

Arizona v. Winn: Negative Implications for First Amendment Proponents and Possibly for Our Nation's Schoolchildren

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

—*First Amendment to the United States Constitution*

Introduction

In a 5-4 decision in *Arizona Christian School Tuition Organization v. Winn*, the U.S. Supreme Court drastically curtailed American taxpayers' ability to challenge the constitutionality of certain government expenditures.¹ At issue in *Winn* was the constitutionality of a tax credit provision that offered a tax break to individuals who donated money to organizations that support religious schools.² The Court ruled that taxpayers could not challenge the constitutionality of the tax credit provision because they lacked legal standing to do so.³

Due to the Court's holding, it is likely that no taxpayer will be found to have legal standing to challenge similar government expenditures in the future. As a consequence, the influence taxpayers could have over government expenditures that support religious organizations is greatly diminished, and taxpayers will have to live

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1. 131 S. Ct. 1436 (2011).
2. *Id.* at 1440.
3. *Id.*

with a government that can routinely engage in actions transparently calculated to avoid constitutional prescriptions.

This note will first present the background of the *Winn* decision and the history of taxpayer standing. Second, it will explore the reasons why *Winn* was wrongly decided. Third, it will explain why—because of *Winn*—no taxpayer can now challenge questionable government expenditures. Finally, the economic, political, and social implications of *Winn* will be described by examining: (1) *Winn*'s impact on secularism in the United States, and (2) whether the *Winn* decision will help to improve the academic performance of our nation's schoolchildren in order to accomplish the lofty educational goals created by the No Child Left Behind Act ("NCLB").

I. Background

A. The Tax Credits

The tax credit provision at issue in *Winn* enabled individual taxpayers to obtain dollar-for-dollar tax credits—up to \$500 per individual and \$1,000 per married couple—for contributions to Student Tuition Organizations ("STOs").⁴ A STO is a nonprofit charitable organization that raises money to provide scholarships for children attending private schools.⁵ Most, if not all, of an STO's annual revenue is used to fund student scholarships.⁶ With the challenged tax credit provision in place, more than fifty STOs in Arizona distributed over \$50 million annually to more than 27,000 students attending private schools—at least two-thirds of which were religious schools.⁷

Tax credits are distinguishable from tax deductions.⁸ Credits directly decrease an individual's tax bill on a dollar-for-dollar basis, while deductions only slightly reduce tax liability—the amount an individual is obligated to pay in taxes in a given year.⁹ For example, an Arizona taxpayer who donates \$500 to an STO will receive a \$500

4. *Id.* at 1440.

5. *Id.*

6. *Id.* (The STOs challenged in Arizona contribute 90% of their annual revenue to scholarships for children to attend private, religious schools.)

7. Nina Totenberg, *High Court OKs Ariz. Tax Credit For Religious Schools*, NPR (Apr. 4, 2011), <http://www.npr.org/2011/04/04/135121183/supreme-court-rules-for-arizona-tax-credit>.

8. *Id.*

9. *Id.*

reduction in his tax liability. However, an individual who makes a charitable donation of \$500 directly to a private school will likely receive less than one-third of that amount deducted from his tax liability.¹⁰

Arizona's state constitution, like the Establishment Clause of the First Amendment, forbids the government from providing aid to religious organizations.¹¹ This is why the taxpayers in *Winn* alleged that the tax credits at issue violated the Establishment Clause by indirectly providing state government subsidies to religious schools.¹² However, the *Winn* majority held that taxpayers lacked the legal standing to challenge the constitutionality of the credits.¹³

B. The Standing Doctrine and Its Application to Taxpayers

The doctrine of standing in federal courts is “an attempt to ensure that each lawsuit is brought by someone with a real and legally cognizable injury, rather than by an officious bystander lacking any personalized grievance.”¹⁴ To establish standing, a plaintiff must show that he or she: (1) suffered a personal and actual injury; (2) that was caused by, or fairly traceable to, the defendant's action; and (3) that injury can receive redress through the courts.¹⁵ When determining if standing exists, courts focus on the connection between the plaintiff and the claim.¹⁶ Unless a plaintiff has established legal standing to bring a claim, courts will refuse to hear the case on the basis that it is not justiciable.¹⁷

Taxpayers who challenge the validity of federal expenditures are subject to the constitutional doctrine of standing.¹⁸ In general, federal taxpayers do not have legal standing to challenge the constitutionality of a federal statute.¹⁹ For instance, in *Frothingham v. Mellon*, a taxpayer challenged a federal expenditure, the Maternity Act, aimed at reducing maternal and infant mortality on the grounds that the Act

10. Totenberg, *supra* note 7.

11. *Id.*

12. *Id.*

13. *Id.*

14. CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 69 (Vicki Been et al. eds., 3d ed. 2009).

15. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

16. MASSEY, *supra* note 14.

17. *Id.*

18. MASSEY, *supra* note 14 at 93.

19. *Id.*

was not within Congress' enumerated powers.²⁰ The taxpayer claimed that the Act would increase her taxes, constituting a taking of her property without due process.²¹ Holding that the taxpayer lacked standing, the Supreme Court stated that the taxpayer's financial injury of an increase in taxes was "shared with millions of others [and] is comparatively minute and indeterminable."²² The Court reasoned that the taxpayer's injury was too speculative to support standing and that the taxpayer lacked the requisite injury in fact since the effect of the expenditures "upon future taxation . . . [is] so remote, fluctuating, and uncertain" as to preclude standing.²³

Similarly, in *DaimlerChrysler Corp. v. Cuno*, taxpayers attempted to challenge an Ohio state tax credit that was offered to a car manufacturer in order to increase the manufacturer's business presence in Ohio.²⁴ The taxpayers claimed the credit increased their local and state tax burdens in violation of the Commerce Clause.²⁵ The Court held that the taxpayers lacked standing since their injuries were not concrete or particularized, but were instead hypothetical and conjectural.²⁶ Thus, the injuries claimed were indistinguishable from those in *Frothingham*.

The Supreme Court eventually, however, created an exception to the general rule that taxpayers lack legal standing to challenge government expenditures. In *Flast v. Cohen*, federal taxpayers alleged that federal funds, collected through taxes under the Elementary and Secondary Education Act of 1965, were improperly used to finance instructional materials for religious schools.²⁷ The taxpayers claimed that the government expenditures contravened the Establishment Clause of the First Amendment.²⁸ The Court held that in order for a taxpayer to have standing, he must: (1) establish a link between his status as a taxpayer and the type of legislative enactment being attacked by alleging the unconstitutionality of the exercise of Congressional power under the Taxing and Spending Clause of Article I, section 8, of the Constitution; and (2) establish a nexus

20. 262 U.S. 447, 479 (1923).

21. *Id.* at 480.

22. *Id.*

23. *Id.* at 487.

24. 547 U.S. 332, 337–38 (2006).

25. *Id.* at 338.

26. *Id.* at 344.

27. 392 U.S. 83, 85 (1968).

28. *Id.* at 86.

between his status and the precise nature of the constitutional infringement alleged by showing that the “challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power.”²⁹ Because the taxpayers were challenging the constitutionality of a federal program involving the expenditure of federal tax funds by alleging that the challenged expenditures violated the Establishment Clause of the First Amendment, the Court held that the taxpayers had standing to challenge the statute.³⁰ The Court noted that merely showing that the challenged enactment was generally beyond the powers delegated to Congress, as the taxpayers in *Frothingham* did, was insufficient.³¹ This distinction was important in the Court’s decision to hold that the *Flast* taxpayers had standing.³²

In granting the taxpayers standing to challenge the constitutionality of the government action, the *Flast* Court also emphasized the importance of secularism.³³ The Court reiterated that one of the specific evils the drafters of the Establishment Clause feared was the government’s abuse of its taxing and spending powers “to aid one religion over another or to aid religion in general.”³⁴ If it were not for the Establishment Clause protection against such government action, “religious liberty ultimately would be the victim.”³⁵

Unfortunately for First Amendment proponents, the *Flast* exception was later narrowed by the Court.³⁶ In *Hein v. Freedom from Religion Foundation*, taxpayers attempted to invoke *Flast* to challenge President George W. Bush’s initiative allocating federal funds for financial aid to faith-based community groups.³⁷ Although the taxpayers, as in *Flast*, alleged that the government action violated the Establishment Clause, the Court held that the taxpayers had no standing.³⁸ The Court was concerned that holding otherwise would “subject every federal action—be it a conference, proclamation, or

29. *Id.* at 102–03.

30. *Id.* at 105–06.

31. *Id.* at 104–05.

32. *Id.* at 104.

33. *Id.* at 103–04.

34. *Id.* at 103.

35. *Id.*

36. 551 U.S. 587 (2007).

37. *Id.*

38. *Id.* at 615.

speech—to Establishment Clause challenge by any taxpayer in federal court,³⁹ and threaten the separation-of-powers between branches of government by requiring federal court supervision of all activities directed by Executive Branch officials.⁴⁰ Therefore, the Court distinguished *Hein*. It reasoned that since the challenged expenditures were made under general appropriations to the Executive Branch, as opposed to congressional action, *Flast* did not apply.⁴¹

Thus, prior to the *Winn* decision, the Supreme Court established that taxpayers have standing only when they: (1) challenge the constitutionality of an exercise of congressional power under the Taxing and Spending Clause of the Constitution; and (2) indicate that the congressional action exceeds a specific constitutional limitation—specifically, the Establishment Clause—instead of merely arguing the government action is generally beyond the powers delegated to Congress.⁴² The Court also feared that permitting taxpayer standing might subject the federal government to an abundance of Establishment Clause challenges.⁴³

II. The *Winn* Majority Wrongly Distinguishes Tax Credits From Government Expenditures

In holding that the Arizona taxpayers did not have legal standing to challenge the Arizona tax provision, the Court in *Winn* refused to allow the taxpayers to invoke *Flast*.⁴⁴ According to the majority opinion, a tax credit is not a government subsidy of religion because taxpayers, who have already chosen to donate money to STOs, are directing the flow of their money.⁴⁵ On the other hand, a government expenditure providing direct aid to a religious group has a direct connection to government spending of taxpayers' tax dollars and constitutes a government subsidization of religion.⁴⁶ Thus, government expenditures and tax credits are different in that they do not “both implicate individual taxpayers in sectarian activities.”⁴⁷

39. *Id.* at 610.

40. *Id.* at 611.

41. *Id.* at 605.

42. *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

43. *Hein*, 551 U.S. at 610.

44. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011).

45. *Id.*

46. *Id.*

47. *Id.* at 1447.

According to the Court, a taxpayer challenging government expenditure who has had his tax dollars “‘extracted and spent’ knows that he has in some small measure been made to contribute to an establishment in violation of conscience.”⁴⁸ This taxpayer’s particular connection with the establishment is direct, and does not rely on “economic speculation or political conjecture.”⁴⁹ However, “when the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. And awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences.”⁵⁰ This distinction contributed significantly to the majority holding that the taxpayers had no legal standing in *Winn*.⁵¹

In her dissenting opinion, Justice Kagan downplayed the novel distinction between government expenditures and tax credits.⁵² Justice Kagan asserted that cash grants given to religious schools and tax credits offered to taxpayers who donate money to STOs accomplish the same objective: to provide government money to religious organizations.⁵³ Taxpayers who oppose government subsidization of religion would have equal interest in protesting against a subsidy regardless of the form the subsidy takes or the way

48. *Id.* (citing *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1455 (Kagan, J., dissenting). Justice Kagan argues that past cases declined to distinguish between an appropriation and a tax expenditure because such “distinction is one in search of a difference.” *Id.* Justice Kagan bolsters her argument through the following hypothetical:

Imagine that the Federal Government decides it should pay hundreds of billions of dollars to insolvent banks in the midst of a financial crisis. Suppose, too, that many millions of taxpayers oppose this bailout on the ground (whether right or wrong is immaterial) that it uses their hard-earned money to reward irresponsible business behavior. In the face of this hostility, some members of Congress make the following proposal: rather than give the money to banks via appropriations, the Government will allow banks to subtract the exact same amount from the tax bill they would otherwise have to pay to the U.S. Treasury.

Would taxpayers genuinely distinguish between the means used by Congress? The Justice writes that surely taxpayers would respond by “saying that a subsidy is a subsidy . . . indeed, we would think the less of our countrymen if they failed to see through this cynical proposal.” *Id.*

53. *Id.* at 1450.

it is implemented.⁵⁴ Thus, “[e]ither way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy.”⁵⁵

Justice Kagan also noted that the majority’s decision breaks from the Court’s precedent.⁵⁶ Five times before, in cases almost exactly like *Winn*, the Court allowed plaintiff taxpayers to “have their day in court” by allowing them to “obtain judicial review of [their] claims that the government has used its taxing and spending power [to subsidize religion] in violation of the Establishment Clause.”⁵⁷ While taxpayers did not always prevail on the substantive issue, they could be heard because the Court allowed them to invoke *Flast* to establish standing.

For example, in *Walz v. Tax Commission of the City of New York*, the Court upheld the constitutionality of a property tax exemption for religious organizations.⁵⁸ In *Hunt v. McNair*, the Court held that the Establishment Clause permitted a state agency to provide tax-exempt bonds to sectarian institutions.⁵⁹ In *Committee for Public Education & Religious Liberty v. Nyquist*, a state tax deduction for parents who paid tuition at religious and other private schools was struck down.⁶⁰ In *Mueller v. Allen*, the Court rejected an Establishment Clause challenge to a state tax deduction for expenses incurred in attending religious and private schools.⁶¹ Finally, in a preliminary stage of *Winn*, the Court held that the Tax Injunction Act, 28 U.S.C. § 1341, posed no barrier to the plaintiffs’ litigation of their Establishment Clause claim.⁶² Although the issues—in all, five decisions—divided the Court, the taxpayers’ legal standing was never challenged.⁶³ In fact, the litigants’ standing was never even raised as an issue in any of these cases.⁶⁴

54. *Id.*

55. *Id.* at 1450.

56. *Id.*

57. *Id.*

58. 397 U.S. 664 (1970).

59. 413 U.S. 734 (1973).

60. 413 U.S. 756 (1973).

61. 463 U.S. 388 (1983).

62. 542 U.S. 88 (2004).

63. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1450 (Kagan, J., dissenting).

64. *Id.* at 1454.

Because of the majority's decision in *Winn*, however, taxpayers no longer have access to the judiciary to challenge potentially unconstitutional government actions involving tax expenditures.⁶⁵ The government need only subsidize religious organizations through the tax system, in lieu of directly providing financial aid, in order to escape from taxpayer challenges.⁶⁶ Thus, the majority's holding in *Winn* has diminished "our Constitution's guarantee of religious neutrality."⁶⁷

III. The Impacts of *Winn*

A. The Separation Between Church and State Has Been Lessened

"One of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general."⁶⁸ The major reason for this concern was that religious liberty would ultimately be diminished if the government could employ its taxing and spending powers to aid religion.⁶⁹ Thus, according to Thomas Jefferson, the Establishment Clause was intended to create a "wall of separation between Church and State."⁷⁰ It was "designed as a specific bulwark against such potential abuses of governmental power," and it "operates as a constitutional limitation upon the exercise by Congress of the taxing and spending power."⁷¹

After *Winn* and *Hein*, the "wall of separation between Church and State" has been partially demolished. By holding that taxpayers lack standing to challenge what are arguably unconstitutional government actions, the Court has deferred the resolution of such constitutional issues, thus eroding the constitutional guarantee of separation between Church and State.

Moreover, it is difficult to comprehend how the Court held that the tax credits in Arizona did not affect other taxpayers in the state,

65. *Id.* at 1451.

66. *Id.* at 1457.

67. *Id.* at 1451.

68. *Flast v. Cohen*, 392 U.S. 83, 103 (1968).

69. *Id.* at 103-04.

70. *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1, 16 (1947) (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

71. *Flast*, 392 U.S. at 104.

especially since the state has a \$1 billion deficit.⁷² When up to \$100 million in tax revenue does not enter into Arizona's treasury because of a state tax credit given to taxpayers who donate money to STOs, where does the state expect to recover that money? The answer is that the other taxpayers in Arizona will have to make up for it. Thus, the injury—greater tax burdens on the other Arizona taxpayers—is real, not speculative as the *Winn* majority suggests.⁷³

Moreover, there is no genuine basis for distinguishing between a direct government cash grant and a tax credit. Thus, Justice Kagan's assertion that "[w]hat is a cash grant today can be a tax break tomorrow," is correct.⁷⁴ *Winn* gives legislators another method of providing federal aid to religious organizations by having the option to provide tax credits.⁷⁵ A path now exists for other states to include similar tax credits in their tax codes. Several states, including Florida, Georgia, Indiana, Iowa, Pennsylvania, and Rhode Island, already have done so.⁷⁶ This method of providing tax breaks not only helps subsidize religious organizations, but also helps legislators politically since they can claim that their policies help to lower taxes.⁷⁷ Thus, *Winn* created a win-win situation for politicians looking to advance both their personal ideologies—by subsidizing religious organizations through tax credits—and political careers.

B. *Winn's Effect on Education*

Despite the negative implications for First Amendment proponents after *Winn*, the Court's decision may have a long-lasting positive effect on our nation's educational system.⁷⁸ Since taxpayers are now precluded from challenging the constitutionality of the tax credits at issue in *Winn*—which indirectly supported private, religious schools by providing students with scholarship money to attend these educational institutions—there could now be an increase in

72. Totenberg, *supra* note 7.

73. See *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447 ("It is easy to see that tax credits and governmental expenditures can have similar economic consequences . . . Yet tax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. . . . Any financial injury remains speculative.").

74. *Id.* at 1462.

75. *Id.* at 1456.

76. Jess Bravin, *Private-School Tax Break Is Upheld*, WALL ST. J., Apr. 5, 2011, at A3.

77. *Id.*

78. *Id.*

opportunities for schoolchildren to transfer from public schools, including those considered “low-performing,” to private schools.⁷⁹

This increase in opportunities to attend private school is known as “increasing private school choice.” School choice—a variety of programs whose aim is to allow parents to choose which schools they want their children to attend—stole the spotlight as one of America’s most debated educational issues beginning in the early 1990s.⁸⁰ In addition to allowing parents to choose the most appropriate educational environments for their children, the idea of school choice also aims to “level the playing field” between minorities and whites by providing minority students the ability to transfer from lower-performing public schools to higher performing private schools and by improving the quality of schools through increased competition for student enrollment. Proponents of school choice argue that increasing educational opportunities will improve student academic performance and the educational system as a whole.⁸¹ Thus, the Court’s holding in *Winn* was a victory for school choice proponents since the decision paved the road for states to use tax credits to increase opportunities for children to attend private schools.

Winn was not, however, the first victory for school choice proponents. In 2002, the Supreme Court in *Zelman v. Simmons-Harris* held that it was not a violation of the Establishment Clause to implement a school choice program which gave publicly funded vouchers to pay for the tuition expenses of low-income children at religious or private schools.⁸² The Court reasoned that “public money reached the schools ‘only as a result of the genuine and independent choices of private individuals’ and that families were in no way coerced to send their children to religious schools.”⁸³

The Court’s decision in *Zelman* was “the first breach in the legal ‘wall of separation’ that for more than a century had shielded the nation’s public education system from outside competition.”⁸⁴ Proponents of private school choice were ecstatic that children attending low-performing public schools would have more

79. *Id.*

80. SOL STERN, *BREAKING FREE: SCHOOL CHOICE AND THE NEW CIVIL RIGHTS MOVEMENT* 215 (2003).

81. *Id.* at 217.

82. 536 U.S. 639 (2002).

83. PAUL E. PETERSON, *THE FUTURE OF SCHOOL CHOICE* 3 (Paul E. Peterson ed., 2003) (quoting Chief Justice William Rehnquist, writing in *Zelman*, 536 U.S. at 649).

84. See STERN, *supra* note 80, at 172, 215–17.

opportunity to transfer to higher performing private schools.⁸⁵ They argued that “public education wasn’t going to improve without the pressure of outside competition” and that students’ academic performance would dramatically increase due to greater opportunities to attend private school.⁸⁶

1. Will the Increase in Private School Choice Help Improve Our Nation’s Educational System and Help Meet the Goals of No Child Left Behind?

Advocates of school choice argue that it will improve the academic performance of our nation’s students and the American educational system as a whole. This section will explore whether increasing private school choice will help achieve our nation’s current educational goals created by the No Child Left Behind Act (“NCLB”).

a. Background of the No Child Left Behind Act

Education reform was a main issue for the 2000 presidential candidates George W. Bush and Al Gore.⁸⁷ Both candidates proposed raising school standards, increasing accountability for results, and creating strong incentives for success during their campaigns.⁸⁸ This alignment of Republican and Democratic policy initiatives was based on the idea that the federal government could make important contributions towards reforming America’s schools.⁸⁹ After winning the 2000 election, President Bush implemented his educational policies by signing NCLB into law on January 2, 2002.⁹⁰

Based partially on Texas school reform, NCLB calls for the federal government to play a stronger role in elementary and secondary education policy.⁹¹ NCLB’s main goal “is to make every public school student proficient in reading and math by the year 2014.”⁹² In order to achieve its goals and raise achievement levels in

85. *Id.* at 218.

86. *Id.* at 217.

87. PATRICK J. MCGUINN, *NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965-2005*, at 148 (2006).

88. *Id.*

89. *Id.* at 165.

90. FREDRICK M. HESS AND MICHAEL J. PETRELLI, *NO CHILD LEFT BEHIND: PRIMER 3* (2006).

91. *Id.*

92. Caroline M. Hoxby, *Inadequate Yearly Progress*, *EDUCATION NEXT* 47 (Summer, 2005), <http://educationnext.org/inadequate-yearly-progress/>.

America's public schools, the Bush administration implemented a number of new policies to increase the accountability of states, school districts, and public schools.⁹³

NCLB requires states to "adopt academic standards to guide their curricula and adopt a testing and accountability system that is aligned with those standards."⁹⁴ According to the law, states must test all students in grades three through eight, and once in high school, in the subjects of math and reading.⁹⁵ In addition, annual tests are given to students who do not speak English as their primary language, and science tests are administered to all students at least once in elementary school, middle school, and high school.⁹⁶ NCLB allows states to develop their own standards and assessment tests; however, students' test results must be publicly accessible and sorted into groups of different types of students. These include racial groups, major income groups, students with disabilities, students with limited English proficiency, and migrant students.⁹⁷ States must also administer the math and reading portions of a national test, the National Assessment of Educational Progress ("NAEP"), every other year to students in grades four and eight in a sample of school districts in each state. This more rigorous test is known as the "nation's report card," and it is meant to check the effectiveness of state standards and provide a means of comparison for student performance across states.⁹⁸

Every year, public school students must show improvement on the state assessment tests given to them.⁹⁹ Meeting the state standards set by NCLB means attaining the annual minimum level of improvement that schools and school districts set, known as Adequate Yearly Progress ("AYP").¹⁰⁰ Since each state creates its own standards, every state's level of AYP is different. Schools and districts achieve AYP when a certain percentage of children from each school score "proficiently" on their state math and reading assessments.¹⁰¹ The goal of NCLB is for every student in every state

93. *Id.*

94. MCGUINN, *supra* note 87, at 178.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 180

100. *Id.*

101. *Id.*

to achieve one hundred percent proficiency on state tests by the year 2014.¹⁰² Therefore, a lot of pressure is placed state governments to ensure that not only are their public schools meeting the state standards required by NCLB, but also improving their performance every year.

The NCLB imposes additional accountability on states through the threat of certain actions if schools and districts consistently fail to meet performance objectives. For example, a school that fails to make AYP for two years in a row must be given technical assistance from the district to help it improve.¹⁰³ Additionally, the students of that school must be given the option to transfer to another public school in the district.¹⁰⁴ If a school fails to meet AYP for a third year, students will be given the option to use federal funds, known as Title I funds, to pay for tutoring.¹⁰⁵ A school that fails for a fourth consecutive year will have to replace its staff and adopt a new curriculum.¹⁰⁶ If a school fails for a fifth consecutive year, that school will be shut down, reconstituted, and given the option to reopen as a charter school.¹⁰⁷

Although there are negative consequences for not meeting performance objectives set by NCLB, there also are rewards for schools that achieve AYP. In exchange for meeting the federal mandates associated with NCLB, states are provided with a twenty percent increase in Title I federal aid.¹⁰⁸ In addition to this increase in funding for education spending, new rules ensure that additional funds are used to improve the poorest classrooms.¹⁰⁹ The extra federal funds provided to the states allow school districts to spend more money to enhance professional development efforts for teachers, adopt innovative curriculum programs, purchase advanced technologies, establish safe, drug-free schools, and introduce school-wide improvement projects.¹¹⁰ Furthermore, the extra federal money also allows schools to implement new programs, such as “Reading First,” “Open Court,” and “Success for All,” which are research-

102. *Id.*

103. *Id.* at 178.

104. *Id.*

105. *Id.* at 179.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

based pedagogical approaches designed to improve students' reading and math skills.¹¹¹

b. Problems Began to Arise

During the implementation of NCLB, there was considerable and heated controversy over the federal mandates contained within the Act. In 2007, Congress began debating the proposed 2008 reauthorization of NCLB, and many conflicting points of view were expressed by Republicans, Democrats, educational scholars, members of the Bush administration, and both state government and local school district officials.¹¹² Even now, ten years after its creation, several key components of NCLB still face considerable opposition. In the minds of NCLB critics, the goal that all students achieve proficiency by 2014 is unrealistic.¹¹³ Critics argue that while NCLB has good intentions and that expectations for all students should be high, the expectations outlined in the statute are unreasonable for schools with high concentrations of low-performing students, especially since NCLB expects students to reach proficiency by the third grade and every grade thereafter.¹¹⁴ These low-performing schools must achieve much more in order to catch up with the schools that have primarily higher performing students.¹¹⁵ Under NCLB guidelines, even when low-performing students are making greater strides than the high-performing students, their schools are still classified as "failing."¹¹⁶ This is due to the challenging obstacles that the low-performing children at these schools must face.¹¹⁷

The following table is from *Education Next*, a journal of opinion and research regarding education policy and school reform. This table illustrates the differences between student performance on respective state assessment tests and the standardized NAEP exam in 2009.¹¹⁸ This table also shows the differences between the percentage of students who were deemed proficient on the NAEP exam in

111. *Id.*

112. *Id.* at 167.

113. Chester E. Finn, Jr. and Fredrick M. Hess, *Crash Course*, *EDUCATION NEXT* 40 (Fall, 2007), http://educationnext.org/files/ednext_20074_40.pdf.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *EDUCATION NEXT*, <http://educationnext.org/files/ProficiencyData.pdf>.

reading and math and the percentage reported to be proficient on state tests for the same year.

	4th Grade		8th Grade		4th Grade		8th Grade		4th Grade		8th Grade	
	Math	Reading	Math	Reading	Math	Reading	Math	Reading	Math	Reading	Math	Reading
Alabama	79.12	86.5	73.77	74.89	24.5	28.2	20.4	23.8	-54.66	-58.29	-53.33	-51.09
Alaska	73.8	78	66.4	81.9	37.8	27.2	33.5	27.0	-35.96	-50.84	-32.94	-54.86
Arizona	74	72	63	69	26.0	24.7	29.0	26.9	-46.05	-47.32	-34.01	-42.09
Arkansas	78	70	61	71	36.3	28.8	27.0	26.7	-41.75	-41.24	-34.02	-44.34
California	66	61	30	48	30.2	23.7	23.4	22.2	-35.76	-37.33	-6.57	-25.76
Colorado	70	65	50	64	45.2	40.2	39.7	32.4	-24.77	-24.78	-10.29	-31.57
Connecticut	84.6	74.4	84.5	80.4	46.2	42.4	39.8	42.5	-38.42	-31.97	-44.73	-37.87
Delaware	76.93	81.7	65.86	81.13	36.4	35.1	31.7	30.7	-40.51	-46.59	-34.15	-50.48
District of Columbia	49.53	44.99	42.39	45.1	17.0	16.8	11.2	13.7	-32.53	-28.22	-31.16	-31.45
Florida	75	74	66	54	40.4	35.8	29.0	31.8	-34.61	-38.23	-37.01	-22.22
Georgia	75	88	80	96	33.8	29.4	26.8	26.9	-41.15	-58.65	-53.18	-69.06
Hawaii	50.3	61.8	38.7	68.2	36.7	25.7	25.3	22.0	-13.56	-36.12	-13.37	-46.24
Idaho	85.52	86.06	78.47	91.24	40.5	32.3	38.4	32.9	-44.99	-53.77	-40.11	-58.39
Illinois	85.8	73.6	81.7	83.6	37.6	32.3	33.1	32.7	-48.17	-41.54	-48.62	-50.91
Indiana	74	74	75	69	41.6	33.7	36.2	32.1	-32.41	-40.27	-38.85	-36.89
Iowa	81.2	81.2	77	74.3	41.4	34.2	33.9	32.2	-39.81	-47.03	-43.10	-42.07
Kansas	86.6	87.2	77.2	84.6	46.3	35.1	39.5	33.1	-40.33	-52.12	-37.70	-51.55
Kentucky	71	74	55	69	36.5	36.2	27.2	33.3	-34.50	-37.79	-27.77	-35.72
Louisiana	65	72	59	62	22.8	18.4	20.3	20.4	-42.15	-53.65	-38.73	-41.57
Maine	66	71	53	71	45.0	35.5	35.3	34.6	-20.99	-35.54	-17.73	-36.42
Maryland	89.2	86.6	65.8	80.2	43.7	37.1	40.1	35.6	-45.48	-49.49	-25.73	-44.59
Massachusetts	48	54	48	78	56.8	47.2	51.7	42.9	8.83	-6.77	3.70	-35.08
Michigan	87.9	82.8	74.5	75.5	35.1	29.7	30.5	30.5	-52.77	-53.10	-43.97	-44.96
Minnesota	74.8	74.5	59.6	66.8	53.8	37.2	46.9	38.4	-20.98	-37.32	-12.67	-28.43
Mississippi	57.6	52.2	53.9	48.4	22.2	21.7	15.2	19.3	-35.37	-30.52	-38.72	-29.09
Missouri	44.9	47	47	50.2	41.1	35.7	35.5	34.3	-3.79	-11.27	-11.50	-15.95
Montana	67	81	60	81	45.5	34.6	43.6	37.7	-21.54	-46.41	-16.42	-43.32
Nebraska	95.5	94.85	91.87	95.22	37.9	34.8	34.6	34.6	-57.56	-60.08	-57.23	-60.62
Nevada	64.3	62	54.7	60.9	32.1	24.0	24.8	22.5	-32.24	-37.97	-29.94	-38.45
New Hampshire	73	75	65	71	55.7	41.3	43.3	39.4	-17.25	-33.70	-21.70	-31.60
New Jersey	72.4	63	71.2	82	46.8	40.3	44.4	41.6	-23.56	-22.75	-26.81	-40.40
New Mexico	42	51.6	42.4	62.1	26.2	19.8	20.2	21.7	-15.81	-31.97	-22.22	-40.36
New York	67.2	76.9	80.2	68.5	40.2	36.0	33.7	33.3	-47.04	-40.94	-46.55	-35.16
North Carolina	81.5	69.1	80.4	66.6	43.2	32.3	35.6	28.8	-38.28	-36.85	-44.63	-37.85
North Dakota	81.1	80	70.8	76.2	44.5	34.8	43.1	34.1	-36.57	-45.19	-27.69	-42.10
Ohio	78.4	82	70.6	72.4	45.3	35.8	35.7	36.7	-33.12	-46.25	-34.92	-35.72
Oklahoma	67	63	61	67	32.7	27.7	23.8	25.7	-34.33	-35.26	-37.18	-41.31
Oregon	77	84	71	69	37.1	30.9	36.6	33.3	-39.86	-53.10	-34.42	-35.69
Pennsylvania	81.8	72.6	71.3	80.5	45.5	36.6	39.8	40.1	-36.29	-35.98	-31.45	-40.40
Rhode Island	63	68	53	65	39.4	35.6	27.8	27.6	-23.61	-32.43	-25.21	-37.43
South Carolina	76.8	75.6	62.7	67.5	34.0	27.6	30.2	24.5	-42.79	-47.99	-32.54	-43.03
South Dakota	78	77	75	74	41.8	32.8	41.5	36.9	-36.20	-44.16	-33.45	-37.11
Tennessee	90.2	90.3	90.1	92.6	28.4	28.0	25.2	27.9	-61.77	-62.28	-64.92	-64.66
Texas	86	84	79	93	38.4	27.7	36.2	27.1	-47.64	-56.35	-42.85	-65.89
Utah	72	77	81	81	41.2	31.0	35.1	32.9	-30.75	-46.04	-48.07	-48.07
Vermont	69	69	65	75	50.7	41.4	43.5	41.0	-18.30	-27.62	-21.51	-34.05
Virginia	86	89	85	87	42.5	38.5	35.6	32.2	-43.45	-50.51	-49.38	-54.81
Washington	52.3	73.6	50.8	67.5	43.2	33.5	39.4	35.7	-9.09	-40.15	-11.43	-31.78
West Virginia	60.83	60.17	51.23	58.62	28.1	25.7	19.4	22.4	-32.73	-34.44	-31.79	-36.26
Wisconsin	81	81	78	84	45.1	32.7	39.3	33.9	-35.92	-48.26	-38.66	-50.08
Wyoming	75.3	71.05	62.05	64.9	40.5	32.6	34.7	34.5	-34.84	-38.44	-27.40	-30.45

Table 1. Differences between State Proficiency Standards and those set by the National Assessment of Educational Progress in 2009.

As this table shows, several states are failing to achieve NCLB’s goal of attaining proficiency on the NAEP exam, despite having students who are proficient on their respective state assessment exams.¹¹⁹ The next section will examine whether the increase in

119. See FREDRICK M. HESS AND MICHAEL J. PETRELLI, NO CHILD LEFT BEHIND: PRIMER 34 (2006). The negative consequences and rewards that are established by NCLB create incentives for states to keep their standards low in order to make it easier for all of their schools and districts to achieve AYP. This creates a problem where some states have

opportunities to attend private schools, after *Winn*, will improve the academic performance of our nation's schoolchildren and increase the number of students who score proficiently on the NAEP exam.

2. *The Belief That Private School Choice Will Make a Difference*

Over the past 30 years, it has been shown that some private school students academically outperform public school students. For example, a RAND Corporation study showed that only twenty-five percent of the public school students in New York graduated and only sixteen percent took the SAT.¹²⁰ On the other hand, ninety-five percent of Catholic school students graduated and seventy-five percent took the SAT.¹²¹ In addition, results from another study showed that Catholic school students were one grade level ahead of their public school counterparts in math, reading, and vocabulary.¹²² The same study also concluded that Catholic schools transform the lives of millions of poor Black and Hispanic children by improving their academic performance.¹²³ These studies' results gave private school choice enthusiasts reason to claim that private schools do a better job than public schools in improving the academic performance of our nation's schoolchildren.

School choice proponents argue that there are several reasons why private schools are better than public schools. First, they claim that private schools have more rigorous academic curricula and a greater degree of student discipline.¹²⁴ Second, private schools are free from central bureaucratic controls that weigh heavily on public schools.¹²⁵ This freedom allows private schools to determine their own curriculum, classroom size, hiring standards, and monetary

very low standards in comparison to others, thereby reducing the probability that all of their students are actually reaching effective reading and math competencies. Because states have considerable leeway to decide how aggressively to raise the AYP bar over time, some critics have noted that NCLB may invite gaming of the system by states that wish to minimize the number of schools that fail to make AYP. States that create low standards have relatively easier assessment tests for schools and districts to give to their students. These less challenging assessment exams increase the total number of students that score proficiently on their state assessment tests. Thus, by lowering educational standards on state assessments, schools and districts in these states avoid the harsh penalties of not meeting AYP and instead receive the rewards created by the NCLB.

120. STERN, *supra* note 80, at 175.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

budget.¹²⁶ Third, private schools have more cooperative environments that contribute to the establishment of trust between school administrators and students' families.¹²⁷ Finally, the quality of teachers in private schools is often better due to the fact that these schools have no "automatic" tenure system; teachers are only eligible for tenure after completing consecutive years of "successful" teaching.¹²⁸ Even if a teacher achieves tenure, he or she can be fired for incompetence or nonperformance.¹²⁹ Thus, incentives for teachers to perform well exist in private schools in ways that do not exist in our nation's public schools.¹³⁰

Private school choice proponents also claim that increasing opportunities for students to attend private schools will contribute to the improvement of public schools, which will face competition for students.¹³¹ A Florida study examined the impact of the nation's largest private school scholarship program, the Florida Tax Credit Scholarship Program ("FTC")—which provides corporations with tax credits for donations they make to scholarship-funding organizations—on the performance of students who remained in public schools.¹³² The results of the study were that students in public schools that faced a greater threat of losing students to private schools, as a result of introduction of tax credit-funded scholarships, improved their test scores more than students in schools that faced less-pronounced threats.¹³³ This improvement occurred before any students actually used a scholarship to switch schools; thus, the threat of competition likely contributed to the public school improvement.¹³⁴ One possible reason for these results is that state school funding is tied to student enrollment; when public schools begin losing students to private schools, they lose revenue.¹³⁵ Thus, the mere threat of losing students to private schools may give public schools greater incentive to cultivate parental satisfaction by operating more

126. *Id.*

127. *Id.*

128. *Id.* at 183.

129. *Id.*

130. *Id.*

131. See Cassandra M.D. Hart & David Figlio, *Does Competition Improve Schools?*, EDUCATION NEXT (Winter, 2011), <http://educationnext.org/does-competition-improve-public-schools/>.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

efficiently and improving the outcomes valued by students and parents.¹³⁶

The advantages for students attending private schools and the increase in public school student performance when faced with competitive pressures created by the Florida tax credit provision—which is similar to Arizona’s tax credit provision at issue in *Winn*—suggest that the increase of private school choice will help improve our schoolchildren’s academic performance and our nation’s educational system as a whole.

3. *Opposition to Private School Choice*

Despite all of the evidence used by private school choice proponents, an equally strong argument that private school choice will not help our nation’s schoolchildren can be made. First, opponents of private school choice state that the studies, which claim that private schools improve academic performance, are skewed.¹³⁷ While public schools are required by law to take every single child, many private schools have the advantage of being able to accept motivated children and reject those from the most troubled families who also happen to be the most difficult to educate.¹³⁸ In other words, private schools will “skim” the best and most motivated students off the top of the public school system, leaving behind a peer group of inferior students.¹³⁹ Also, it is tough to correctly separate effects of private school teaching from other causes of success, such as a student’s social circumstances or differences in student or family academic motivation.¹⁴⁰ Thus, the self-selection bias of private schools may distort the reality of private schools’ effect on schoolchildren.

In addition, those who oppose private school choice claim that data actually shows that the fictional advantages of attending private schools are wiped out when differences in student background are taken into account.¹⁴¹ In fact, one study shows that almost half of public school students have higher achievement than the average private school student who is statistically similar.¹⁴² Hence, the

136. *Id.*

137. STERN, *supra* note 80, at 176.

138. *Id.*

139. RICHARD D. KAHLENBERG ET AL., PUBLIC SCHOOL CHOICE VS. PRIVATE SCHOOL VOUCHERS 46 (2003).

140. *Id.*

141. *Id.*

142. *Id.*

argument that private schools outperform public schools appears weak.¹⁴³ With a given set of schooling resources, there is no reason to believe that an average private school would do a better job of educating a group of students than an average public school educating that same group of students.¹⁴⁴

Finally, private school choice opponents warn that increasing opportunities to attend private schools will lead to greater racial and socioeconomic segregation.¹⁴⁵ Today, one of the leading causes of educational inequality is the degree to which poor and middle-class American schoolchildren are taught in separate settings.¹⁴⁶ Integrating students of a variety of racial and ethnic backgrounds is imperative to promote equal educational opportunity, forge social cohesion, promote individual achievement, improve life chances, and promote unity and tolerance.¹⁴⁷ Conversely, school segregation contributes to educational inequality among private and public schools, which perpetuates the academic failure of our nation's public school students.¹⁴⁸ Currently, segregation levels are quite high among private schools. In fact, studies show that Catholic and other religious private schools have levels of segregation that are equal or greater than levels of segregation among public schools.¹⁴⁹ This is partly due to Black/White segregation being the greatest among Catholic schools, as Blacks and White Catholic school students largely attend separate schools.¹⁵⁰ Also, studies show that White students are more racially isolated in private schools than in public schools.¹⁵¹ In public schools, forty-seven percent of white students attend schools that are ninety to one-hundred percent white.¹⁵² However, in private schools, sixty-four percent of white students attend schools that are ninety to one-hundred percent white.¹⁵³ Thus, both minority and White

143. *Id.* at 34.

144. *Id.*

145. *Id.* at 72.

146. *Id.* at 155.

147. *Id.*

148. *Id.* at 154.

149. *Id.* at 72.

150. *Id.*

151. *Id.* at 73–74.

152. *Id.*

153. *Id.*

students experience a significantly lower level of integration in private school than they would in public schools.¹⁵⁴

All of these findings suggest that attending private school will not improve the academic performances of students more than public schools do. Also, increasing opportunities in private schools, by using the unchallengeable tax credits at issue in *Winn*, will lead to greater class and racial segregation among our schoolchildren which results in increasing school inequality. Therefore, an increase in opportunity to attend private schools may not improve the academic performance of the nation's schoolchildren.

Conclusion

Despite the fact that tax credits qualify as government expenditures, since they reduce the amount of tax revenue that can be used for government spending, the *Winn* majority proceeded to hold otherwise.¹⁵⁵ Although the argument that the federal government should not be burdened by lawsuits challenging its every move is defensible, the *Winn* decision crossed the line by placing the constitutional principle of religious liberty in question. Because *Winn* precludes taxpayers from challenging government expenditures that are clearly designed to avoid constitutional boundaries,¹⁵⁶ the government can now act in seemingly legitimate ways in order to achieve illegitimate ends that are forbidden by the First Amendment's Establishment Clause.

Furthermore, the assertion that the *Winn* decision will improve the academic performance of our nation's schoolchildren is questionable. Although attending private school, as opposed to public school, may seem to have its advantages, students can perform well in either educational setting. Considering the fact that private schools are able to dismiss "problem students" and leave them for the public school system to deal with, it is difficult to determine whether attending private school actually increases student performance.¹⁵⁷

In addition, the idea that increasing school choice will help to improve public schools seems like a false premise. It is difficult to understand how public schools can improve if the better public school students are encouraged to go elsewhere. Also, does the scholarship

154. *Id.* at 72.

155. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1455 (2011) (Kagan, J., dissenting).

156. *See Totenberg*, *supra* note 7.

157. *See KAHLENBERG ET AL*, *supra* note 139.

money created by the tax credits at issue in *Winn* actually help poor children to attend private schools? In reality, even with the help of subsidies, poor families cannot afford private school tuition. Thus, the minimal amount of scholarship created by the credits may really only be a gift to the affluent, who can already afford to send their children to private schools.

Therefore, although there are arguments for why the *Winn* decision can be good for our nation's schoolchildren, it is likely that increasing opportunities to attend private schools is not going to help improve academic performance and meet the lofty goals of No Child Left Behind.