

# ***CAIN V. HORNE:*** **SCHOOL CHOICE FOR WHOM?**

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## **INTRODUCTION**

In *Cain v. Horne*,<sup>1</sup> the Arizona Supreme Court unanimously held that school-voucher programs providing state funding for the private education of disabled and foster children violated the Arizona Constitution. Finding that the programs contravened the plain language and purpose of the Aid Clause,<sup>2</sup> the court did not address the constitutionality of the programs under the Religion Clause.<sup>3</sup> Although the court struck down the voucher programs, it reaffirmed its earlier holding in *Kotterman v. Killian*<sup>4</sup> that tuition tax credits are constitutional.<sup>5</sup> This Case Note considers several questions stemming from *Cain*. First, what school-choice programs are currently constitutional in Arizona? Second, is there a material difference between the allowed constitutional programs and the school-voucher programs prohibited in *Cain*? Third, given the differences between the programs, which ones provide the greatest social benefits? The Case Note ultimately concludes that the tax credits are a fairer way of providing school choice, despite some potentially unsavory social consequences.

## **I. FACTS AND PROCEDURAL HISTORY**

In 2006, the Arizona Legislature enacted the Arizona Displaced Pupils Choice Grant Program and the Arizona Scholarships for Pupils with Disabilities Program: two school-voucher programs designed to assist foster children and disabled children in attending private schools.<sup>6</sup> The Arizona Scholarships for Pupils with Disabilities Program granted “pupils with disabilities . . . the option of attending any public school of the pupil’s choice or receiving a scholarship to any qualified school of the pupil’s choice.”<sup>7</sup> If the student attended a public school and

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1. 202 P.3d 1178 (Ariz. 2009) (en banc).

2. *Id.* at 1184; ARIZ. CONST. art. IX, § 10.

3. *Id.* at 1185 n.4; ARIZ. CONST. art. II, § 12.

4. 972 P.2d 606, 625 (Ariz. 1999).

5. *Cain*, 202 P.3d at 1183.

6. Arizona Scholarship for Pupils with Disabilities, 2006 Ariz. Sess. Laws 1272, 1272–76; Displaced Pupils Grant Program, 2006 Ariz. Sess. Laws 1510, 1510–1513.

7. ARIZ. REV. STAT. ANN. § 15-891(A) (2009).

the parent was “dissatisfied with the pupil’s progress,”<sup>8</sup> the state would pay a scholarship for the pupil to attend a qualified private school.<sup>9</sup> The scholarship amounted to the total state aid the student would have generated for a public school district.<sup>10</sup>

The Arizona Displaced Pupils Choice Grant Program was a similar program aimed at assisting foster children.<sup>11</sup> This scholarship was limited to the lesser of \$5000 or the cost of tuition and fees,<sup>12</sup> and the program was limited to 500 children.<sup>13</sup> A parent’s satisfaction (or dissatisfaction) with the child’s progress in the public school was not relevant; so long as the student was a foster child under title 8, chapter 5 of the Arizona Revised Statutes the student was eligible for the scholarship.<sup>14</sup>

In order for a private school to be “qualified” under these programs, it could not “discriminate on the basis of race, color, handicap, familial status or national origin.”<sup>15</sup> Yet the school was not forced to revise its “creed, practices or curriculum” in order to accept the financial aid given to the students.<sup>16</sup> Thus, both sectarian and nonsectarian schools could become “qualified schools” and receive scholarship money given to pupils under both programs.<sup>17</sup>

Virgil Cain and various other plaintiffs filed a complaint in the superior court demanding an injunction on implementation of the programs.<sup>18</sup> Plaintiffs named Tom Horne, the Superintendent of Schools, as the defendant, and argued that the programs were unconstitutional under the Aid and Religion Clauses of the Arizona Constitution.<sup>19</sup> Defendants moved for judgment on the pleadings, and the

8. *Id.* at § 15-891(B).

9. *Id.* at § 15-891(A).

10. *Id.* at § 15-891.04(A). This complex formula is provided in Arizona Revised Statutes Annotated. § 15-943. The calculation aims to equalize funding amongst the school districts so that they may all spend approximately the same amount of money per pupil from state and local sources. JOINT LEGISLATIVE BUDGET COMM., FISCAL YEAR 2009 APPROPRIATIONS REPORT 161 (2009), available at <http://www.azleg.gov/jlbc/09app/adeform.pdf>. While some municipalities may be able to fund schools entirely from local taxes, most require some state assistance. *Id.* The amount of money generated by each individual pupil depends on various factors, including student count, transportation costs, grade level of the student, and the amount of funding from local sources. *Id.*; § 15-943. The average amount of aid generated per pupil in 2009 is projected to be \$5597. JOINT LEGISLATIVE BUDGET COMM., K-12 FUNDING (M&O, CAPITAL AND ALL OTHER): FY 2000 THROUGH FY 2009 (2009), available at <http://www.azleg.gov/jlbc/allfunding.pdf>.

11. ARIZ. REV. STAT. ANN. § 15-817.02 (2009).

12. *Id.* at § 15-817.04.

13. *Id.* at § 15-817.02(C).

14. *Id.*

15. *Id.* at §§ 15-817(3), 15-891(F)(2).

16. *Id.* at §§ 15-817.07(B), 15-891.02, 15-891.05(B).

17. *Id.* at §§ 15-817.07(B), 15-891.02, 15-891.05(B).

18. Cain v. Horne, 202 P.3d 1178, 1181 (Ariz. 2009).

19. *Id.*

superior court granted the motion, dismissing Plaintiffs' Complaint with prejudice.<sup>20</sup>

On appeal, the Arizona Court of Appeals held that the programs violated the plain language of the Aid Clause, but did not violate the Religion Clause.<sup>21</sup> Defendants petitioned for review, arguing that the programs did not violate the Aid Clause;<sup>22</sup> Plaintiffs cross-petitioned, asserting that the programs violated the Religion Clause.<sup>23</sup> The Arizona Supreme Court granted review.<sup>24</sup>

## II. THE CAIN DECISION

The Arizona Supreme Court's previous decision in *Kotterman v. Killian* upheld a tax-credit program that gave taxpayers a dollar-for-dollar tax credit for donations to their choice of private school scholarship programs.<sup>25</sup> Under the tax-credit program, an individual receives a full tax credit for donations to an organization that grants scholarships for children to attend a private school.<sup>26</sup> Despite the language of the Aid and Religion Clauses, the *Kotterman* court held that the tax credit program was constitutional.<sup>27</sup> The court reasoned that tax credits are not public funds, and therefore could not constitute public funding of a private school or religious organization in violation of the Aid and Religion Clauses.<sup>28</sup> Moreover, individual taxpayers were free to donate to religious or secular tuition organizations, and parents were free to send their children to either religious or secular private schools.<sup>29</sup> Therefore, the state was not impermissibly supporting religion under the Religion Clause.<sup>30</sup> The *Cain* defendants hoped to convince the court that, like the tax-credit program, the school-voucher program did not constitute public funding of private schools or religious organizations.<sup>31</sup>

In determining the constitutionality of the school-voucher programs, the *Cain* court first noted well-established rules of constitutional construction: in order to carry out the intent of the framers, courts must first look to the provision's plain language.<sup>32</sup> Courts may only depart from the text and consider legislative history if the wording is unclear.<sup>33</sup> The Aid Clause forbids "appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation,"<sup>34</sup> and the Religion Clause instructs that "[n]o public money . . . shall

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20. *Id.* Defendants included various individual intervenors who entered the lawsuit voluntarily. *Id.* at 1178.

21. *Id.* at 1181.

22. *Id.*

23. *Id.*

24. *Id.*

25. 972 P.2d 606, 625 (Ariz. 1999).

26. ARIZ. REV. STAT. ANN. § 43-1089 (Supp. 2008).

27. 972 P.2d at 625.

28. *Id.* at 620.

29. *Id.*

30. *Id.*

31. *Cain v. Home*, 202 P.3d 1178, 1182 (Ariz. 2009).

32. *Id.* at 1181.

33. *Id.*

34. ARIZ. CONST. art. 9, § 10.

be appropriated to any religious worship, exercise, or instruction, or to the support of any religious establishment."<sup>35</sup> Thus, the court rejected Defendants' argument that the two clauses are coextensive.<sup>36</sup> Departing from previous case law considering the two clauses together, the court explained that the text and purpose of the two provisions are different.<sup>37</sup> Although some considerations may overlap, the two Clauses require independent construction.<sup>38</sup>

In support of this conclusion, the court noted that the language of the Aid Clause is much more inclusive than that of the Religion Clause, particularly in the context of school funding.<sup>39</sup> While the Religion Clause prohibits only public funding of religious instruction, the Aid Clause forbids the use of public money to fund private or sectarian schools.<sup>40</sup> The two Clauses also serve different purposes: the Aid Clause protects the public fisc, while the Religion Clause protects the separation of church and state.<sup>41</sup>

Unlike tax credits, which the *Kotterman* court found were not public funds,<sup>42</sup> the court found that school vouchers constituted public funds.<sup>43</sup> Tax credit money does not technically become a public fund because it never passes through the state treasury; it is instead in the individual taxpayers' custody.<sup>44</sup> School vouchers, on the other hand, use funds drawn from the state treasury—undoubtedly money that is in the government's possession.<sup>45</sup>

The true beneficiary theory also did not save the programs.<sup>46</sup> Under this theory, the state may reimburse a religious organization for non-religious services.<sup>47</sup> For example, the state has, in the past, issued vouchers that directly reimbursed the Salvation Army for the cost of emergency supplies, such as food or clothing, provided to people in need.<sup>48</sup> But state funds could only be used to cover

35. *Id.* at art. 2, § 12.

36. *Cain*, 202 P.3d at 1182. This interpretation would have been favorable to Defendants, as Arizona has typically interpreted the Religion Clause along the same lines as the federal Establishment Clause. *Id.* Because the U.S. Supreme Court has upheld programs where state funds reach religious institutions through the independent choice of aid recipients, it is likely that the voucher programs would have been permissible under this reading. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986).

37. *Cain*, 202 P.3d at 1182–83.

38. *Id.*

39. *Id.* at 1182.

40. *Id.*

41. *Id.* at 1183. Although legislative history does not reveal a great deal about these clauses, the court also noted that public education was of great importance to the framers, as they clearly intended to have a strong public education system to provide compulsory education. *Id.*

42. 972 P.2d 606, 620 (Ariz. 1999); *Cain*, 202 P.3d at 1183.

43. *Cain*, 202 P.3d at 1183.

44. *Id.*

45. *Id.*

46. *Id.* at 1184.

47. *See Cmty. Council v. Jordan*, 432 P.2d 460, 468 (1967).

48. *Id.*

the cost of materials; the funds could not be used to support the infrastructure or general administrative costs of the organization.<sup>49</sup>

Although Defendants tried to argue that the “true beneficiary” of the aid was the children and not the schools themselves, the schools’ use of the funds from the vouchers was not limited to supplies.<sup>50</sup> Once the parents redeemed the vouchers, the schools could use the funds for general support of the organization.<sup>51</sup> It was also immaterial that the funds would first pass through the hands of a third party, the parents.<sup>52</sup> Despite this formality, the vouchers ultimately did exactly what the Aid Clause forbids: they appropriated “public money . . . in aid of . . . private or sectarian school[s].”<sup>53</sup> The court reasoned that invoking the true beneficiary exception in this circumstance would “render the clause a nullity.”<sup>54</sup>

Although the court was sympathetic to the purposes behind the voucher programs, stating that they were “a well-intentioned effort to help two . . . student populations with special needs,” the court concluded that it was “bound by [the] constitution.”<sup>55</sup> Additionally, the court hinted that “[t]here may well be ways of providing aid to these student populations without violating the constitution.”<sup>56</sup> Because the court determined that the programs violated the Aid Clause, it did not address the question of whether they also violated the Religion Clause.<sup>57</sup> The court reversed the judgment of the superior court, vacated the court of appeals’ opinion, and remanded the case.<sup>58</sup>

### III. GOALS AND IMPLICATIONS

To their supporters, school-choice programs offer numerous benefits. First, they grant parents more power to choose the education that they believe to be best for their children.<sup>59</sup> Second, a larger variety of schooling options could produce more free-market competition with all of its attendant benefits, including

49. *Id.*

50. *Cain*, 202 P.3d at 1184.

51. *Cf. id.* (stating that “[t]he voucher programs do not have comparable limitations” to the vouchers at issue in *Jordan*).

52. *Id.*

53. ARIZ. CONST. art. 9, § 10; *Cain*, 202 P.3d at 1184.

54. *Cain*, 202 P.3d at 1184. The court also remarked in a footnote that it was not bound by the language of the Displaced Pupils statute stating that “[a] grant . . . constitutes a grant of aid to a qualifying pupil through the pupil’s respective custodian and not to the grant school.” *Id.* at 1184 n.3 (internal quotations omitted) (quoting ARIZ. REV. STAT. ANN. § 15-817.01(B)). The courts have the responsibility to decide if legislation is constitutional, and the legislature’s conclusory statements do not alter the duty of the court to perform its own constitutional analysis. *See id.*

55. *Id.* at 1185.

56. *Id.*

57. *Id.* at 1185 n.4.

58. *Id.* at 1185.

59. *See Alliance for Sch. Choice, About Us*, <http://www.allianceforschoolchoice.org/AboutUs/>. Freedom of parents to educate their children as they see fit has also been recognized as a fundamental right by the U.S. Supreme Court. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

innovation, response to consumer demand, and cost-effectiveness.<sup>60</sup> Third, school-choice programs offer low-income families more access to any superior education provided by private schools, thus giving low-income families opportunities similar to upper-income families.<sup>61</sup>

Keeping these goals in mind, this Part first determines which school-choice programs are currently constitutional in Arizona. It then looks to whether there is a material difference between the effects of the constitutional programs and those of the unconstitutional ones. Finally, it examines which programs produce the most desirable social benefits.

#### *A. What School-Choice Programs Are Constitutional in Arizona?*

The Arizona Supreme Court unanimously found that a school-voucher program is unconstitutional.<sup>62</sup> The court held that the state directly funded private schools through the voucher program, even though the voucher money first passes through the hands of the parents.<sup>63</sup> Directly funding private schools with public money is, of course, a blatant violation of the constitutional mandate that there be no “appropriation of public money made in aid of any . . . private or sectarian school,”<sup>64</sup> so the court held that the voucher programs were unconstitutional. Yet, the court both hinted, and confirmed, that constitutional school-choice programs exist.<sup>65</sup>

The most widely used school-choice programs in Arizona are tax credit programs for corporations and individuals.<sup>66</sup> The current tax credit system for corporations in Arizona establishes a dollar-for-dollar tax credit to any corporation paying Arizona corporate income taxes.<sup>67</sup> The state gives the tax credit “for the amount of voluntary cash contributions made by the taxpayer during the taxable year to a school tuition organization.”<sup>68</sup> A “School Tuition Organization” (STO) is a charitable organization that is tax-exempt under § 501(c)(3) of the federal Internal Revenue Code, allocates 90% of its revenue for educational scholarships or tuition grants, and provides scholarships to students without limiting availability to only students of one school.<sup>69</sup>

Corporate taxpayers cannot designate a contribution for a specific student, and families receiving scholarships must not exceed certain income limits.<sup>70</sup> Total statewide corporate tax credits are limited to \$10 million annually, and the amount

60. See generally David Salisbury, *What Does a Voucher Buy? A Closer Look at the Cost of Private Schools*, CATO INST., Pol’y Analysis 486, Aug. 28, 2003, available at [http://www.cato.org/pub\\_display.php?pub\\_id=1345](http://www.cato.org/pub_display.php?pub_id=1345).

61. See George Archibald, *12 Million Languish in Failing Public Schools*, *Report Says*, WASH. TIMES, Aug. 30, 2004, at A08.

62. *Cain*, 202 P.3d at 1185.

63. *Id.* at 1183–84.

64. ARIZ. CONST. art. 9, § 10.

65. *Cain*, 202 P.3d at 1183, 1185.

66. ARIZ. REV. STAT. ANN. §§ 43-1089, 43-1183 (Supp. 2008).

67. *Id.* at § 43-1183(A).

68. *Id.*

69. *Id.* at § 43-1183(Q)(2).

70. *Id.* at § 43-1183(I), (J).

increases by 20% each fiscal year beginning with fiscal year 2007–2008.<sup>71</sup> The credit is available to corporations on a first-come, first-served basis.<sup>72</sup>

The tax credit program for individual taxpayers is similar, with a few minor differences. Individuals have a \$500 annual cap on distributions, but they may carry excess credits forward into the next five tax years.<sup>73</sup> And while individual taxpayers may not earmark their contributions for the direct benefit of their dependent, the taxpayers may designate donations for the benefit of specific individuals.<sup>74</sup> Finally, there are no income limits on the families receiving the scholarships.

The Arizona Court of Appeals recently upheld the corporate tax credit program in *Green v. Garriott*.<sup>75</sup> The majority held that the dollar-for-dollar tax credits did not violate the state Religion Clause or the federal Establishment Clause.<sup>76</sup> The program makes no distinction between religious and secular schools.<sup>77</sup> Corporations could donate money to, and parents could accept scholarships from, both secular and religious institutions.<sup>78</sup> The majority also held that the credits did not violate the Aid Clause, because, as previously resolved by *Kotterman*, creating a tax credit is not equivalent to the laying of a tax.<sup>79</sup>

*Kotterman* held that the individual tax credit program is constitutional,<sup>80</sup> and Arizona recently enacted a program that makes it easier for private taxpayers to utilize this program.<sup>81</sup> The bill authorizes employees to make tax-deductible contributions to qualified STOs or public schools through a direct payroll deduction.<sup>82</sup> The employer will reduce the employee's withholding tax (thereby increasing the employee's take-home pay) by the pro-rata amount of the credit for which the employee will qualify.<sup>83</sup> The employer must then forward contributions directly to the organizations chosen by the employee.<sup>84</sup> This enables private employees to take advantage of the tax credit without having to perform the “leg work” of mailing their contributions to the STO, and it also allows individuals to

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71. *Id.* at § 43-1183(C)(1).

72. *Id.* at § 43-1183(C)(3).

73. *Id.* at § 43-1089(A), (C).

74. *See id.* at § 43-1089(E).

75. 212 P.3d 96, 107–08 (Ariz. Ct. App. 2009).

76. *Id.*

77. *Id.* at 103.

78. *Id.* at 102.

79. *Id.* at 105–06. The *Green* dissenter would have remanded the case to resolve a factual question of whether the predominant intent of the program was secular or was aimed at promoting religion. If the program favored religious schools, it would be unconstitutional. *Id.* at 119 (Kessler, J., dissenting in part and concurring in part).

80. *Kotterman v. Killian*, 972 P.2d 606, 625 (Ariz. 1999).

81. Tax Credits; Withholding Tax Reduction, 2009 Ariz. Sess. Laws 167.

82. *Id.* at § 3.

83. *Id.*

84. *Id.*

get their tax reimbursements quickly.<sup>85</sup> These modifications to the *Kotterman* tax credit program are effective January 1, 2010, and have not been tested in court.<sup>86</sup>

***B. Is There a Material Difference Between the Tax Credit Programs and the Unconstitutional School-Voucher Programs?***

In fiscal year 2007–2008, the amount of dollar-for-dollar income tax credit granted to corporations for their donations to STOs was close to the \$12 million allowable maximum.<sup>87</sup> In tax year 2008, approximately \$55.25 million worth of tax credits was given to individual taxpayers for their donations to STOs.<sup>88</sup> How is this any different from taking \$67.25 million from the state budget and giving it directly to private schools?

The Arizona Supreme Court in *Kotterman* set forth an extensive analysis as to why a tax credit is not an appropriation of public funds.<sup>89</sup> The court reasoned that, in order to be public funds, the government must, at some point, actually possess the money.<sup>90</sup> The state does not have quasi-ownership over taxpayer money just because it could become state funds in the future.<sup>91</sup> If this was the case, all income could be considered “state funds” because almost all income could theoretically be taxed.<sup>92</sup> It is not as if the state is reimbursing the taxpayers for their donations; the taxpayers never owed the money to the state to begin with.<sup>93</sup> Further, tax deductions for charitable donations and tax-exempt status for charitable (and religious) organizations are widely recognized as constitutional practices.<sup>94</sup> The theory that any tax credit is an expenditure of public funds would lead to the conclusion that many of these practices are impermissible.<sup>95</sup> The framers of the Arizona Constitution clearly did not believe that all tax incentives equated to an appropriation of public funds: they drafted constitutional provisions both forbidding appropriation of public money for religious institutions and exempting religious institutions from taxation.<sup>96</sup>

85. *Id.*

86. *Id.* at § 6.

87. ARIZ. DEP’T OF REVENUE, CORPORATE INCOME TAX CREDIT FOR CONTRIBUTIONS TO SCHOOL TUITION ORGANIZATIONS: REPORTING FOR 2007 2 (2008), available at [http://www.revenue.state.az.us/ResearchStats/2007%20corporate%20school\\_credit%20report.pdf](http://www.revenue.state.az.us/ResearchStats/2007%20corporate%20school_credit%20report.pdf). The exact amount granted was \$11,996,000. *Id.*

88. ARIZ. DEP’T OF REVENUE, INDIVIDUAL INCOME TAX CREDIT FOR DONATIONS TO PRIVATE SCHOOL TUITION ORGANIZATIONS: REPORTING FOR 2008 EXECUTIVE SUMMARY 1 (2008), available at [http://www.azdor.gov/ResearchStats/private\\_schl\\_credit\\_report\\_2008.pdf](http://www.azdor.gov/ResearchStats/private_schl_credit_report_2008.pdf). The exact amount was \$55,269,528. *Id.*

89. *Kotterman v. Killian*, 972 P.2d 606, 617–20 (Ariz. 1999).

90. *Id.* at 617–18.

91. *Id.* at 618.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* This is because: (1) aiding religion is not the primary purpose of the exemption, as donations to both religious and secular charities are included; and (2) it is the private choice of individuals to make the donations, so government involvement is minimal. *Walz v. Tax Comm’n*, 397 U.S. 664, 672–76 (1970).

96. *Kotterman*, 972 P.2d at 620.



The *Kotterman* analysis is quite compelling from a strictly constitutional perspective. From a practical standpoint, however, it is difficult to see how tax credit programs are materially different from the voucher programs. Are tax credits, in practice, no more than a form of money laundering?

Not exactly. There are some significant differences between the programs. School-vouchers take money from all taxpayers and put it into the general fund. The state then takes money out of that fund and gives it to individual families who spend it on the school of their choice. Thus, money from all taxpayers is taken to fund programs that pay for private schools, which is against the consent of some individuals. While this is of course true of any government-funded program, the Arizona Constitution forbids the government from forcing taxpayers to fund certain types of programs, including programs that fund private schools.<sup>97</sup>

The tax credits, on the other hand, allow individuals to spend money that they would have paid in taxes on non-government-funded programs. It is the taxpayer's personal autonomous decision whether to spend its money on general government taxes or on the STOs.<sup>98</sup> This is opposed to the government forcibly taking money from all taxpayers to fund the school-voucher programs. While the school-voucher program allowed the pupils to choose where to spend the money, it was not the pupils' money to spend. It was the taxpayers'.

Perhaps the state would need to increase taxes in order for the state treasury to have the same amount of general public funds as it would have without the tax-credit program. This would indirectly force all taxpayers to subsidize the programs. While this is possible, it is also feasible that the programs actually *reduce* the state's expenditures on public education. If private schools are able to educate students more efficiently, then under the tax-credit programs less money is spent to educate more children. Of course, the voucher programs may have the same benefits. But again, the difference is, in the voucher system, the pupils decide how the taxpayers' money is spent. With the tax-credit programs, the taxpayers decide how their money is spent.

### ***C. Which Programs Provide the Greatest Social Benefits?***

While the proposition that taxpayers can decide how their own money is spent may seem fair, tax credits for donations to STOs have led to what some may feel are unsavory consequences.<sup>99</sup> In the government run school-voucher program, the STO middleman is not necessary because the government distributes the money itself. The problem with the STO system is not that it necessarily increases

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97. Cain v. Horne, 202 P.3d 1178, 1185 (Ariz. 2009).

98. However, a taxpayer cannot get a tax credit for money donated directly to public schools (unless the money is for support of extra curricular activities or character education programs), even if the taxpayer would prefer that its money support these institutions. The *Green* dissent believed this deficiency undermined the concepts of school choice and competition that are arguably promoted by the tax credit system. *Green v. Garriott*, 212 P.3d 96, 112 (Ariz. Ct. App. 2009) (Kessler, J., dissenting in part and concurring in part).

99. *Id.* at 108–19 (Kessler, J., dissenting in part and concurring in part).

transaction costs. The government would likely have to implement its own distribution network, albeit possibly using or modifying a preexisting government distribution or funding infrastructure. The difficulty is that STOs, and the schools that receive the scholarships, are permitted to discriminate against scholarship recipients in ways that a government-run system could not.<sup>100</sup>

Schools that receive money from STOs are forbidden by statute to discriminate based on race, color, handicap, familial status, or national origin, but they may discriminate on the basis of religion and sex.<sup>101</sup> The STOs are permitted to discriminate based on race, sex, religion, or any other basis when deciding which students should receive the scholarship money.<sup>102</sup> And, because the sole purpose of the STOs' existence is to distribute tax-credit money, it seems inevitable that private groups with the agenda of promoting certain religions will attempt to control the STOs and hence the flow of funds to private schools.<sup>103</sup>

In fact, this may be what has happened. As the *Green* dissent noted, religious STOs control and distribute approximately 70% of the tax-credit scholarships.<sup>104</sup> Because corporate tax credits are limited and available on a first-come, first-served basis, it is relatively easy for a few STOs to monopolize this money.<sup>105</sup> These STOs allegedly discriminate based on religious beliefs, and may require students to observe certain religions as a condition of the scholarship.<sup>106</sup>

Currently, these consequences are not much more than allegations, as the *Green* court dismissed the case before factual development of the record occurred.<sup>107</sup> But, if true, the effects of a limited supply of STOs that may also discriminate on the basis of religion would constrain the choices of pupils. While 30% of the scholarship money is distributed by secular organizations, it is less likely that those organizations discriminate on the basis of religion. For example, the top recipient of private tax credit scholarship money, the Arizona Christian School Tuition Organization, will only release scholarship money for a child to

100. See *id.* at 110–11 (Kessler, J., dissenting in part and concurring in part). The *Green* court held that this does not create a state action problem forcing these schools and organizations to alter their practices. *Id.* at 104 (“For a law to have forbidden ‘effects’ . . . the *government itself* [must] advance[] religion through its own activities and influence.” (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987))). The private choices of the taxpayers to donate the money to the discriminating STOs, the parents to receive money from those STOs, and the parents to choose to enroll their students in religious schools, indicate that individuals are making the discriminatory decisions, and not the “government itself.” *Id.* at 104. Because private entities are discriminating autonomously, there is no state action problem. *Id.*

101. *Id.* at 110 (Kessler, J., dissenting in part and concurring in part); see ARIZ. REV. STAT. ANN. §§ 43-1089(G)(2), 43-1183(Q)(1)(a) (Supp. 2009).

102. *Green*, 212 P.3d at 110–11 (Kessler, J., dissenting in part and concurring in part); see ARIZ. REV. STAT. ANN. §§ 43-1189(G)(3), 43-1183(Q)(2).

103. *Green*, 212 P.3d at 110–11 (Kessler, J., dissenting in part and concurring in part).

104. *Id.* at 112 (Kessler, J., dissenting in part and concurring in part).

105. *Id.* (Kessler, J., dissenting in part and concurring in part).

106. *Id.* (Kessler, J., dissenting in part and concurring in part).

107. See *id.* at 107.

attend a Christian school.<sup>108</sup> The top non-religious recipient of scholarship money, the Arizona Scholarship Fund, has no restrictions on the religious affiliation of the school that the child may attend.<sup>109</sup> This means that students who want to attend religious schools have the option of receiving money from either organization, while students who do not want to attend religious schools may only receive money from a small percentage of the organizations. Once the money from secular organizations is gone, the pupil's choices are more limited.

A voucher program avoids this shortcoming. While the state would have a monopoly on distribution and may establish its own criteria, it already has this power under the tax-credit system because it can control which schools and STOs are approved for the program.<sup>110</sup> If the goal is to promote school choice for parents and pupils, the tax-credit system does not allow for as much choice and competition.

So tax credits allow for less consumer choice, if the pupil is viewed as the consumer. But arguably, the pupil is not the consumer. In either program, it is the taxpayers' money that is being used to assist people in need. Seen in that light, school-choice assistance is more akin to a charitable organization's donations. Therefore, it is the donor who is properly seen as the consumer, not the recipient of the charity. As long as there are sufficient options available to the donor, the level of consumer choice is adequate. This choice would not be available in the school-voucher program.<sup>111</sup>

So, which view is correct? Should Arizona be more concerned about the choices of the students or about the choices of the donor?

Part of the answer may call for a return to the rationale behind the constitutionality of the various programs. This endorses the idea that the money is the taxpayers', and therefore it is the taxpayers who can decide how and where to spend it.<sup>112</sup> While the pupils may be able to choose amongst various non-profit organizations, their choice is limited by who is willing to donate money to them. This is a more proprietary view of who gets to make the choice.

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108. Ariz. Christian Sch. Tuition Org., Inc., Tuition Grant/Scholarship Application, <http://www.acsto.org/scholarshipapplicationhome.html> (last visited Aug. 26, 2009).

109. Ariz. Scholarship Fund, ASF Overview, <https://www.azscholarships.org/index.aspx?c=54&id=11> (last visited Aug. 26, 2009).

110. See ARIZ. REV. STAT. ANN. §§ 43-1089(G)(2)-(3), 43-1183(Q) (Supp. 2008) (setting qualification requirements for schools and STOs).

111. This is not always the case. Although parents are not allowed to donate money for the direct benefit of their dependents, there have been reports of individuals circumventing this requirement. Ronald J. Hansen & Pat Kossan, *Tuition Aid Misses Mark*, ARIZ. REPUBLIC, Aug. 1, 2009, at A1. Essentially, Family A who wants to send its child to a private school will find Family B who also wants to send its children to a private school. *Id.* Family A will then make a donation earmarked for Family B's child, and vice versa. *Id.* While this does increase choice for those families, the only families who will benefit from this are those who earn enough taxable income to be eligible for the tax credit. *Id.* The choice of the lowest-income families is still limited. *Id.*

112. See *supra* Part III.B.

Also implicit in the notion of publicly funded education is the concept that it is ultimately the public that benefits from the service, not just the students. In this sense, the donors are beneficiaries who have a right to choose which product will benefit them. Pupils receive more choices than they would otherwise have, and the taxpayers who earned the funds have a voice in how they will be used in their society.

### CONCLUSION

*Cain v. Horne* held that school-voucher programs are unconstitutional in Arizona, as they directly appropriate public funds to aid private schools. Dollar-for-dollar tax credits for private money donated to these schools are constitutional, however. The money used to aid the schools was never in the government's possession and therefore is not public money. This may lead to some unsavory consequences because pupils have fewer choices. The result seems fair, however, because the money being spent was not initially the pupils'. Tax credits still allow for "school choice," but the choice lies in the hands of both the taxpayers and the pupils. The constitutional requirements are not mere technicalities. They ensure that the person who earns the money gets a voice in how it is spent.