (imposing educational standards).

¹⁷ See 20 U.S.C. § 7231d(b) (requiring evidence of desegregation).

¹⁸ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 575, 598–99 (1983) (holding that race discrimination in education is inconsistent with the requirements for charitable status).

¹⁹ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I.

schools, according to a recent survey by the Department of Education.²⁰ Consequently, about 8% of all K–12 children attend private religious schools and only 2% attend private nonreligious schools.

The entitlement to a public education is important because primary and secondary school is where children learn to be citizens. The lessons that children learn and the experience of being in community with people who differ from them are essential preparation for participatory government. In addition to creating a literate and numerate population of adults, public education fosters civic awareness and social cohesion. In a country where people are separated by immense geographic distances and diverse cultural experiences, public school education is a rare point of commonality for American children.

In numerous opinions, the Supreme Court has recognized this civic role of public schools. Consider these quotes from Supreme Court opinions about education: “We have recognized ‘the public schools as a most vital civic institution for the preservation of a democratic system of government.’”²¹ “[P]ublic schools . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system.”²² In *Brown v. Board of Education*, the landmark decision that ended de jure racial segregation in education throughout the United States and guaranteed Black children integrated public schools as a matter of equal protection,²³ the Supreme Court wrote:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.²⁴

Scholars have also pointed to public education as the key to a functioning democratic society. Education scholar Derek Black posits that public schools and a republican form of government are “inextricably

²⁰ See Stephen P. Broughman, Adam Rettig & Jennifer Peterson, *Characteristics of Private Schools in the United States: Results from the 2015–16 Private School Universe Survey*, NAT’L CTR. FOR EDUC. STAT. 2 (2017), <https://nces.ed.gov/pubs2017/2017073.pdf> [<https://perma.cc/NLD3-D3SP>].

²¹ *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).

²² *Ambach v. Norwick*, 441 U.S. 68, 77 (1979).

²³ 347 U.S. 483, 495 (1954).

²⁴ *Id.* at 493.

intertwined.”²⁵ In his recent book championing public education and warning of the dangers it currently faces, Black explains: “The nation’s very concept of government is premised on an educated citizenry. From its infancy, the United States has sought to distinguish itself with education. More particularly, education has been the tool through which the nation has sought to perfect its democratic ideas.”²⁶ Black argues that public education was a central feature at every important juncture in American history, and the most crucial element for American government.²⁷

A generation ago, Amy Gutmann devised a democratic theory with public education at its center. Her theory depended on public education as the “primary means by which citizens can morally educate future citizens.”²⁸ She argued that schooling in a democratic society must “cultivate common democratic values in all children, regardless of their academic ability, class, race, religion or sex.”²⁹ Her theory champions the messy process of deliberation and disagreement in determining the content of what children learn, emphasizing that democracy requires such a process.³⁰

Proponents of public subsidies for the flight from public schools to private schools argue that educational outcomes will be better for students if parents have more school choice. However, there is no evidence that educational outcomes are better for private school students than public school students. A definitive longitudinal study by Robert C. Pianta and Arya Ansari, published in 2018, shows that private schools do not produce superior educational outcomes for graduates.³¹ Of course, children who attend private schools have different experiences than children who attend public schools, but the difference is not primarily about educational quality. Across the United States, rich children receive better educations—both public and private—than poor children.³² Consequently, children who attend private schools receive a different education, but not a better

²⁵ DEREK W. BLACK, *SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY* 11 (2020).

²⁶ *Id.* at 133.

²⁷ *Id.* at 50 (“At our founding, in our most significant constitutional moments, and during our most serious political challenges, the commitment to public education—to the right to education—has served as the ideological and practical anchor for democracy.”) The book starts with the founding and follows education through history.

²⁸ AMY GUTMANN, *DEMOCRATIC EDUCATION* 70 (1999).

²⁹ *Id.* at 116.

³⁰ *See id.* at 70.

³¹ *See* Robert C. Pianta & Arya Ansari, *Does Attendance in Private Schools Predict Student Outcomes at Age 15? Evidence from a Longitudinal Study*, 47 *EDUC. RESEARCHER* 419, 429 (2018).

³² *See generally* Fabian T. Pfeffer, *Growing Wealth Gaps in Education*, 55 *DEMOGRAPHY* 1033 (2018), <https://read.dukeupress.edu/demography/article/55/3/1033/167883/Growing-Wealth-Gaps-in-Education> [<https://perma.cc/W8RP-A4ZH>] (summarizing research on income inequality’s effects on education and presenting empirical evidence on the relationship between wealth inequality and educational outcomes).

education, than children who attend public schools.³³ Depending on the educational content, that difference could be destructive to the values of equality and community in a democratic system.

Colleges and universities have made great efforts to foster diversity and inclusion in higher education, and diversity has increased.³⁴ But if the goal of educational inclusion is equal opportunity for economic mobility, then college diversity efforts come too late to succeed. Raj Chetty's work at Opportunity Insights shows that high-quality early-childhood K–12 education is crucial to later economic mobility.³⁵ We cannot start to address inequity at the college level. If we care about inequality, we need to try harder to make elementary school an engine for opportunity and mobility. The tax law needs to help fuel that engine.

B. WHAT DO TAX BENEFITS HAVE TO DO WITH K–12 EDUCATION?

We need to marshal all the tools at our disposal to ensure that children are taught the civic values that allow our public institutions to exist. Living in community with others requires that we understand, disagree with respect, and insist on the dignity of every person. Separation and intolerance threaten every aspect of our political system. Taxation is often overlooked in these discussions and assumed to be irrelevant to the core questions of political legitimacy and survival because it is less transparent than other mechanisms.

As a tax scholar, I have no expertise concerning the role of public education in a democracy, but my own experience as a public school student prepared me to participate in democracy by respecting difference, accepting compromise, and trusting in democratic institutions. If education scholars Black and Gutmann are correct that public education is necessary to our democracy, then the role of tax scholars is to identify aspects of the tax system that are threatening it. Tax scholars are inclined to see taxation as more central than it is in both creating and solving our problems, and I do not want to suggest that taxation was the main cause or will be the main solution for unfairness in childhood education. For every tax benefit this Article considers, there are non-tax vectors that contribute to inequality,

³³ See Pianta & Ansari, *supra* note 31, at 429.

³⁴ See OFF. OF PLAN., EVALUATION AND POL'Y DEV. AND OFF. OF THE UNDER SEC'Y, U.S. DEP'T OF EDUC., ADVANCING DIVERSITY AND INCLUSION IN HIGHER EDUCATION: KEY DATA HIGHLIGHTS FOCUSING ON RACE AND ETHNICITY AND PROMISING PRACTICES 5 (2016) <https://www2.ed.gov/rschstat/research/pubs/advancing-diversity-inclusion.pdf> [<https://perma.cc/38RA-CK46>] (“[T]oday’s college students are more diverse than their predecessors with respect to race and ethnicity as well as socioeconomic background”)

³⁵ See Raj Chetty, John N. Friedman, Nathaniel Hilger, Emmanuel Saez, Diane Whitmore Schanzenbach & Danny Yagan, *How Does Your Kindergarten Classroom Affect Your Earnings? Evidence from Project STAR*, 126 Q. J. ECON. 1593, 1624 (2011) (explaining statistically significant improvement in outcomes, including mobility rates, for students assigned to small classes from kindergarten through third grade).

segregation, or both. Even without tax benefits, many parents will spend money trying to give their children advantages that are unavailable to others. Even without tax benefits, some parents will separate their children from others with different backgrounds, races, and religions. The tax law cannot fully solve the problems plaguing primary and secondary education. Nevertheless, it is important to recognize the ways that benefits delivered through the tax law encourage and subsidize segregation and stratification in childhood education, along multiple dimensions—socioeconomic, racial, political, and religious. Along with many other areas of the law, the tax law could better promote democratic values in education.

This Article analyzes how the tax law relates to the civic challenges of K–12 education in two ways. First, the tax system—both federal and state—diverts funds away from traditional public education into all kinds of private and semiprivate education, which fosters economic, racial, religious, and political separation. It also operates to increase resource inequality in public education. It makes the schools that affluent children attend—both public and private—better. It both encourages and subsidizes the concentration of greater resources into education for children in high-income families.³⁶ The two Internal Revenue Code provisions directly responsible are Section 170, the deduction for charitable contributions,³⁷ and Section 529, the exclusion for income earned in education savings accounts.³⁸

Second, tax benefits for private education contribute to the privatization of core public decision-making. Public institutions need to make the decisions about what childhood education is and how to prepare children to become citizens in a democracy.³⁹ Primary and secondary school are the loci of civic education. Unfortunately, the Supreme Court has invited states to use tax benefits as a mechanism for delegating substantial control over childhood education to private organizations and individuals, and states have seized on the invitation to use tax credits to support private schools at the expense of public schools.⁴⁰

This Article proceeds by analyzing federal tax law in Part I and state tax law in Part II. Federal law is problematic primarily because it subsidizes the affluent; state law is problematic primarily because it subsidizes racial and religious segregation and weakens the civic role of public education. Part I argues that the charitable contribution deduction and the tax benefits for education savings plans in the federal tax law promote inequality in education. It also challenges the jurisprudence around the definition of a charitable gift, arguing that no deduction should ever be allowed for

³⁶ Tax benefits can both encourage and subsidize certain activities, depending on taxpayer elasticity and incidence of the tax savings. For a discussion of subsidies compared to incentives, see Linda Sugin, *Tax Expenditures, Reform, and Distributive Justice*, 3 COLUM. J. TAX L. 1, 23–26 (2011).

³⁷ See *infra* Section I.A.

³⁸ See *infra* Section I.C.

³⁹ See GUTMANN, *supra* note 28.

⁴⁰ See *infra* Part II.

parental payments to schools attended by their children, regardless of their designation as tuition or gifts. Part II focuses on state tax credits and argues that states are undermining their public schools, and subsidizing religion and segregation through tax credits, to the detriment of both children and society.

I. THE CHARITABLE DEDUCTION PROMOTES INEQUALITY AND PRIVATE BENEFITS

A. CHARITABLE GIFTS INCREASE INEQUALITY IN BOTH PUBLIC AND PRIVATE K–12 EDUCATION

Section 170 authorizes a deduction for contributions that benefit both public and private schools, and systematically favors schools chosen by the affluent in both realms. Individuals who itemize their deductions are allowed to claim a deduction against income for amounts donated to both private nonprofit schools and nonprofit organizations that support public schools. Private schools are generally eligible for charitable status under Section 501(c)(3) of the Code.⁴¹ Nonprofit organizations connected to public schools, like parent–teacher associations (PTAs) and school/team booster clubs can also qualify for exemption by virtue of their contribution to the educational purposes that they support.⁴²

Although the charitable deduction is theoretically available to lower-income donors, as a practical matter, it is not. All taxpayers are entitled to reduce their total gross income by certain expenses when calculating their taxable income, but taxpayers can opt for either a standard deduction amount or an itemized deduction amount. Because the charitable deduction is exclusively available to taxpayers who itemize, it is only valuable to taxpayers who exceed the deduction threshold in the standard deduction. Most taxpayers choose to claim the standard deduction because their aggregate itemized deductions do not reach the threshold of the standard deduction, and taxpayers must choose either one or the other, but may not claim both. For married taxpayers, that threshold is currently \$25,900, a

⁴¹ A nonprofit school is presumptively a public charity, as long as it refrains from political campaigning, private inurement, and discrimination on the basis of race. *See* I.R.C. § 501(c)(3); *Bob Jones Univ. v. United States*, 461 U.S. 574, 598–99 (1983). The regulations give the following example of an exempt educational organization: “An organization, such as a primary or secondary school, a college, or a professional or trade school, which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.” *Treas. Reg* § 1.501(c)(3)-1 (example 1) (2011).

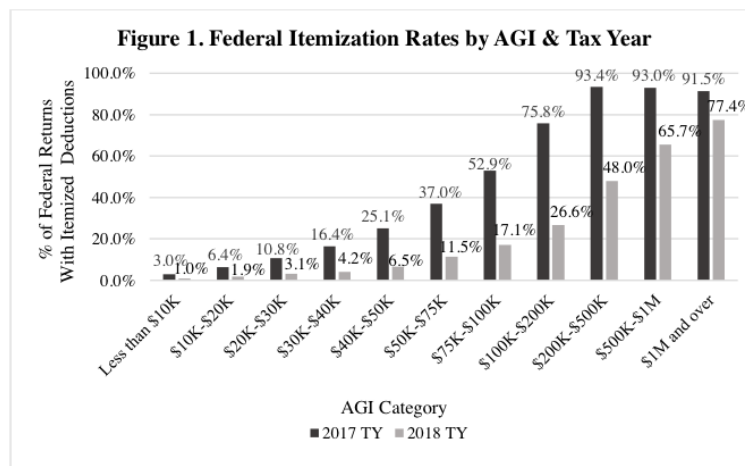
⁴² In some cases, auxiliary organizations provide explicit benefits for participating families and are ineligible for exemption. *See* *Rev. Rul. 69-175*, 1969-1 C.B. 149 (noting organization was ineligible for exemption where the sole purpose was pooling parental funds to provide transportation for their children to go to and from private school).

substantial portion of total income for most Americans.⁴³ Low-income taxpayers are unlikely to meet that threshold, so will not claim any itemized deductions and will instead opt for the standard deduction. Since the substantial increase in the standard deduction in 2017 as part of the Tax Cuts and Jobs Act, the charitable deduction (like all itemized deductions) has become a benefit for a narrow slice of high-income taxpayers.⁴⁴ For this reason alone, high-income taxpayers are receiving the bulk of the tax benefits associated with charitable gifts to education.

In addition, if low-income taxpayers did itemize, they would likely benefit only minimally (or not at all) from claiming charitable deductions because their low (or zero) tax rates make the deduction worth less (or nothing) for them. To the contrary, at a top marginal rate of 37%, high-income taxpayers who itemize can receive substantial tax benefits for gifts made to the schools their children attend. These forces make the deduction

⁴³ See Rev. Proc. 2021-45 I.R.B 14. According to the U.S. Census Bureau, the median household income in 2016–2020 was \$64,994. See Press Release, U.S. Census Bureau, New Statistics Available from the 2016–2020 American Community Survey 5-Year Estimates (Mar. 17, 2022), <https://www.census.gov/newsroom/press-releases/2022/acs-5-year-estimates.html> [<https://perma.cc/DG2U-G2VJ>].

⁴⁴ According to the chart below from Heather Field’s recent article, the percentage of itemizers dropped considerably after the passage of the Tax Cuts and Jobs Act (TCJA) and is low for taxpayers with less than \$200,000 income.



See Heather M. Field, *Taxpayer Choices, Itemized Deductions, and the Relationship Between the Federal & State Tax Systems*, 13 COLUM. J. TAX L. 1, 16 fig.1 (2021). According to the Tax Foundation’s estimates, over 90% of taxpayers in the 99th percentile (of income) itemize deductions. See Scott Eastman, *How Many Taxpayers Itemize Under Current Law?*, TAX FOUND. (Sept. 12, 2019), <https://taxfoundation.org/standard-deduction-itemized-deductions-current-law-2019/> [<https://perma.cc/WFM6-QBTP>] (basing estimates on Tax Foundation’s general equilibrium model for post-TCJA filers). That share drops with income (to 73% in the next 4% and 50% in the 90–95th percentile.) *Id.* Middle-income taxpayers overwhelmingly do not itemize, with only 13.8% in the 60–80th percentile and fewer below that are itemizers. *Id.* These percentages should remain roughly the same as long as the rate structure and exemption amounts continue to resemble the law in effect following the 2017 tax changes.

quite valuable to high-income taxpayers and worthless to low-income taxpayers.

Some observers object, in principle, to the charitable deduction because it benefits those who can afford to make donations.⁴⁵ I believe that critique is not sufficiently nuanced. Because tax benefits for philanthropy are intended to benefit recipient organizations, and not donors, the distributional effects of donations must be evaluated by analyzing both the incidence of the tax savings and an organization's beneficiaries.⁴⁶ Charities benefit where the deduction encourages donors to increase the size of their gifts because they are not burdened by tax. In situations where a broad charitable class benefits from the gifts, the deduction can be redistributive and just.⁴⁷ For example, when rich people donate to food banks, poor people receive more food if the donors increase their contributions by the tax savings on their gifts. If the incidence of the tax savings is passed through to the organizations, the deduction subsidizes the work of the charities and does not enrich the donors.⁴⁸

This analysis of incidence and beneficiaries is important for primary and secondary education because the donee organizations are designed to benefit the children of the donors. It does not matter whether the recipient of the donation is the school itself (as is likely the case with private schools) or a nonprofit organization associated with the school (as is likely the case with public school PTAs). Whenever parents donate to improve the education of their children, the incidence of the tax savings benefits them—either through reduced parental tax liability or increased child educational opportunities. There is no separate class of charitable beneficiaries that does not include the parent-donors and their children. That is why the charitable deduction for K–12 education is problematic from the perspective of distributive justice. Parental donations to primary and secondary schools are different from many other charitable gifts because the tax benefits that subsidize the recipient schools directly benefit the donors' own children and the community in which they live. These are non-redistributive gifts that perpetuate inequality in a particularly crucial social context because equality in education is paramount. Education is preparation for civic

⁴⁵ The anti-philanthropy literature focuses on the concentration of power in the hands of a few rich people and its undemocratic nature. See generally TERESA ODENDAHL, CHARITY BEGINS AT HOME: GENEROSITY AND SELF-INTEREST AMONG THE PHILANTHROPIC ELITE (1990) (emphasizing the selfish aspect of philanthropy). Leading philanthropy scholars have been debating the role of philanthropy in democracy for a long time. See Rob Reich, *What Are Foundations for?*, BOS. REV. (May 28, 2013), <https://www.bostonreview.net/forum/foundations-philanthropy-democracy/> [<https://perma.cc/XMM9-YA69>] (challenging scholars and nonprofit leaders to justify the plutocracy of private foundations in a society committed to equality).

⁴⁶ See Sugin, *supra* note 36, at 25.

⁴⁷ I have argued that the scope of charity needs redefinition, but that it has an important role in a just and pluralistic society. See Linda Sugin, *Rhetoric and Reality in the Tax Law of Charity*, 84 FORDHAM L. REV. 2607, 2626–28 (2016).

⁴⁸ See Sugin, *supra* note 36, at 25.

participation, so equality in education fosters political equality. The charitable deduction should encourage and subsidize the redistribution of resources that promotes political equality. It should not subsidize self-benefitting payments that widen the educational gap between rich and poor.

B. THE LEGAL DISTINCTION BETWEEN TUITION
AND PARENTAL GIFTS IS UNJUSTIFIED

A longstanding legal distinction between tuition payments and non-tuition payments to schools explains how the law provides a tax-based subsidy to schools educating the affluent. Under U.S. tax law, parents are not entitled to deduct tuition payments,⁴⁹ but are permitted to deduct non-tuition payments to schools—if they qualify as gifts.⁵⁰ To be deductible, “gifts” must satisfy both an intent requirement and a no-consideration requirement. The donative intent required of gifts was described by the Supreme Court as “detached and disinterested generosity.”⁵¹ That intent cannot include an expectation of a return benefit, and deductible gifts cannot, in fact, produce a return benefit.⁵²

The law’s no-consideration analysis turns on whether the payor receives a quid pro quo.⁵³ Tuition gives rise to a quid pro quo because the education that children receive is a return benefit to the taxpayer’s family, negating the gift requirement.⁵⁴ It is well established that tuition payments result in a quid pro quo to the payor that bars the deduction.⁵⁵ Despite these basic principles in the definition of a charitable gift, the law has long allowed parents to deduct payments that are not designated as tuition and do not operate as direct substitutes for tuition.⁵⁶

⁴⁹ Rev. Rul. 54-580, 1954-2 C.B. 97 (“Tuition paid on behalf of children attending parochial, or other types of church sponsored schools is not deductible as contributions or gifts in computing net income for Federal income tax purposes . . .”). Because tuition does not satisfy the basic requirements for deductibility, Congress adopted tax benefits connected with higher education costs. See I.R.C. § 25A (specifying American Opportunity and Lifetime Learning Tax Credits).

⁵⁰ See *DeJong v. Comm’r*, 309 F.2d 373, 379 (9th Cir. 1962) (distinguishing tuition from gifts).

⁵¹ *Comm’r v. Duberstein*, 363 U.S. 278, 285–86 (1960) (“A gift in the statutory sense, on the other hand, proceeds from a ‘detached and disinterested generosity,’ . . . ‘out of affection, respect, admiration, charity or like impulses.’ . . . And in this regard, the most critical consideration . . . is the transferor’s ‘intention.’”) (internal citations omitted).

⁵² See *United States v. Am. Bar Endowment*, 477 U.S. 105, 116–17 (1986) (holding deductible gift must exceed value of benefit received).

⁵³ See *id.*

⁵⁴ See *Oppewal v. Comm’r*, 468 F.2d 1000, 1002 (1st Cir. 1972); *DeJong*, 309 F.2d at 379; Rev. Rul. 78-189, 1978-1 C.B. 68 (disallowing deduction for what functions as tuition and citing *Oppewal* for the proposition that “[s]uch amounts are not gifts to the school, but are consideration between the parties”).

⁵⁵ See Rev. Rul. 54-580, 1954-2 C.B. 97; Rev. Rul. 71-112, 1971-1 C.B. 93 (disallowing deductions for tuition and fixed donations from parents to schools).

⁵⁶ See Rev. Rul. 83-104, 1983-2 C.B. 46 (listing factors for consideration in separating tuition from gifts and giving examples of nondeductible tuition and deductible gifts).

Because parental gifts to schools their children attend produce a deduction for affluent taxpayers, the distinction between tuition and non-tuition payments subsidizes inequality in education. Even in geographic regions with equal public funding, resources devoted to childhood education can differ substantially across districts and schools on account of private, parental contributions that vary across schools.⁵⁷ According to the Center for American Progress, in the 2013–14 school year, the fifty most affluent parent–teacher associations spent \$43 million in privately raised funds enriching their schools’ public education.⁵⁸ The tax deduction incentivizes larger parental contributions by reducing parents’ after-tax costs. This distributive effect alone suggests that the charitable deduction for parental payments to schools is an undesirable government policy and should be discontinued.

Apart from the policy concerns, the charitable deduction for non-tuition payments—though longstanding—is legally incoherent. Given the standard for deductibility under current law, non-tuition payments from parents to schools that their children attend should never be treated as gifts eligible for a deduction. The law’s bright line between tuition and gifts is imaginary. Parents lack donative intent and fail the no-return benefit requirement.

In some cases, parents and schools attempt to disguise what is really tuition as a gift, by making part of the cost of education a “suggested payment[.]”⁵⁹ The government sees through this obfuscation.⁶⁰ But the problem goes beyond distinguishing tuition from gifts because the distinction itself has no substance. Both (1) the intent of the payor and (2) the benefits received by the payor are indistinguishable for tuition and other parental payments. Given that donative intent and quid pro quo constitute the legal standard for determining deductibility, tuition and parental gifts should not be treated as legally distinct.

Consider intent. Parents pay tuition and donate additional funds in excess of tuition (or in lieu of tuition at public schools) because the collected funds finance important educational opportunities for students, including every parent’s own child. Parents are not motivated by “disinterested generosity,” as the leading case requires.⁶¹ There is nothing altruistic about educational benefits for one’s own children; the parent’s intent is to finance their own children’s better education. Even if the parent’s donation is not

⁵⁷ See Catherine Brown, Scott Sargrad & Meg Benner, *Hidden Money: The Outsized Role of Parent Contributions in School Finance*, CTR. FOR AM. PROGRESS (Apr. 8, 2017), <https://www.americanprogress.org/article/hidden-money/> [<https://perma.cc/6NNV-2QXJ>] (arguing that government should counteract the inequality arising from parental funding).

⁵⁸ See *id.*

⁵⁹ This was the design in Rev. Rul. 83-104, 1983-2 C.B. 46. The suggested charitable contribution was not deductible.

⁶⁰ See *DeJong v. Comm’r*, 309 F.2d 373, 379 (9th Cir. 1962) (disallowing deduction for parental payment to school even though there was no set tuition fee).

⁶¹ *Comm’r v. Duberstein*, 363 U.S. 278, 285–86 (1960) (explaining that “the proper criterion . . . is one that inquires what [was] . . . the dominant reason that explains [one’s] action in making the transfer”).

actually spent by the school or the organization on their child's education, the "disinterested generosity" standard cannot be satisfied because the test focuses on the motivation of the parent. The Supreme Court explained that "the donor's characterization of his action is not determinative—that there must be an objective inquiry as to whether what is called a gift amounts to it in reality."⁶²

The quid pro quo analysis is also indistinguishable for tuition and other payments. That analysis turns on whether the payor receives a return benefit commensurate with the payment,⁶³ and only amounts given in excess of the benefits received are allowed to be deducted.⁶⁴ Families receive a return benefit when their children attend schools with better opportunities for learning. Any additional amount over tuition (or public funding) increases the benefit received by families because those amounts finance additional educational services for their children. The educational benefits from tuition and non-tuition payments are not separable because tuition and other parental gifts both produce education for their children—it is not as though tuition is purchasing something distinguishable from other payments.

There are no *excess* payments to schools that can be distinguished from payments that produce benefit. Unlike meals and tickets to performances, which the IRS has analyzed in the return-benefit context,⁶⁵ educational benefits can grow as large as resources allow, so there is no limit to the scope of return benefits that families can enjoy. There is no principled way to distinguish *types* of benefits either, because the law makes clear that intangible benefits are no different from tangible benefits and can constitute a quid pro quo that precludes a deduction.⁶⁶ In the most recent circuit court opinion on parental payments to a school, parent-taxpayers attempting to deduct part of their private school payments tried to separate out secular from religious educational benefits; they lost their case.⁶⁷ The court held that parents could not deduct the portion of their tuition payments that paid for religious education for their children because the parents were unable to show that their payments exceeded the value of what they received.⁶⁸ Under this standard, parents can never prove they made excess payments qualifying for a deduction because the value of education received is not fixed or determinable. Because the courts have held that a disqualifying

⁶² *Id.* at 286.

⁶³ *See* *United States v. Am. Bar Endowment*, 477 U.S. 105, 117 (1986).

⁶⁴ *See* Rev. Rul. 67-246, 1967-2 C.B. 104 ("In showing that a gift has been made, an essential element is proof that the portion of the payment claimed as a gift represents the excess of the total amount paid over the value of the consideration received therefor. This may be established by evidence that the payment exceeds the fair market value of the privileges or other benefits received by the amount claimed to have been paid as a gift.").

⁶⁵ The examples in the ruling are this type of benefit. *See id.*

⁶⁶ *See* *Hernandez v. Comm'r*, 490 U.S. 680, 691–92, 694 (1989) (holding payments for religious practice produced quid pro quo that barred charitable deduction).

⁶⁷ *Sklar v. Comm'r*, 282 F.3d 610, 620, 622 (9th Cir. 2002).

⁶⁸ *Id.* at 622. The taxpayers conceded that tuition for the secular education would be nondeductible. *Id.* at 620.

return benefit constituting a quid pro quo could be religious in nature,⁶⁹ the return benefit does not have to resemble a true market transaction with property or services available in the for-profit market. All educational benefits are return benefits that make a deduction inappropriate, and all parental payments to schools are made to produce educational benefits.

There are some practical differences between tuition and non-tuition payments, but they are not relevant to the legal standard, which looks to intent and return benefit. For example, critics might argue that tuition is a required payment, while amounts not required for attendance are voluntary. At one level, this is true, but nothing in the legal standard turns on it. In addition, focusing on voluntariness creates a false distinction. All payments for K–12 education, whether designated as tuition or gifts, are voluntary because they occur against a backdrop of universal, free, public education to which every child has a right in every state.⁷⁰ The choice to forego a public education for a private one is voluntary.

Another irrelevant distinction between tuition and other payments is that tuition pays for one’s child only, while other payments are shared by all children at the school. This is also a false dichotomy. Although the cost of a school could be divided by the number of students to determine a per-pupil cost, fixed costs and shared benefits make education unlike individual purchases of goods and services. Every dollar that a school receives produces shared benefits for its students. Tuition payments produce only shared goods, so they are necessarily redistributive. The cost of education is not uniform across students and the benefits are not equivalent either. Complicating the argument is that costs and services vary within schools as well as across them. Some children require more academic attention compared to others, some children may receive school-based financial aid, and some children learn well independently. These differences mean that there is always sharing and redistribution within a school community and parents do not receive precisely what they pay for in a private property sense. That benefits are shared and cannot be precisely measured for any individual does not change the fact that families receive benefits that depend on the resources available to the school. Consequently, none of the payments made by parents to schools fit the legal definition of a “contribution or gift,” and none should be eligible for deduction.

This analysis extends to PTAs and other nonprofit auxiliary organizations connected to public schools. These organization are a source of inequality across schools and districts.⁷¹ Auxiliary organizations finance

⁶⁹ The leading case on quid pro quo is *Hernandez v. Commissioner*, in which the Supreme Court disallowed a deduction for payments to a church for religious services. 490 U.S. at 691–92, 694.

⁷⁰ See *supra* text and accompanying notes 5–23.

⁷¹ See Sarah A. Hill, D. Roderick Kiewiet & Shelly Arsneault, *Public Schools, Private Money: The Persistence of Inequality*, 47 J. EDUC. FIN. 179, 194 (2021) (collecting data on private donations to California public schools); see also Brown et al., *supra* note 57 (finding the richest PTAs raise and spend millions of dollars).

a great deal of enrichment programming enjoyed by students in well-resourced public schools.⁷² In wealthy communities, parents supplement public funding to ensure that schools have enough teachers and extensive opportunities for children to flourish in art, science, and sports.⁷³ Poorer communities simply cannot afford to supplement public funding, producing substantial inequality in resources across public schools in different states and localities.⁷⁴ This inequity deriving from private funding exacerbates the differences in educational funding arising from the decentralized funding system in the U.S. and the differential tax revenues and public spending decisions made by different states and localities.⁷⁵ Disallowing charitable deductions for all parental payments to their children's schools would remove the incentive and tax-based subsidy for parental donations to public schools and the inequality to which those donations contribute.

This discussion so far has focused on the first equality problem with the deduction: inequality *across* institutions—some schools have access to parental resources that are not available to other schools, producing inequality for children at different schools. Disallowing charitable deductions for students' families would also address an additional concern about inequality in education. The second equality problem is *within* institutions. Current law subsidizes and incentivizes parents to make gifts to their children's schools. Because of those payments, the wealthiest parents gain access to school leaders, something the parents of poorer students cannot achieve.⁷⁶ That access focuses school leaders on individual students with wealthy parents and the issues of greatest concern to them.⁷⁷ Consequently, parental gifts have a pernicious effect on equality among students within an institution. The legal problem from this perspective is

⁷² See Suzanne Cope, *The Power of a Wealthy PTA*, ATLANTIC (Nov. 5, 2019), <https://www.theatlantic.com/education/archive/2019/11/pta-fundraising-schools/601435/>.

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ Public funding ranges from a high of over \$27,000 per student in Vermont to just \$9,800 in Arizona. See DANIELLE FARRIE & DAVID G. SCIARRA, EDUC. L. CTR., MAKING THE GRADE: HOW FAIR IS SCHOOL FUNDING IN YOUR STATE? 9 fig.1 (2021) (detailing funding amounts) <https://edlawcenter.org/research/making-the-grade-2021.html> [<https://perma.cc/3T6A-T54B>]. Funding formulas are complicated, and low-income schools are often recipients of additional funding from both the state and federal governments. See *generally* REBECCA R. SKINNER, CONG. RSCH. SERV., R45827, STATE AND LOCAL FINANCING OF PUBLIC SCHOOLS (2019) (reviewing funding formulas); Adrienne Fischer, Chris Duncombe & Eric Syverson, *50-State Comparison: K-12 and Special Education Funding*, EDUC. COMM'N STATES (Oct. 13, 2021), <https://www.ecs.org/50-state-comparison-k-12-and-special-education-funding/> [<https://perma.cc/HK62-PMGZ>].

⁷⁶ The Supreme Court's case on affirmative action this Term has focused attention on Harvard's "Dean's Interest List," which identifies students whose admission can help bring in philanthropic gifts. See Delano R. Franklin & Samuel W. Zwickel, *In Admissions, Harvard Favors Those Who Fund It, Internal Emails Show*, HARV. CRIMSON (Oct. 18, 2018), <https://www.thecrimson.com/article/2018/10/18/day-three-harvard-admissions-trial/> [<https://perma.cc/PM5R-PJJY>].

⁷⁷ See *id.*

clear here also—payments that buy access and attention are not gifts, as they lack the requisite intent and are accompanied by return benefits. Parental payments should simply be ineligible for deduction as charitable contributions.

This improved understanding of the contours of the charitable deduction would apply not only to K–12 education, but also to higher education as well. Parental gifts are a growing fundraising focus at many higher education institutions, and they present an insidious threat to equal opportunity and treatment for students. The tax law should not be encouraging or subsidizing preferred treatment for a select group of affluent students at an institution, whether in primary, secondary, or higher education.

This Section has explained how the charitable deduction exacerbates educational inequality in both public and private schools. Allowing a charitable deduction for parents' payments to schools that their children attend encourages and subsidizes that inequality and should not be permitted. Such a deduction is also doctrinally indefensible. There is no principled distinction between tuition and other parental payments to schools under the current law's standard, which depends on the absence of return benefits and the presence of donative intent.

C. EDUCATION SAVINGS ACCOUNTS ALLOW THE RICH TO PAY TUITION WITH TAX-FREE MONEY

There is another way that the federal tax system promotes inequality in education: Federal Education Savings Accounts, which are governed by Section 529 of the Internal Revenue Code and are known simply as “529 plans.” While not useful for families with children attending public schools in their districts,⁷⁸ these accounts subsidize and incentivize the flight from public schools into private schools for those who can afford to benefit from its provisions.

Originally adopted in 1996,⁷⁹ Section 529 started out as a provision for states and educational institutions to encourage and simplify college savings. Amounts placed in qualifying 529-plan savings accounts grow tax-free⁸⁰ and earnings can be withdrawn tax-free for educational expenses.⁸¹ Many states additionally allow a deduction from state income tax liability for contributions to these accounts.⁸² Despite the original focus on helping

⁷⁸ The statute applies to “expenses for tuition in connection with enrollment or attendance at an elementary or secondary public, private, or religious school.” I.R.C. § 529(c)(7).

⁷⁹ Small Business Job Protection Act of 1996, Pub. L. No. 104–188, § 1806(c), 110 Stat. 1755, 1898 (1996).

⁸⁰ I.R.C. § 529(a).

⁸¹ I.R.C. § 529(c)(3).

⁸² For a fifty-state survey comparison of 529 plans, see generally Adrienne Fischer, Bryan Kelley, Damion Pechota & Sharmila Mann, *50-State Comparison: 529 Education Savings Plans*, EDUC. COMM'N STATES (June 15, 2020), <https://www.ecs.org/50-state-comparison-529-education-savings-plans> [<https://perma.cc/JK6S-VMHH>].

people who needed to save for college, 529 plans were eventually widely known to benefit the wealthy. President Obama proposed scaling them back, but ultimately dropped the idea because the political resistance was too strong.⁸³

In 2017, the Tax Cuts and Jobs Act expanded the provision to include K–12 education tuition, as well as college costs.⁸⁴ Now, in addition to tax-free withdrawals for higher education, Section 529 allows withdrawals for elementary and secondary education tuition of up to \$10,000 per year.⁸⁵ Because the tax savings grow over time as the invested amount earns returns, the benefit of tax exemption depends on how much is invested and how long it remains invested; taxpayers enjoy the tax benefit from saving in a 529 plan if they can afford to invest a large sum and keep it invested for many years.

Given the incentives created by the law, it is not surprising that 529 plans have turned into an irresistible tax shelter opportunity for wealthy people who can afford to superfund their accounts at the birth of a beneficiary.⁸⁶ Every state has a maximum per-beneficiary allowable investment, with some states allowing benefactors (i.e. parents or other relatives) to invest more than \$500,000 per beneficiary.⁸⁷ The greatest tax benefits flow to super-funded plans that are allowed to accumulate until a child is ready to attend college.⁸⁸ Eighteen years of investment growth provides huge tax benefits, but even after a few years, a super-funded account can have considerable earnings. Consequently, the 2017 expansion to primary and secondary education creates a windfall benefit to wealthy families who send their children to private schools. In addition, it is also possible to create dynasty 529 plans that multiply tax benefits by accumulating untaxed income for generations.⁸⁹

In addition to blatantly subsidizing the private school expenditures of the affluent,⁹⁰ the tax-free earnings regime in Section 529 also undermines

⁸³ See David Wessel, *Making Sense of the Uproar over Obama's 529 Proposal*, BROOKINGS (Jan. 23, 2015), <https://www.brookings.edu/opinions/making-sense-of-the-uproar-over-obamas-529-proposal/> [<https://perma.cc/5QDA-SLL7>].

⁸⁴ Pub. L. No. 115–97, § 11032, 131 Stat. 2082 (2017).

⁸⁵ I.R.C. § 529(c)(7); § 529(e)(3)(A) (limiting the amount to \$10,000).

⁸⁶ See Ron Lieber, *Yes, You Really Can Pay for Private School with 529 Plans Now*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/your-money/529-plans-taxes-private-school.html> (“[I]t would be financial malpractice for accountants and financial advisers not to be recommending to clients that they consider this kind of upfront investment.”).

⁸⁷ See Fischer et al., *supra* note 82.

⁸⁸ This is simply the consequence of compound interest.

⁸⁹ See Victoria J. Haneman, *Dynasty 529 Plans and Structural Inequality*, 61 WASHBURN L.J. 497, 498 (2022).

⁹⁰ See Richard V. Reeves & Nathan Joo, *A Tax Break for ‘Dream Hoarders’: What to Do About 529 College Savings Plans*, BROOKINGS (June 29, 2017), <https://www.brookings.edu/research/a-tax-break-for-dream-hoarders-what-to-do-about-529-college-savings-plans/> [<https://perma.cc/DL55-4DYP>] (“Affluent families reap almost all of the benefits from the federal tax incentives.”).

the current legal distinction between tuition payments and parental gifts discussed above.⁹¹ Recall that current law requires that private school tuition be paid with after-tax dollars,⁹² and the government has policed that requirement by preventing taxpayers from pretending that tuition payments are gifts deductible under Section 170.⁹³ Section 529 allows tax-free build-up of earnings within the plans and never imposes taxes on the expenditures made with funds distributed out of the plans, as long as the expenditures are used for education.⁹⁴ Consequently, it erases the tax distinction between tuition and gifts. In tax terms, the permanent exemption of funds earned in a 529 plan is equivalent to an inclusion followed by a deduction—the system in place for contributions under Section 170. Both mechanisms allow taxpayers to finance expenditures with pre-tax income. For this reason, Section 529 is designed to remove the tax burden from tuition payments, contrary to the longstanding authority on private school tuition.⁹⁵

Since Section 529 is designed as an exclusion from income, high-bracket taxpayers save the most tax by investing in 529 plans. Low-bracket taxpayers are doubly disadvantaged under the terms of the law because of (1) their inability to invest large sums and (2) their low marginal rates of tax. The 2017 extension of Section 529 to primary and secondary education has made it cheaper for wealthy taxpayers to send their children to private school. But it has not relieved the tax burden on lower-income taxpayers who cannot afford to save in a Section 529 plan.

⁹¹ See *supra* Section I.B.

⁹² See Rev. Rul. 54-580, 1954-2 C.B. 97.

⁹³ “Whether a transfer of money by a parent to an organization that operates a school is a voluntary transfer that is made with no expectation of obtaining a commensurate benefit depends upon whether a reasonable person, taking all the facts and circumstances of the case into account, would conclude that . . . the payment was not made pursuant to a plan (whether express or implied) to convert nondeductible tuition into charitable contributions” Rev. Rul. 83-104, 1983-2 C.B. 46.

⁹⁴ I.R.C. § 529(a) exempts qualified tuition programs from tax, which allows the build-up in earnings free of tax. I.R.C. § 529(c)(3)(B) allows the tax-free distribution from the plan for qualifying higher education expenses. The statute provides:

(B) Distributions for qualified higher education expenses. For purposes of this paragraph —

(i) In-kind distributions. No amount shall be includible in gross income under subparagraph (A) by reason of a distribution which consists of providing a benefit to the distributee which, if paid for by the distributee, would constitute payment of a qualified higher education expense.

(ii) Cash distributions. In the case of distributions not described in clause (i) , if—

(I) such distributions do not exceed the qualified higher education expenses (reduced by expenses described in clause (i)), no amount shall be includible in gross income, and

(II) in any other case, the amount otherwise includible in gross income shall be reduced by an amount which bears the same ratio to such amount as such expenses bear to such distributions.

⁹⁵ See *supra* Section I.B.

II. STATE TAX CREDITS UNDERMINE DEMOCRACY AND INDIVIDUAL RIGHTS FOR CHILDREN

One of the reasons that both Sections 170 and 529 promote inequity is because they are designed to be sensitive to a taxpayer's marginal rate of tax. Section 170 deductions and Section 529 exclusions operate to adjust taxable income, so their value depends on a taxpayer's marginal rate of tax. High-rate taxpayers (the highest marginal federal rate is currently 37%)⁹⁶ enjoy the greatest benefit from exclusions and deductions. Unlike deductions and exclusions, tax credits can ameliorate the distributional concerns of tax benefits that depend on marginal rates because they offset tax liabilities directly, rather than reducing taxable income.⁹⁷ Nevertheless, as this Part explains, tax credits for education are not a good way to promote equality in education. State tax credits incentivize families to move their children from public to private school, diverting resources from public education and its civic function. They also subsidize private education that lacks the diversity and nondiscrimination mandated in public schools.

State tax-credit scholarship funds are a growing trend in K–12 education funding. Twenty-one states have some form of tax-credit scholarship program,⁹⁸ and over a billion dollars of tax revenue is diverted through them from public education to private schools every year.⁹⁹ These programs grew substantially during the Trump administration, when the Department of Education championed private education.¹⁰⁰ State tax credits are designed to operate like voucher systems (they are also called “neovouchers”).¹⁰¹ The most common design consists of state tax credits for payments that taxpayers make to nonprofit tuition-granting organizations.¹⁰² Those organizations then subsidize families with children in private schools by paying for private school tuition. The tax credits for so-called donors to the

⁹⁶ See Rev. Proc. 2021-45 I.R.B. 6.

⁹⁷ See Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 24 (2006).

⁹⁸ “There are 26 tax-credit scholarship programs in 21 states—Alabama, Arizona (4), Arkansas, Florida (2), Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Montana, Nevada, New Hampshire, Ohio, Oklahoma, Pennsylvania (2), Rhode Island, South Carolina, South Dakota, Utah and Virginia.” *Fast Facts*, EDCHOICE (May 28, 2019), <https://www.edchoice.org/school-choice/fast-facts/> [<https://perma.cc/5XPX-9ML3>].

⁹⁹ CARL DAVIS, INST. ON TAX’N & ECON. POL’Y, STATE TAX SUBSIDIES FOR PRIVATE K-12 EDUCATION 2 (Oct. 2016), <https://itep.sfo2.digitaloceanspaces.com/k12taxsubsidies.pdf> [<https://perma.cc/B8K4-V7U5>].

¹⁰⁰ See Leslie S. Kaplan & William A. Owings, *Funding School Choice: Implications for American Education*, 44 J. EDUC. FIN. 199, 199 (2018) (“Betsy DeVos, President Donald Trump’s Secretary of Education, champions school choice, sometimes called education privatization”).

¹⁰¹ *Id.* at 205. A comprehensive treatment of state tax-credit programs is beyond the scope of this Article. For an interactive guide to every state’s program, see Emily Ronco, *Interactive Guide to School Choice Laws*, NAT’L CONF. OF STATE LEGISLATURES (July 1, 2020) [<https://perma.cc/HS6R-2V3J>].

¹⁰² There are currently 26 tax-credit scholarship programs. See *Fast Facts*, *supra* note 98.

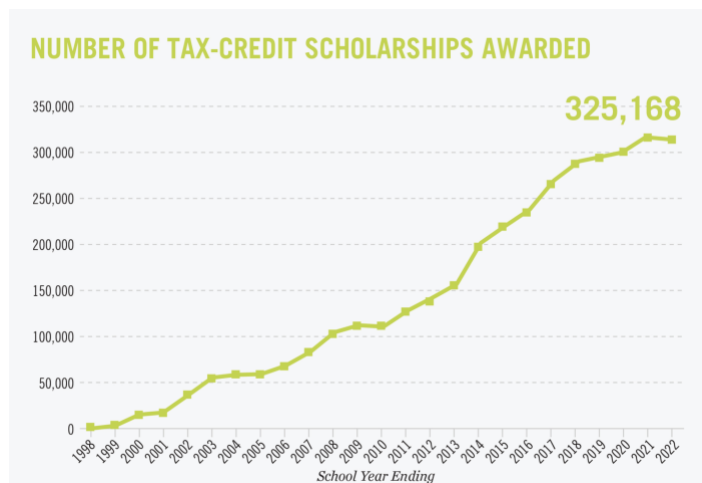
organizations can equal 100% in some states, so that taxpayers are fully reimbursed for any payments they make to the scholarship funds with equivalent tax reductions.¹⁰³ Taxpayers can effectively choose whether to pay their taxes or divert them to private K–12 education (subject to limits on amounts that vary by state).¹⁰⁴ The effect of the system is to redirect state tax revenue into private education, with no financial burden on “donors.” Some states are explicit about the trade-off between public and private school funding by limiting the availability of credits to an amount by which the state is willing to reduce its public school budget. Some of these limits are staggeringly high.¹⁰⁵ Although the number of students using tax-based vouchers is still not huge, the rate of increase has been steep in the last decade.¹⁰⁶ In 2011, the Supreme Court insulated these programs from judicial review by treating them as tax cuts, rather than government subsidy programs.¹⁰⁷

¹⁰³ This is the design of the Arizona credit that was at issue in *Arizona Christian School Tuition Organization v. Winn*. See *id.*; 563 U.S. 125 (2011). Alabama, Arizona, Florida, Georgia, Montana, Nevada, and South Carolina have 100% tax-credit programs. See DAVIS, *supra* note 99, at 3.

¹⁰⁴ Some states allow credits for corporations as well as individuals, and some states provide for refundability so that reimbursement does not depend on a “donor’s” tax liability. See Ronco, *supra* note 101.

¹⁰⁵ Florida’s program is one of the nation’s largest. In 2022–2023, the state budgeted \$1,091,957,093 for tax-credit scholarships and capped the credits at that amount. See *Florida Tax Credit Scholarships*, FLA. DEP’T EDUC., <https://www.fldoe.org/schools/school-choice/k-12-scholarship-programs/ftc/> [<https://perma.cc/NUJ8-CETZ>] (last visited Feb. 19, 2023).

¹⁰⁶ See *Fast Facts*, *supra* note 98. The chart below highlights the rate of increase. *Id.*



¹⁰⁷ See *Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 130. For a full legal analysis, see Linda Sugin, *The Great and Mighty Tax Law: How the Roberts Court Has Reduced Constitutional Scrutiny of Taxes and Tax Expenditures*, 78 BROOK. L. REV. 777 (2013).

A. TAX CREDITS UNDERCUT THE CIVIC
FUNCTION OF PUBLIC SCHOOLS

State tax credits for primary and secondary education undermine democracy by taking money away from public school budgets to subsidize private, mostly sectarian, schools. By siphoning public funds into private education, state tax credits undermine the civic functions of public education. Recall that public education is at the core of the American system of government, the right to education is enshrined in every state's constitution,¹⁰⁸ and a substantial portion of every state's budget funds K–12 education.¹⁰⁹

Because tax benefits are often invisible to lawmakers and policy analysts, it is important to call attention to tax programs that undermine public values. State tax credits are an example of such a program. That a billion dollars is being diverted annually from public to private schools¹¹⁰ is enough to create concern for people who care about the future of democratic government. The more that public schools are starved of resources and the more children opt out of public education, the less democratic impact public schools will have.

The risk to democracy should be enough reason to stop the flow of tax revenues from public schools to private ones. But the concern over that diversion of funds is more specific because tax-based tuition programs divert money from public schools to schools that are religiously affiliated and/or discriminate against individual students, as the next Sections describe. Evidence suggests that the flight to private schools is also resegregating education according to race, reversing a hard-fought victory for equality, as discussed in Section II.C.

B. TAX CREDITS SUBSIDIZE RELIGION

In many states, substantial sums diverted through tax-credit tuition programs go to religious schools.¹¹¹ This is problematic because tax-based funding may allow constitutionally suspect levels of government revenue to be diverted to religion. The Constitution mandates the separation of church and state, and direct funding of religious education has long been

¹⁰⁸ See DALLMAN & NATH, *supra* note 6.

¹⁰⁹ See NAT'L ASSOC. OF STATE BUDGET OFFICERS, *supra* note 8.

¹¹⁰ See DAVIS, *supra* note 99.

¹¹¹ The leading Supreme Court case on this issue involved an organization established to subsidize Christian schools. See *Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 129. This is consistent with the overall dominance of religious schools among private school attendance. More than seventy-five percent of private school students attend religious schools. See *Enrollment and Percentage Distribution of Students Enrolled in Private Elementary and Secondary Schools, by School Orientation and Grade Level: Selected Years, Fall 1995 Through Fall 2017*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d20/tables/dt20_205.20.asp [<https://perma.cc/K3VW-Y8B4>] (last visited Feb. 19, 2023).

considered unconstitutional.¹¹² Alongside the historical prohibition on direct funding, tax benefits have been successfully used to bypass the constitutional impediment.¹¹³ As I have previously argued, the Supreme Court's approach to tax benefits for religious education can potentially allow unreviewable sums to flow from public coffers to religious education.¹¹⁴

Two cases decided by the Supreme Court last Term destabilize the jurisprudence around the separation of church and state. *Carson ex rel. O.C. v. Makin* made clear that some direct funding of religious education is permitted (actually, required) under the Constitution,¹¹⁵ and *Kennedy v. Bremerton School District* overruled the long-standing test used by courts to analyze Establishment Clause claims.¹¹⁶ It is not clear how much direct public funding of religion will be allowed by the current Supreme Court—the separation of church and state in the Constitution presumably demands some limit to public funding of religion, though we will need to wait for future cases to learn where this Court will draw that line.

Although the line between establishment of religion and free exercise remains unclear,¹¹⁷ we should still be skeptical of tax benefits for religious education. Citizens may not realize the scope of public resources devoted to religion when they are designed as tax credits or deductions against income.¹¹⁸ Because tax-based funding is less transparent than direct government funding, it is more likely to grow without public scrutiny or interference by democratic forces. Consequently, tax credits may direct more total public money into religious education than would be constitutionally permitted or democratically allowed, compared to direct spending.

Some history of the distinction between tax-based funding and direct funding for religion may be helpful to understand both the Supreme

¹¹² As the Supreme Court wrote in 1948: “Here not only are the State’s tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State’s compulsory public school machinery. This is not separation of Church and State.” *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 212 (1948). As recently as 2004, the Court allowed the State of Washington to exclude religious education from a state scholarship program, holding “that such an exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment.” *Locke v. Davey*, 540 U.S. 712, 715 (2004).

¹¹³ *See Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 129–30.

¹¹⁴ This is the main thesis of an earlier article. *See* Sugin, *supra* note 107.

¹¹⁵ 142 S. Ct. 1987, 2002 (2022).

¹¹⁶ 142 S. Ct. 2407, 2433 (2022).

¹¹⁷ Just a few years ago, the Court stated: “[W]e have recognized that there is ‘play in the joints’ between what the Establishment Clause permits and the Free Exercise Clause compels.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Locke*, 540 U.S. at 718).

¹¹⁸ Political scientist Christopher Howard emphasizes this lack of salience with the title of his book on tax expenditures. *See THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES* (1997).

Court's recent turn in First Amendment jurisprudence, and the continuing problem of tax-based funding for religion. Tax benefits have long been a mechanism for indirect financial aid to religious institutions, even when direct spending was prohibited. Courts adopted a legal—rather than economic—approach to tax benefits, distinguishing some tax-based aid from direct government spending with the same economic effect.¹¹⁹ Tax law scholar Stanley Surrey's classic approach to tax benefits that analyzes tax provisions like their direct spending equivalents¹²⁰ still resonates from a policy perspective. But the legal status of tax benefits has diverged from the legal status of economically equivalent direct spending, and tax benefits have legally subsidized religion for a long time, even where direct spending would not have been permitted.¹²¹

Starting in 1971, the Supreme Court's "*Lemon* test" for aid to religion looked at whether a state's provision (1) had a secular purpose, (2) had the primary effect of advancing or inhibiting religion, and (3) produced excessive entanglement between the religious institution and the state.¹²² Under that test, much tax-based funding for religious schools was permissible, while direct funding was prohibited. The distinction arose, in part, because tax-based funding is indirect and therefore rarely creates entanglement between church and state. Last Term, the Supreme Court effectively overruled the three-part *Lemon* standard.¹²³ Whether that development brings the legal analysis of direct spending and tax-based spending for religion closer is unclear.

In 2011, the Supreme Court changed its legal approach to tax-based funding, and effectively insulated all tax-based funding for religious schools from constitutional scrutiny by denying standing to plaintiffs with an Establishment Clause claim.¹²⁴ In a case about state tax credits that benefitted religious schools, the Supreme Court treated the challenged tax credits as tax cuts for taxpayers, rather than government programs subsidizing religion. By designing the subsidy as a tax benefit, the state

¹¹⁹ For a more complete discussion of this issue, see generally Linda Sugin, *Invisible Taxpayers*, 69 TAX L. REV. 617 (2016) (arguing that the legal rules governing taxpayer standing deny taxpayers non-economic rights and introducing the concept of democratic fairness in taxation as an independent norm apart from economic injury).

¹²⁰ See generally STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES (1985) (detailing the analysis of tax benefits as equivalent to direct spending).

¹²¹ The seminal case is *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 675, 680 (1970), in which the Supreme Court upheld property tax exemptions for churches. The Court acknowledged that direct government funding of churches would not be constitutionally permissible. See also generally Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407 (1999) (arguing against the constitutionalization of tax expenditure analysis).

¹²² *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

¹²³ See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022). The dissent was explicit: "The Court overrules *Lemon v. Kurtzman* and calls into question decades of subsequent precedents that it deems 'offshoot[s]' of that decision." *Id.* at 2434 (Sotomayor, J., dissenting) (citation omitted).

¹²⁴ *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 142 (2011).

directed the Court’s attention away from the Establishment Clause—even though the sectarian tuition organization was financed dollar for dollar by a reduction in tax revenues through the 100% credit. The Court held that the tax credit program was not constitutionally reviewable state action, characterizing it instead as an abstention from legislative action.¹²⁵ That made the payments that triggered the tax credits wholly private, individual spending, rather than state spending.¹²⁶ The Court refused to consider the merits of the alleged constitutional violation. In doing so, it invited state legislatures to use tax credits to avoid the constraints they would face on direct spending for religion. The Court has not revisited that approach in the intervening decade.

Which brings the history to last Term’s precedent-busting religion cases, when the Court directed a state to directly fund religious education for a group of students. The issue before the Supreme Court in *Carson ex rel. O.C. v. Makin* was Maine’s statute allowing students in rural districts lacking local public schools to receive state funding to attend nonsectarian private schools or public schools in other districts.¹²⁷ Plaintiffs claimed that the exclusion of sectarian schools violated their right to free exercise, and the Court agreed. It invalidated the exclusion of religious schools from the state’s direct subsidy program, explaining: “As we held in *Espinoza*, a ‘State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.’”¹²⁸ In knocking down Maine’s system for guaranteeing education to children residing in rural areas, the Court held that direct state funding of religious schools is not only permitted under the Constitution’s Establishment Clause, but required by its Free Exercise Clause.¹²⁹

Although *Carson* was about direct spending for religious education, tax-based subsidies for religious schools may have paved the way for the Supreme Court’s decision in *Carson*. It was only a small step from the tax-based subsidies of *Arizona Christian School* to the direct spending in *Carson*. As this Article demonstrates, it is important to pay attention to the way in which tax benefits can quietly erode important public values by flying under the radar.

The Court’s holding in *Carson*, along with its abrogation of the nuanced test in *Lemon*, was a serious attack on the separation of church and state, the full implications of which are not yet known. It may be that the 2022 precedents will mean that tax benefits for religious schools are no longer constitutionally privileged compared to direct spending. If that

¹²⁵ *Id.* at 144 (noting that “contributions yielding [student tuition organization] tax credits are not owed to the State”).

¹²⁶ *Id.* at 142 (“When Arizona taxpayers choose to contribute to [school tuition organizations], they spend their own money, not money the State has collected from respondents or from other taxpayers.”).

¹²⁷ 142 S. Ct. 1987, 1993 (2022).

¹²⁸ *Id.* at 2000 (quoting *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020)).

¹²⁹ *See id.* at 2003.

is the case, then the law that developed around tax-based funding for religion may no longer be as important to the jurisprudence of the religion clauses. The current Supreme Court is making America into a more transparently Christian nation,¹³⁰ so states may no longer be compelled to use tax-based funding to avoid Establishment Clause limits on spending. While this is an alarming change in constitutional jurisprudence, political constraints are likely to prevent large-scale direct public funding of religious schools. In that legal framework, tax benefits demand scrutiny, and state tax credits remain an effective non-transparent mechanism to divert substantial public funding to religion.

Finally, tax benefits for religious education present the same problems as tax benefits for any private education. Incentivizing or subsidizing¹³¹ students to shift from public education to religious education reduces the social benefits that grow out of the civic function of public education.¹³² Nudging students toward sectarian schools also deprives those students of some of the guarantees against discrimination that public schools provide, as compared to private schools.¹³³

C. TAX-CREDITS SUBSIDIZE SEGREGATION AND DISCRIMINATION

The Supreme Court's treatment of tax-based funding for religious schools has implications that extend beyond funding for religion. The characterization of tax-credit funding in *Arizona Christian School* as private spending applies to all tax-based spending, seemingly without legal restriction. This characterization is troubling because private spending is not state action and consequently is not subject to protections against discrimination. The individual rights that people have under the Constitution are protections against government action, not the actions of other individuals. Private parties are not required to permit freedom of speech or refrain from racial discrimination, for example.¹³⁴

¹³⁰ See Linda Greenhouse, Opinion, *Religious Doctrine, Not the Constitution, Drove the Dobbs Decision*, N.Y. TIMES (July 22, 2022), <https://www.nytimes.com/2022/07/22/opinion/abortion-religion-supreme-court.html?searchResultPosition=3>.

¹³¹ See Sugin, *supra* note 36 (distinguishing the effects of incentives and subsidies).

¹³² See *supra* Introduction.

¹³³ See discussion *infra* Section II.C. Religious schools do not guarantee students the same rights they have in public schools. Title IX of the Education Amendments of 1972 prohibits sex-based discrimination in any school or educational program receiving funding from the federal government. See 20 U.S.C. § 1681(a) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”). However, the Section does not apply to “an educational institution which is controlled by a religious organization if the application of [the] subsection would not be consistent with the religious tenets of such organization[.]” *Id.* at § 1681(a)(3).

¹³⁴ The First Amendment, which protects freedom of speech, begins: “Congress shall make no law . . .” U.S. CONST. amend. I. The Fourteenth Amendment, which

Under the Supreme Court’s approach to tax credits, no tax credit would rise to the level of state action because the tax-credit form was the reason the Court concluded that only private spending was involved. The *Arizona Christian School* Court treated individuals as the only relevant parties making decisions to fund private schools.¹³⁵ The Court ignored the legislature’s role in the state’s tax-based subsidy: “Here, . . . contributions result from the decisions of private taxpayers regarding their own funds.”¹³⁶ The Supreme Court refused to acknowledge the *creation* of the tax-credit program and its *funding* from would-be tax revenues as government action to be addressed in the case. It therefore relegated any injury to one inflicted by private citizens: “These considerations prevent any injury the objectors may suffer from being fairly traceable to the government.”¹³⁷ Consequently, there was no cognizable legal claim, and the Court dismissed the case for lack of standing.

The Court’s conceptualization of and rhetoric around tax credits in *Arizona Christian School* wholly insulates tax credits from the individual rights restrictions in the Constitution.¹³⁸ This is a breathtaking constitutionalization of the tax-credit form,¹³⁹ and poses a dangerous threat to the rights guaranteed therein. If legislatures want to support restrictions on speech or encourage discriminatory purposes—which are both unconstitutional—the Court has invited them to use the simple sleight of hand of tax credits, rather than direct spending. This is an unwarranted insulation of tax credits from judicial review. The Supreme Court refused to acknowledge that the money is diverted dollar for dollar and directly from tax revenues and substitutes precisely for direct spending, even though its resemblance to public funding is apparent to everyone else.

Using tax credits, states can now subsidize schools that segregate students by race. This is a shocking development. Almost seventy years

guarantees equal protection, directs: “No State shall make or enforce any law” U.S. CONST. amend. XIV.

¹³⁵ The Court explained: “The distinction between governmental expenditures and tax credits refutes respondents’ assertion of standing. When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers.” *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 142 (2011).

¹³⁶ *Id.* at 143. The Court continued:

Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs. While the State, at the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention. Objecting taxpayers know that their fellow citizens, not the State, decide to contribute and in fact make the contribution.

Id.

¹³⁷ *Id.*

¹³⁸ See generally Sugin, *supra* note 107 (analyzing the case and its implications at length).

¹³⁹ In prior work, I have warned against constitutionalizing formal aspects of taxation. See Sugin, *supra* note 121, at 418–424.

after the Supreme Court outlawed racial segregation in education,¹⁴⁰ there is growing evidence that government support for private education—in all its forms—contributes to racial segregation in education.¹⁴¹ A recent study in Indiana concluded that the state’s school choice program has “created a new generation of segregation academies,”¹⁴² hearkening back to the resistance of states and localities to integrating their schools after the Court’s decision in *Brown*. Charter schools in North Carolina have diverted white students and more affluent students away from traditional public schools.¹⁴³ By using tax credits, states can unravel the hard-won progress that had been achieved in education equality, opportunity, and adequacy.

Tax credits can also undermine antidiscrimination laws. Unlike public schools, there is no guarantee that private schools comply with federal standards of racial, religious, and gender equality.¹⁴⁴ Fewer than half of the

¹⁴⁰ *Brown v. Bd. of Ed.*, 347 U.S. 483, 493 (1954) (“Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.”).

¹⁴¹ See Halley Potter, *Do Private School Vouchers Pose a Threat to Integration?*, CENTURY FOUND. (Mar. 21, 2017), <https://tcf.org/content/report/private-school-vouchers-pose-threat-integration/?agreed=1> [<https://perma.cc/W2KW-8PS8>] (concluding that “voucher programs on balance are more likely to increase school segregation than to decrease it or leave it at status quo”). School districts in Ohio have sued the state because the state’s school voucher systems have led to white flight from public schools. They are claiming that the voucher system is unconstitutional because of the way it underfunds public schools attended by students of color. See Susan Tebben, *School District Coalition Files Lawsuit Challenging Ohio’s Private School Voucher Program*, OHIO CAP. J. (Jan. 5, 2022, 1:00 AM), <https://ohiocapitaljournal.com/2022/01/05/school-district-coalition-files-lawsuit-challenging-ohios-private-school-voucher-program/> [<https://perma.cc/H3FR-5NK4>]; Susan Tebben, *EdChoice Voucher Lawsuit Continues Fight, Dozens of Orgs, Schools Join in Support*, OHIO CAP. J. (July 13, 2022, 3:50 AM), <https://ohiocapitaljournal.com/2022/07/13/edchoice-voucher-lawsuit-continues-fight-dozens-of-orgs-schools-join-in-support/> [<https://perma.cc/9KHJ-8CWQ>].

¹⁴² Michael B. Shaffer & Bridget Dincher, *In Indiana, School Choice Means Segregation*, KAPPAN (Jan. 27, 2020), <https://kappanonline.org/indiana-school-choice-means-segregation-shaffer-dincher/> [<https://perma.cc/M93F-N9MN>].

¹⁴³ See Charles T. Clotfelter, Steven W. Hemelt, Helen F. Ladd & Mavzuna Turaeva, *School Segregation in the Era of Immigration and School Choice: North Carolina, 1998-2016* iii, 18 (Nat’l Ctr. for Analysis of Longitudinal Data in Educ. Rsch., Working Paper No. 198-0618-1, June 2018), <https://files.eric.ed.gov/fulltext/ED591841.pdf> [<https://perma.cc/D64C-HLQ7>].

¹⁴⁴ Federal nondiscrimination provisions are connected to some form of federal subsidy. Private schools that receive no federal subsidy (including tax exemption) are not bound by federal standards. See Michael J. Petrilli, *Are Private Schools Allowed to Discriminate?*, EDUC. NEXT (June 5, 2017), <https://www.educationnext.org/private-schools-allowed-discriminate/> [<https://perma.cc/SF8Z-GWPE>]. Private schools that want to be recognized as tax-exempt for federal tax purposes are not permitted to discriminate on the basis of race. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (1983). Donors seeking federal tax deductions may only contribute to tax-exempt charities. See I.R.C. § 170. Some states impose nondiscrimination requirements on private schools, but many do not. See Bayliss Fiddiman & Jessica Yin, *The Danger Private School Voucher Programs Pose to Civil Rights*, CTR. FOR AM. PROGRESS 1–3 (May 13, 2019), <https://files.eric.ed.gov/fulltext/ED596183.pdf> [<https://perma.cc/XMV6-6AA7>].

currently operating state-based voucher programs provide statutory protections for racial discrimination, and even fewer protect against discrimination based on sex, sexual orientation, or gender identity.¹⁴⁵ Discrimination also occurs in some schools even where there are formal protections, through indirect means such as participation in reduced-price lunch programs, transportation funding, parental-service requirements, dress codes, and other facially neutral policies.¹⁴⁶ In contrast, public schools are subject to a wide array of nondiscrimination and access standards under state and federal law.¹⁴⁷

Through tax credits, states are diverting public resources to schools that deny students the individual rights protections to which students in public schools are entitled. Although individual children are the subject of that discrimination, we are all worse off for it. When the government not only condones, but actively subsidizes, schools that treat some children as unworthy of an education, those harmed by the system should have some recourse. The insulation of tax-credit funding of private schools from constitutional challenge is a grave disservice to all our children.

CONCLUSION

This Article has highlighted the ways in which both federal and state tax law undermines fairness in primary and secondary education in the United States. Federal law effectively subsidizes the education of more affluent children and makes private education more affordable than it would otherwise be for parents. Consequently, it perpetuates educational inequality in both public and private education. State laws divert public funds into private schools, depleting public budgets that would otherwise be devoted to supporting public education for all students, as guaranteed in every state constitution. Tax subsidies for private education, whether in the form of Section 529 plans or state tax-credit vouchers are part of a larger constellation of tools that are splintering American society. The more people decide to opt out of public school, the worse polarization and distrust will become. Although recent fights in school districts have been painful for everyone involved, resolving our differences over education policies so that our children can learn together to resolve differences is necessary to the

(describing the ways in which private schools can discriminate and how the laws authorizing voucher programs fall short in guaranteeing federal nondiscrimination standards).

¹⁴⁵ See Fiddiman & Yin, *supra* note 144, at 3 (including race, religion, sex, disability, sexual orientation, and gender identity). Table A1 contains a comprehensive state-by-state listing of legal protections. *Id.* at 9–11.

¹⁴⁶ See *id.* at 1 (describing video of child refused entry to school for loc'd hairstyle); see also Halley Potter & Miriam Nunberg, *Scoring States on Charter School Integration*, CENTURY FOUND. (April 4, 2019), <https://tcf.org/content/report/scoring-states-charter-school-integration/> [<https://perma.cc/VDQ9-JC6H>] (analyzing charter schools, though the same policies can exist at private schools).

¹⁴⁷ See *supra* notes 12–17 and accompanying text.

future stability of democracy. The tax law must do its part to promote equality, understanding, and human dignity in education at every level.