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SECTION 529 PREPAID COLLEGE TUITION SCHOLARSHIPS: HELP IN UNCERTAIN ECONOMIC TIMES

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Carol L. Zeiner[*]

ABSTRACT

The economy is wretched. The United States' economic recovery is dependent in part on the country's position in a global economy. If we as a nation wish to remain competitive in a knowledge-based economy that requires a higher level of education, we must facilitate greater access to postsecondary education.[1] Unfortunately, in the last two decades, the United States has fallen from first to tenth place in the world in the proportion of its population that has obtained that all important postsecondary education.[2] President Obama has set a goal of restoring the United States to first place by 2020.[3]

The United States faces a number of problems when it comes to facilitating access to higher education. For many years, children in a large segment of our society, the economically disadvantaged, have not even dreamed of graduating from high school and going to college.[4] If we are to make any serious inroads into the proportion of our population that has attained postsecondary education, we must prepare children within this group for postsecondary education and provide access for them. Now we have a new problem hampering students from families whose children have traditionally attended college. Just as these children are about to attend college, their families' college savings have been decimated. We as a nation cannot afford to lose these children from the proportion of our population that has attained higher education.

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[1] *See generally,* PATRICK CALLAHAN, ET AL., JOINT REPORT OF THE NATIONAL CENTER FOR PUBLIC POLICY AND HIGHER EDUCATION AND THE NATIONAL CENTER FOR HIGHER EDUCATION MANAGEMENT SYSTEMS , GOOD POLICY, GOOD PRACTICE, IMPROVING OUTCOMES AND PRODUCTIVITY IN HIGHER EDUCATION: A GUIDE FOR POLICYMAKERS, 36 (2007), http://www.highereducation.org/reports/Policy_Practice/GPGP.pdf. (Sometimes referred to in the text as the "Joint Centers Report")

[2] *Id.* at iv.

[3] President Barack Obama, address to the Joint Houses of Congress, February 24, 2009.

[4] President Obama notes that "[w]e have one of the highest high school dropout rates of any industrialized nation, and half of the students who begin college never finish." *Id*.

While there is no single silver bullet for the nation's educational woes,[5] this article proposes a model that will prove effective for both cohorts of students. It is based on Florida's highly successful, cost-effective prepaid college tuition scholarship program, a jewel that has gone largely unnoticed. This article evaluates the existing program, suggests how it can be adapted to assist students whose college savings have recently evaporated, especially in those states that already have prepaid tuition plans.

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I. BACKGROUND:

A. Section 529 Plans.

Section 529 of the Internal Revenue Code[6] permits each state to create its own qualified state tuition programs.[7] These can consist of a prepaid tuition plan,[8] a college savings plan,[9] or both. Congress intended these plans to encourage saving for future college expenses.[10]

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[5] Callahan et al, *supra* note 1 at 36 ("No single policy of practice offers a silver bullet to states that will raise the level of their population's educational attainment.").

[6] I.R.C..§ 529 (1996) (hereinafter Section 529)

[7] I.R.C. § 529(b)(1).

[8] Hereinafter "Prepaid Tuition Plan."

[9] Hereinafter "College Savings Plan."

[10] Danielle A. Merrick, *States' Nightmare, Estate Planners' Dream*, 59 J. MO. BAR 316, 316 (2007) (citing Staff of Joint Committee, 104th Cong., General Explanation of Tax Legislation Enacted in the 104th Congress (Comm. Print 1996)), *available at* http://www.mobar.org/eflaa610-1e23-4f8d-9c32-c7e11ed6caa3.aspx; RICHARD A. FEIGENBAUM & DAVID J. MORTON, THE 529 COLLEGE SAVINGS PLAN 1 (Sphinx Publishing 2002) ("help people save money [for college.]"). The debate as to the true beneficiaries is further discussed at notes 79 - 82 and 140 -148 and accompanying text.

Under a Prepaid Tuition Plan the purchaser[11] pays a sum of money as prepaid tuition for a particular prospective college student.[12] The cost to the purchaser is based on the age of the beneficiary when the plan is purchased.[13] The rules of the particular state provide whether the purchase can be made in monthly installments over a number of years, or whether payment must be made in a lump sum.[14] The funds are held and invested by the plan manager[15] until the beneficiary attends college at which point the plan is redeemed for the semesters of study or number of course credits purchased, depending on the type of plan purchased.[16] The key feature of prepaid plans is that regardless of how much the cost of tuition has increased by the time of redemption, the plan credits are accepted as full payment for the current tuition, provided they are used at a participating college.[17] "Thus, the risk of future tuition increases is shifted to the state's program."[18] Typically, the participating educational institutions are the state-supported universities, colleges and community colleges in the sponsoring state.[19] Some states' plans, such as Florida's, have optional features that allow prepayment of certain fees in addition to tuition that are charged by the state's colleges and universities,[20] thereby eliminating the risk to the beneficiary of escalation in the price of these fees as well.[21]

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[11] Often a parent or grandparent.

[12] Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L. J. 451, 494 (2004). Some states structure the program so that what is purchased is a level of study, such as a four-year state university plan or a two-year community college plan, or a two-plus two plan (a program of study consisting of two years at a community college followed by two years at a state university – typically less expensive than four years at a state university). This is the design of the plans in a number of states, Florida, Michigan and Alabama plans, among them Jim Hamilton, *Notice 2001-55 and the Rapid Growth of 529 Plans*, 45-APR Res Gestae 29,(2002). In other states, Ohio and Pennsylvania, among them**.** The purchaser of a Prepaid Tuition Plan purchases tuition credits like course credits earned when attending college.

[13] *See*, *e.g*. Florida Prepaid College Plan, Plan Prices and Master Covenant, published annually by the Florida Prepaid College Board.

[14] *See, e.g., id*. For example, in Florida "[p]ayments can be made in a lump sum, over five years, or monthly until the year the child is projected to start college." Florida Prepaid College Board, 2005/2006 Annual Report, at 3 (hereinafter *2005/2006 Report*).

[15] Typically the funds are held in a trust fund by the state that cannot be used for other purposes. *See,* Karin Fischer, *Ky. Judge Protects In the States Prepaid Tuition*, CHRON. HIGHER EDUC., Apr. 28, 2006, at A35.

[16] Feigenbaum & Morton, *supra* note 10, at 1. For a description of the basic types of plans, see *supra* note 12.

[17] Feigenbaum & Morton, *supra* note 10, at 1*;* Zelinsky*, supra* note 12, at 494; Katherine Baird, *The Political Economy of College Prepaid Tuition Plans*, 29 REV. HIGHER EDUC. 141, 142, (2006).

[18] Zelinsky*, supra* note 12, at 494. Zelinsky notes that that the actuarial funding techniques and superior investment performance (together with lower transaction costs and savings of scale enjoyed by the states as compared to the individual investor) is intended to fund the increases in tuition. Zelinsky*, supra* note 12, at 494. However, footnote 142 therein discusses problems that have arisen. *Id*. at 494 n.142. Likewise, Professor Olivas noted that downturns in the market during the early 2000s have placed several plans in trouble. Michael A. Olivas, *State College Savings and Prepaid Tuition Plans: A Reappraisal and Review*, 32 J. L. & EDUC. 475, 479, 483-486 (2003). He also shows that despite adverse market performance these funds have done better than the market in general and better than the results that are obtained by typical individual investors. *Id***.**

[19] Zelinsky, *supra* note 12, at 494. Baird notes that a group of private universities have grouped together to offer a prepaid tuition plan that is accepted in payment of the price of tuition at any of the participating universities. Baird, *supra* note 17, at 142.

[20] Some may cover room and board as well as tuition and related expenses. Callahan et al, *supra* note 1, at 3.

[21] For example, in addition to the tuition plan, Florida offers an optional dormitory plan (that covers the cost of a standard double occupancy air-conditioned dorm room) and a local fee plan (that covers certain required fees such as the student activity fee, health and athletic fees). However, see Part III below for new

Guarantees for these funds, when they exist, are provided in a number of ways. Some, like the Prepaid Tuition Plans of Florida, Ohio and Texas, are backed by the full faith and credit of the sponsoring state.[22] Others, although technically not guaranteed by the full faith and credit of the state, have been backed by what amounts to a moral pledge of full faith and credit.[23]

Prepaid Tuition Plans often contain a feature that provides for redemption of a set amount[24] if the beneficiary child attends college at a qualifying institution that does not participate in the plan, such as a private university or a public institution in another state,[25] or if the child does not attend college.[26]

For purposes of analogy, Prepaid Tuition Plans can be compared to defined benefit plans in the pension and employee benefits area of law.[27]

In contrast, a College Savings Plan typically offers much more flexibility in the number of institutions at which maximum benefits can be utilized,[28] but does not guarantee that the plan proceeds will be sufficient to cover tuition costs at any institution.[29] These plans are state-operated investment funds that benefit from the economies of scale and sophisticated investment management.[30] Lump sum, periodic or random deposits can be made for a particular beneficiary up to specific maximums.[31] As the beneficiary student attends college, the principal and accumulated earnings will be available to defray the costs of higher education. Earnings can accumulate free of federal income taxes;[32] distributions are free of federal income taxes[33] if they are utilized for

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developments that may present an impediment to students.

[22] *2005 Florida Prepaid College Board 2005/2006 Annual Report*, *supra* note 16, at 2 (Florida); Michael A. Olivas, *State College Savings and Prepaid Tuition Plans: A Reappraisal and Review,* 32 J. L. & EDUC. 475, 477–478 (2003) (Texas and Ohio)**.**

[23] For example, Michigan. Olivas, *supra* note_18,_at 493. In 1998, voters in Oregon voted down a proposal to provide that state's full faith and credit to its Prepaid Tuition Plan. Olivas, *supra* note 18, at 478, 494.

[24] Each state is free to adopt its own rules. Some states provide only minimal earnings. Feigenbaum & Morton, *supra* note 10 at 27. Others, such as Florida provide that the amount paid if the beneficiary attends a non- participating institution is the average in-state tuition. *See* Florida Master Covenant.. State policies on refunds vary considerably.

[25] For example if the beneficiary of a Florida Prepaid Tuition Plan attends a qualified (properly accredited) in-state private college or university, or an out-of-state college or university, the plan will pay an amount not to exceed the current rates at state universities or community colleges in Florida (subject to some additional limitations). Florida Prepaid College Plan, 2005-2006 Master Covenant, at §§ 5.05 and 5.06.

[26] There are rules applicable to the transfer of the plan to another beneficiary if the original beneficiary does not attend college or obtains another means of attending college. The tax ramifications of a transfer depend on the identity of the new beneficiary. Plans also have rules for refund if the designated beneficiary does not attend college and there is no transfer to another beneficiary; the earnings in such instances, if any, tend to be minimal. As creatures of state government, the structure and rules applicable to each plan, other than federal tax rules, vary considerably from state to state.

[27] Zelinsky, *supra* note 12, at 494-495.

[28] This is a feature that is touted by advertisers in marketing College Savings Plans (while the lack of such flexibility, or low rate of return when a beneficiary of a Prepaid Tuition Plan attends college at a non-participating institution, is often cited as a criticism of Prepaid Tuition Plans by these advertisers).

[29] Zelinsky, *supra* note 12, at 495. This highly significant shortcoming of College Savings Plans is not highlighted by advertisers.

[30] Olivas *supra* note 18, at 477.

[31] Maximums are set by each state in order to comply with I.R.C. § 529(b)(6).

[32] I.R.C. § 529(c)(1)**.**

[33] The sunset provision in the Internal Revenue Code, which would have caused the preferential tax treatment to expire, has been repealed. *Tax-Free 529 Withdrawals are Now Permanent,* CPA CLIENT BULL., Oct. 2006, at 3.

"qualified higher education expenses," at an "eligible educational institution."[34] "Qualified higher education expenses"[35] include tuition, room and board (if the student is enrolled at least half-time), fees, books supplies, equipment required for enrollment, and -- for special needs children -- expenses incurred in connection with the child's enrollment or attendance at an eligible school.[36] An "eligible education institution"[37] is "defined in the Higher Education Act of 1965,[38] as being a school eligible to participate in a student aid program."[39] Withdrawals from a College Savings Account that are not used for qualified higher education expenses or are used at an institution that is not an eligible educational institution are subject to federal income taxes[40] and a penalty tax.[41] Under present law, there is no federal income tax deduction for payments by the purchaser into a College Savings Plan.[42] Some states, however, allow partial or complete deduction against state income taxes for contributions to a state's home College Savings Plan.[43] For purposes of analogy, College Plans can be compared to defined contribution plans in the pension and employee benefits area of law.[44]

Although the general scheme of Prepaid Tuition Plans and College Savings Plans is straightforward and easy to comprehend, the devil is in the details.[45] Each state can create its own particular versions of a Prepaid Tuition Plan and College Savings Plans.[46] "Virtually no state operates its prepaid or savings plans the same way as does another state."[47] The complexity of and variation in features among plans are great, making it difficult for prospective investors to compare plans[48] and creating unnecessary barriers for some purchasers.[49]

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34 Feigenbaum & Morton, *supra* note 10, at 33; I.R.C. § 529(c)(1).

35 IRC §529(e)(3)(A)&(B).

36 Feigenbaum & Morton, *supra* note10, at 34; IRC §529(e)(3)(A)(ii).

37 I.R.C. §529(e)(5).

38 I.R.C. §529(e)(5)(A) (referring to the Higher Education Act of 1965 (20 U.S.C. 1088)).

39 I.R.C. §529(e)(5)(B); Feigenbaum & Morton, *supra* note 10, at 34. Feigenbaum and Morton go on to say that "[g]enerally speaking, these are accredited schools offering credits towards a bachelor's degree, an associates degree, professional, vocational or other postsecondary education." Feigenbaum & Morton, *supra* note 10, at 34.

40 I.R.C. §529(c)(3)(A)

41 I.R.C. §529(c)(6) (imposing the ten percent penalty tax created under IRC§530(d)); Feigenbaum & Morton, *supra* note 10, at 35. State plan documents may also impose penalties. *See, e.g.,* Rolf Auster, *Qualified Tuition Programs: The Often-Overloaded Downside,* PRAC. TAX STRATEGIES, June 2003, at 336, 337.

42 Feigenbaum & Morton, *supra* note 10, at 35.

43 Feigenbaum & Morton, *supra* note 10, at 36. Feigenbaum and Morton provide a state-by-state summary of tax deductibility for contributions to a College Savings Plan as of the date of their publication. Feigenbaum & Morton, *supra* note 10, at 36-37; Olivas, *supra* note 18 at 493.

44 Zelinsky, *supra* note 12, at 495.

45 Olivas, *supra* note 18, at 486-490.

46 *Id.*

47 Olivas, *supra note* 18, at 486.

48 *Id.*, at 488–490. Comparison is necessary because the plans of some states are open to residents of other states and the variety of features can have significant impact on the rate of return and risk vis-a-vis the number of years the funds will remain in the plan until the beneficiary attends college. Alexander and Luna have noted that, "The plan complexities coupled with lack of information, makes investment decisions quite difficult for even the most sophisticated financial consumer." *See* Raquel M. Alexander & LeAnn Luna, *Follow the Money: Factors Influencing Investors' Choice of State-Sponsored §529 College Savings Plans,* NAT'L TAX ASS'N – TAX INST. AM.. PROC. ANN. CONF. TAX'N. 434 (2004).

49 "A system can have too many choices, and can intimidate or paralyze unsophisticated buyers. . . This system complexity can become a barrier to market entry for some." Olivas, *supra* note 18, at 488. It can result in poor investment diversification for others. *Id.* at 489.

The earliest Section 529 Plans[50] tended to be Prepaid Tuition Plans.[51] Today states and the large investment firms that manage the plans for the states tend to promote College Savings Plans.[52] There are several possible reasons for the shift. The most obvious is states' aversion to the potential liability that exists under Prepaid Tuition Plans if the state extends either its full faith and credit or a moral obligation to guarantee the plans if either the actuarial assumptions on which the plans are based were not well-founded or tuition prices rise greatly in excess of actuarial assumptions that were well-founded when made.[53] Another explanation is "that state officials regard [C]ollege [S]avings [P]lans as a way to offer people a benefit with little or no cost to the state."[54] Another key reason, in my opinion, is the greater potential profit to investment houses that is possible under the College Savings Plan variety of Section 529 Plan.[55]

B. The Rationale for 529 Plans: The Need for Higher Education and Escalating Prices.

The rationale for adoption and continuation of Section 529 Plans was, and is, the importance of higher education to the nation and to the individual, and the skyrocketing price of obtaining higher education.[56]

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50 Michigan's MET predated the addition of Section 529 to the Internal Revenue Code.

51 Barbara M. Jennings & Michael A. Olivas, *Prepaying and Saving for College: Opportunities and Issues*, THE COLLEGE BOARD (College Board Publications, New York, N.Y.), March 2000, at 5-6.

52 *Id.*, at 6 (describing that states and finance magazines promote College Savings Plans over Prepaid Tuition Plans); *See* Olivas, *supra* note 18 (describing and including the advertisement of a College Savings Plan).

53 LINDA LEVINE, SAVING FOR COLLEGE THROUGH QUALIFIED TUITION (SECTION 529) PLANS, CONG. RESEARCH SERVICE REPORT, at 4 (Dec. 2003). Linda Levine also notes, "Due to the impact of the 2001 recession on state government support for higher education and the [then] stock market downturn on plan performance, some state-sponsored prepaid plans have been modified or closed.") Some states have terminated (Colorado) or stopped selling Prepaid Tuition Plans. *Id.*. at Summary. Wyoming's plan was closed due to concerns that the plan might become bankrupt with the possible need for a state bailout or huge outcry from plan purchasers given the states' original involvement in endorsing the plans. Of course, if the state must undertake a bailout there will also be concomitant outcry from taxpayers who are not purchasers.

54 *Id*. at 4. In my view, the prime element of "little or no cost" means the reallocation of risk of tuition inflation from the state to the family.

55 *See Id.*, at 5–8; LINDA LEVINE, SAVING FOR COLLEGE THROUGH QUALIFIED TUITION (SECTION 529) PLANS, CONG. RESEARCH SERVICE REPORT, at 5-8 (Updated, Oct. 2004). Professor Dynarski noted that there are large fee differentials among College Savings Plans and that "529s sold through financial advisors generally charge loads, which could easily produce asset losses [that would make the plans economically less beneficial than a taxable, non-529 investment]." Susan Dynarski, *Who Benefits from the Education Saving Incentives? Income, Educational Expectations and the Value of the 529 and Coverdell*, 57 NAT'L TAX J., 359, 362-63 (June 2004); Alexander and Luna, *supra* note 48, at 436 (citing Anne Turgesen, *The 529 Ate My Tax Break,* BUS. WK., Aug. 16, 2004); Austan Goolsbee, *The '529' Ripoff*, SLATE, Aug. 23, 2002, http://www.slate.com/?id=2070062. Professor Bullard argues that the states' monopoly in offering 529 plans (his discussion focuses on the College Savings Account variety) allows rent-seeking behavior by the states that "increase the likelihood that 529 plan participants will pay higher fees or receive inferior services," Mercer E. Bullard, *The Invisible Hand in Government-Sponsored Financial Services: Why States Should Not be Allowed to Offer 529 Plans,* 74 U. CIN. L. REV. 1265, 1288 (2006) and that the insufficient disclosure of 529 plan fees provides the best illustration of the inadequacy of 529 plan disclosure. "The complexity [multiplicity] and non-standardized nature of 529 plan fees make it unlikely that an investor who is not already financially sophisticated about fees will be able to make an informed investment decision regarding 529 plans." *Id*. at 1290-91.

56 Not all commentators would agree. Professor Baird argues that the existence of Section 529 Plans might actually contribute to the increase in tuition prices. Baird, *supra* note 17, at 142, 145-46, 152-56. Professor Bullard asserts that states should not be allowed to issue Section 529 Plans, or at a minimum, private investment firms should be allowed to offer them to the public as well. Bullard, *supra* note 55.

Both the political and the scholarly literature are full of statements that the need for postsecondary education has never been greater. "Education remains the key to our nation's future economic prosperity. The educational opportunities available to future generations are going to determine the strength of our economy and ultimately whether our nation's standard of living will rise or fall. Education has always been a top priority for our country; but now it truly must be a top priority."[57] The Joint Centers Report[58] states, "Economic competitiveness and individual opportunity increasingly require a college-educated and trained workforce."[59] Yet, "the United States now ranks tenth in the share of its 25- to 34-year old population that has completed high school and tenth in the share holding a college degree,"[60] whereas the United States was first in the world on both measures as recently as 20 years ago.[61] This does not bode well for the United States' position in a competitive world economy.

Other writers have emphasized the perspective of the individual. "No longer a point of elite social and economic distinction, a college degree is now a staple to success in the middle-class job market, even for many entry level jobs. If today's college degree is equivalent to a high school diploma of 40 years ago, it is remarkable that it has become so much less affordable."[62] And, "[t]he bachelor's degree has effectively replaced the high school diploma as a requisite to successfully enter the job market."[63]

The statistics support the statements. "In 1993, the mean monthly income for all workers with a bachelor's degree was on average 90 percent greater than that of comparable workers with only a high school degree."[64] The United States Department of Labor reported that on average, a college graduate will earn $1 million more in his or her lifetime than someone who does not go to college.[65] "Higher levels of education 'increase[ ] labor force participation, decrease[ ] the probability of unemployment, and decrease job turnover."[66] "Additionally, because educated workers are less likely to suffer unemployment, they are also less likely to depend on welfare or other public

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[57] *Tax Incentives for Education: Hearings before the Senate Comm. on Finance,* 100th Cong. 1 (1988) (statement of Committee Chair Lloyd Bentsen), *quoted in* Eric A Lustig, *Taxation of Prepaid Tuition Plans and the 1997 Tax Provisions – Middle Class Panacea or Placebo? Continuing Problems and Variations on a Theme,* 31 AKRON L. REV. 229, 229 (1997). Professor Lustig noted the continuing applicability of those statements as of 1997. They remain apt today.
[58] Callahan et al, *supra* note 1.
[59] Callahan et al, *supra* note 1, at iv.
[60] *Id.*.
[61] Callahan et al, *supra* note 1, at 2.
[62] Karen M. Stockmal, *Two New Changes in the Law Make Section 529 Plans Even More Attractive,* J. TAX'N, Sept. 2006, at 158.
[63] Amy J. Oliver, *Improving the Tax Code to Provide Meaningful and Effective Tax Incentives for Higher Education*, 12 U. FL J. LAW & PUB. POL'Y 91, 93 (2000).
[64] Natasha Mulleneaux, *The Failure to Provide Adequate Higher Education Tax Incentives for Lower-Income Individuals,* 14 AKRON TAX J. 27, 30 (1999) (citing U. S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S., 116th ed., tbl. 244 (1996)). Another author writing in 2000 indicated that college graduates earn twice as much or more than high school graduates. Gregory D. Herbert, State Sponsored Prepaid College Tuition Programs: A Social Engineering Perspective 20 (May 2000) (unpublished Ed.D dissertation, The George Washington University) (on file with ProQuest, Pub. No. AAT 9973081).
[65] Bureau of Labor Statistics, http://www.bls.gov/spotlight/2007/back_to_school/ (last visited Sept 10, 2008).
[66] Oliver, *supra* note 63 at 98 (citing JOINT ECONOMIC COMMITTEE, 106TH Cong., INVESTMENT IN EDUCATION: PRIVATE AND PUBLIC RETURNS, 5 (Joint Comm. Print 2000).

assistance programs."[67] The benefits to society do not stop with the national economy and competitiveness in a global economy. "Those with some college education are more likely to vote and to engage in volunteer activities than those with only a high school diploma or less."[68] "A higher level of education in a particular community positively effects crime reduction."[69]

The individual obtains benefits from higher education that go beyond the obvious benefit of greater financial success and spending power. "[T]hese non-monetary benefits include greater fringe benefits and superior working conditions, a better ability to select appropriate savings instruments, better health and longer life, lower unemployment and lower disability rates, fewer unwanted children, and better health for offspring."[70] "Educated individuals make better 'mothers, fathers, children, voters and citizens.'"[71] A college education "broadens one's understanding and increases his appreciation of his social and cultural environment

Unfortunately, despite the ever-increasing importance of higher education to national economic competitiveness, the social fabric and individual well-being, the cost of higher education to the student and his or her family has escalated far faster than both individual income and inflation.[72] Some staggering statistics have been gathered.[73] The

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[67] *Id,* at 98] (citing NATIONAL CENTER FOR EDUCATION STATISTICS, THE CONDITION OF EDUCATION 1998, ECONOMIC AND OTHER OUTCOMES OF EDUCATION 98).

[68] Mulleneaux, *supra* note 64, at 29-30 (citing *Education and Training Tax Provisions of the Administration's Fiscal Year 1998 Budget Proposal: Hearings Before the House Comm. on Ways and Means,* 105th Cong. (1997) (statement of James B. Appleberry, President of the American Association of State Colleges and Universities)).

[69] Oliver, *supra* note 63 at 98 (citing JOINT ECONOMIC COMMITTEE, 106th Cong., INVESTMENT IN EDUCATION: PRIVATE AND PUBLIC RETURNS 1-3 (Joint Comm. Print 2000)).

[70] Herbert, *supra* note 64, at 21 (citing LARRY L. LESLIE & PAUL T. BRINKMAN, THE ECONOMIC VALUE OF HIGHER EDUCATION (Oryx Press) (1993)).

[71] Oliver, *supra* note 63, at 98, (citing, JOINT ECONOMIC COMMITTEE, 106th Cong., INVESTMENT IN EDUCATION: PRIVATE AND PUBLIC RETURNS 5 (Joint Comm. Print 2000)).

[72] Baird, *supra* note 17, at 141.

[73] Figures gathered by Andrew Roth showed that between 1980 and 1998 in then current (1998) dollars tuition and fees increased 301% at private four-year institutions, 303% at public four-year institutions and by 318% at two-year public institutions. Andrew Roth, State-Sponsored, Tax-Advantaged College Savings Plans: A Study of Their Impact on Contemporary Understanding of the Public-Versus-Private Responsibility to Pay for Higher Education Issue 15 – 16 (April, 1999) (unpublished Ph.D. dissertation, State University of New York) (on file with author). He went on to say that as inflammatory as those figures may appear "looking at the same phenomena expressed in constant dollars revealed the same pattern. Between 1980 and 1998, four-year private institutions's [sic] tuition and fees increased by 113%, or at a rate of 2.13, or for every 1998 dollar in 1980 it cost $2.13 in 1998—which is to say the price doubled! . . . Four-year public institutions' tuition and fees increased 114%, or at a rate of 2.14, or for every 1998 dollar in 1980 it cost $2.14 in 1998! Again, however, the rate of increase was greater at two-year public institutions, which increased their tuition and fees 121.6% between 1998, or for every 1998 dollar in 1980 it cost $2.22 in 1998." *Id.* at 17-18.

A report prepared for the Board of Governors for Florida's higher education system provides a more recent snapshot. The national average for one year increases in tuition and fees between 2005-06 and 2006-07 academic years was 6% at public 2-year institutions, 4% at public 4-year institutions and 6% at private 4-year institutions. PAPPAS CONSULTING GROUP, INC., PROPOSING A BLUEPRINT FOR HIGHER EDUCATION IN FLORIDA: OUTLINING THE WAY TO A LONG-TERM MASTER PLAN FOR HIGHER EDUCATION IN FLORIDA 45 app. (2007) (citing College Board's *Trends in College Pricing 2006* (2006)), *available at* http://www.senate.ufl.edu/archives/Homepage/FBOG%20REPORT.PDF. (Hereinafter the "Florida Pappas Report.")

The figures based on constant dollars provided by Roth show that the rate of increase in tuition and fees exceeded inflation. He went on to show that the increases exceeded the growth in household income and that there was a growing divide between the most and least affluent Americans. Roth, *supra* amount of student debt has become a major problem.[74] The trend of tuition increases has continued in the early years of the 21st century,[75] and justified the concern among parents, students and others that college could become unaffordable for many.[76]

Section 529 Plans were born in response to this concern. While Congress enunciated the purpose of 529 Plans, to "encourage persons to save to meet post-secondary educational expenses,"[77]many commentators explained that "much of the public policy rationale for state-sponsored, tax-advantaged college savings plans was

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note 73 at 18-19. "In constant dollars, from 1980 to 1998, the lowest quintile of American households experienced a 3.5% increase in their income [17% increase in household income for middle income households], whereas the highest quintile increased 47.1%." *Id*. and Table III at 20.

Roth goes on to point out that "for all income categories, at both public and private institutions, tuition and fees consumed a greater proportion of household income. In 1980 . . . a year at a four-year public institution consumed 12.5% of a low income household's income, [3.8% for a middle income household] and only 1.6% of a high income household's income." *Id.* at 18-19, 21 and Table III at 20. By 1998, those proportions had increased to 25.9% for a low income household, (a 106.8% increase using constant dollars), 7% for a middle income household (a 82.9% increase using constant dollars) and to only 2.4% (a 45.5% increase using constant dollars) for a high income household. *Id.* 19, 21 and Table III at 20. The increases were similar, but slightly lower for private four-year institutions. In 1980 private tuition and fees consumed 56.4% of a low income household's income, 17.2% of a middle income household's income and 7.3% of a high income household's income. *Id.* and Table III at 20. By 1998, those proportions had increased to 116% for a low income household, (a 105.78% increase using constant dollars), 31.2% for a middle income household (a 81.9% increase using constant dollars) and to 10.6% (a 44.8% increase using constant dollars) for a high income household. *Id.* and Table III at 20. These figures justify the concern among parents and others that college could become unaffordable for many.

Roth states that "[t]hese numbers alone explain two trends in student enrollment circa 1998 – the movement of high income students from private to public institutions and low income students from four-year to two year colleges." *Id*. at 19, (citing MICHAEL S. MCPHERSON & MORTON OWEN SCHAPIRO, THE STUDENT AID GAME: MEETING NEED AND REWARDING TALENT IN AMERICAN HIGHER EDUCATION (Princeton University Press 1998); THE COLLEGE BOARD COLLOQUIUM ON COLLEGE AFFORDABILITY AND ENROLLMENT CHALLENGES STAFF, COLLEGE AFFORDABILITY AND ENROLLMENT CHALLENGES (1998)). *See generally* Jamal Watson, *TIAA-CREF Conference Examines Higher Ed Access*, DIVERSE ISSUES HIGHER EDUC., Nov. 30, 2006, at 23.

[74] In 1991, it was noted, "The untoward consequences of [tuition increases, inflation and a financial aid policy of favoring loans over grants] have already appeared: Some students entirely forego college, and those who do attend graduate with debt levels that dictate their career choices. R. Paul Guerre, *Financial Aid in Higher Education: What's Wrong, Who's Being Hurt, What's Being Done?* 17 J.C. & U.L. 483, 485 (1991). More recent observations are in accord. Watson, *supra* note 73; *Students Denied Access to Higher Education*, ACADEME, Mar.–Apr. 2004, at 7.

[75] Libby Sander, *Student Aid is Up, but College Costs Have Risen Faster, Surveys Find*, CHRON. HIGHER EDUC., Nov. 2, 2007, at A26, *available at* http://proquest.umi.com/pqdweb?did=629611961&sid=1&Fmt=3&clientld=22311&RQT=309&VName=PQD.

[76] Watson, *supra* note 73, *[presently note 79 TIAA-CREF Conference Examines*] at 23; Students Denied Access to Higher Education, *supra* note (currently note 80); Michael Arnone, *Students Face Another Year of Big Tuition Increases in Many States,* 49 CHRON. HIGHER EDUC., Aug. 15, 2003, at A24, *available at* http://proquest.umi.com/pqdweb?did=405672351&sid=1&Fmt=3&clientId=22311&RQT=309&VName=PQD. For the twelve months ending March 2003, inflation was running at a low 3 percent; however, tuition costs rose 7.3 percent for the same period.; *See also* Kathleen Madigan, *It Sure Doesn't Feel Like Low Inflation,* BUS. WEEK, May 19, 2003 at 39 (double-digit percentage increases in tuition for the second straight year, by the largest margins ever at some institutions, were common across the country).

[77] Merrick, *supra* note 10, at 316 (citing Staff of Joint Committee, 104th Cong., General Explanation of Tax Legislation Enacted in the 104th Congress (Comm. Print 1996)), *available at* http://www.mobar.org/eflaa610-1e23-4f8d-9c32-c7e11ed6caa3.aspx.

centered on the need to meet the challenge of middle-class affordability . . . and the resultant increase in student indebtedness."[78]

Section 529 Plans, and Prepaid Tuition Plans in particular, generated debate as to who is actually benefited. Some, Professors Lehman and Olivas among them, argue that Prepaid Tuition Plans, and by extension College Savings Plans, primarily benefit the wealthy and the upper middle class generating equity concerns.[79] Others posit that although the plans can and are utilized by the wealthy because of their access to disposable funds that can be dedicated to savings, Prepaid Tuition Plans, and by extension College Savings Plans, provide an important means by which the middle class can ensure continuing access[80] to higher education for their children.[81] A number of commentators caution that if a state substitutes Section 529 Plans for other forms of aid,

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[78] Jennings & Olivas, *supra* note 51, at 5, 10. *See also* J. Timothy Phillips & Ed. R. Haden, *It's Not Love, But It's Not Bad: A Response to Critics of Prepaid College Tuition Plans*, 26 U. RICH. L. REV 281, 282 (1992), Karin Fischer, *States Rethink Popular Aid Plans,* THE CHRON. HIGHER EDUC., Sept. 9, 2005, at A.21. Others say that the plans were intended to encourage investment by lower-income families. Hamilton, *supra*, note 12. In the latter instance I ask, "Lower than what?" Some commentators assert that the true beneficiaries are the well-to-do. (E.g., Jeffrey S. Lehman, *Social Irresponsibility, Actuarial Assumptions, and Wealth Redistribution: Lessons about Public Policy from a Prepaid Tuition Plan*, 88 MICH. L. REV. 1035 (1990); Jeffrey S. Lehman, *The Distribution of Benefits from Prepaid Tuition Programs: New Empirical Evidence About the Effects of Program Design on Participant Demographics*, *in* PREPAID COLLEGE PLANS: PROMISE AND PROBLEMS (Michael A. Olivas ed., 1993)). Katherine Baird likewise notes that because of tax advantages for investments and stiff penalties on withdrawals for non-educational purposes Prepaid Tuition Plans and College Savings Plans are especially attractive to higher income households. Moreover, she posits that the existence of such plans might actually contribute to increases in the costs of tuition. Baird, *supra* note 17 at 145–46, 152–56. Jennings and Olivas, *supra* note 51, at 5, 10; Roth, *supra* note 73, at 19-21. Ruth Lynn Buchwalter reported that among the objectives of the Clinton Administration in proposing and supporting adoption of a number of tax-advantaged programs for higher education were to help middle-income families pay for college and to provide families an incentive to save for education. Ruth Lynn Buchwalter, *Should 1+1=2? Does the Structure of Federal Income Tax Expenditures for Higher Education Disadvantage Women and Low-income Individuals,* 22 WOMEN'S RTS. L. REP 77, 95-96 (2000); *See also,* Phillips & Haden, *supra* note 78, at 282 (stating "[T]he authors believe that the prepaid tuition concept meets a genuine need for a middle-class college savings vehicle.").

[79] Lehman, *supra* note 78 (1990); Lehman, *supra* note 78 (1993); Olivas *supra* note 18 at 490; *See* Baird, *supra* note 17. The issue is further discussed in Part II.A.2. below.

[80] Planners have examined the question of whether 529 plans are beneficial to families that can use them. Travagliato and Lippincott point out that tax rate, the turnover of investments in a taxable account (a non-529 account) and 529 plan fees all impact whether and the extent to which 529 plans are economically more beneficial than taxable accounts. They indicate that in most, but not all situations, 529 plans are more beneficial, but may not be so from an estate planning perspective. Vincent C. Travagliato & Michael T. Lippincott, *Use a 529 Plan?* 145 TR. & EST. 52 (2006). A number of commentators, Katherine Baird, Susan Dynarski and Linda Levine among them, noted that students with Section 529 Plans, especially Prepaid Tuition Plans, were penalized when seeking financial aid because of the way those assets were treated in the federal financial aid process. Dynarski, *supra* note 55 at 380; Levine, *supra* note 55 at 14-16; Baird, *supra* note 17, at 146. Revisions to the financial aid provision have improved the treatment of Section 529 Plans, particularly Prepaid Tuition Plans. Donald Jay Korn, *All Fired Up? Recent Legislation has been a Boon for 529 Savings Plans. Will More Financial Planners Find Them Worthwhile?*, FIN. PLAN.: N.Y., Dec. 1, 2006, at 1, *available at* http://proquest.umi.com/pqdweb?did=1172227761&sid=2&Fmt=3&clientId=22311&RQT=309&VName=PQD. However, a middle income family that suffers a reversal of fortune such as extended unemployment, very high medical bills or other unanticipated event is more likely than a wealthier family to need to withdraw a Section 529 assets Plan's to cover that emergency, subjecting the family to income tax and penalties. Levine, *supra* note 55, at 17; Baird, *supra* note 17 at 146-147 (citing to the earlier version of Levine, (*supra* note 53)).

[81] Jennings & Olivas, *supra* note 51, at 5, 10**;** Phillips & Haden, *supra* note 78, at 303-304.

it can put lower-income students and their families at a great disadvantage,[82] and I agree with them. The issue is discussed further in Part II.A.2. where I suggest that scholarships for economically disadvantaged students based on Prepaid Tuition Plans can help address the inequity and are an important addition to the financial aid landscape.

C. Scholarships Based on 529 Plans..

Conceptually, scholarships could be structured using either College Savings Plans or Prepaid Tuition Plans. Commentary on scholarships based on Section 529 Plans is limited. Feigenbaum and Morton suggest that College Savings Plans provide a new way for charities to fund education-related scholarships.[83] They envision the use of scholarships based on College Savings Plans for compensation planning by employers[84] that form a charitable foundation for providing educational benefits to employees and their children.[85] Based on its title, another article, *Creating College Scholarships with Qualified State Tuition Programs,* would appear to address the topic. However, the "scholarships" described there are merely those of the wealth transfer variety in which parents or grandparents lower their taxable estates through establishing College Savings Plans for members of their families.[86]

Professor Olivas suggests that state agencies can become "magnets for scholarship funds and charitable donations, and can distribute the funds to needy students." He advises that the plans could be structured to benefit such students at their state's public and private colleges.[87] Barbara M. Jennings suggests a national program of scholarships based on Prepaid Tuition Plans and points to the Florida's Project STARS scholarships as a possible model.[88] I believe that scholarship programs based on states' Prepaid Tuition Plans are a better choice.

Florida is the only state that has both passed enabling legislation and funded a program of scholarships based on its Prepaid Tuition Plan. Privately raised funds are matched dollar for dollar with public appropriations. It has enjoyed remarkable success. The Florida Prepaid Tuition Scholarship Program discussed and examined in detail at Part II serves as a model for programs to incentivize economically disadvantaged children to make the most of their educational opportunities and to provide them with access to higher education. It can also be adapted to assist children whose families' college savings have been lost in the present economic crisis.

II. THE RECOMMENDATIONS.

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[82] Andrew P. Roth, *Who Benefits from States' College-Savings Plans?* 47 CHRON. HIGHER EDUC., Jan. 19, 2001, at B13 ("if a state substitutes [529] plans for other forms of aid, it can put lower-income students and their families at a great disadvantage,"), *available at* http://proquest.umi.com/pqdweb?did=66861675&sid=3&Fmt=3&clientId=22311&RQT=309&VName=PQD; PREPAID COLLEGE PLANS: PROMISE AND PROBLEMS 4 (Michael A. Olivas ed., 1993); Baird, *supra* note 17.

[83] Feigenbaum & Morton, *supra* note 10, at 82.

[84] Especially colleges and universities.

[85] Feigenbaum & Morton, *supra* note 10, at 85–90.

[86] Rodney C. Koenig, *Creating College Scholarships with Qualified State Tuition Programs,* 14 PROB. & PROP. 46, May/June 2000.

[87] Jennings & Olivas, *supra* note 51, at 33.

[88] *Id.* at 39.

This article makes two recommendations. First, more states, particularly those that have Prepaid Tuition Plans, should adopt and fund a long-term program of Prepaid Tuition Scholarships for economically disadvantaged children. That program should be funded by a combination of public and private dollars. Florida's program serves as an exemplary model. Second, states that create Prepaid Tuition Scholarships should also adapt that model to create a second program of Prepaid Tuition Scholarships, funded totally with private donations, to provide short term relief to families whose children would be about to enter higher education, but for the fact that the family's college savings have been decimated in the recent economic downturn.

A. Recommendation 1: Prepaid Tuition Scholarship Program for Economically Disadvantaged Children Utilizing Florida's Successful, Cost-Efficient Model

The states, particularly those that have Prepaid Tuition Plans, should adopt and fund a long-term program of Prepaid Tuition Scholarships for economically disadvantaged children. That program should be funded by a combination of public and private dollars, preferably a 50/50 match, and the availability of such scholarships should be widely advertised among those who work with these children. Florida's highly successful, cost-efficient program serves as the model.

Florida began selling Prepaid Tuition Plan contracts in 1987. Although Florida's was not the nation's first Prepaid Tuition Plan, it has been described as the "Cadillac" of such plans.[89]

The scholarship program was begun in 1990 and as of July 2007 [any figures for July 2008?], had awarded more than 25,000 scholarships.[90]

The scholarship program, created and structured by Stanley G. Tate, is brilliant for its simplicity, low-operating costs, effectiveness and success.[91] Its establishment was a bipartisan effort.[92] The statute creating the Florida Prepaid Tuition Scholarship

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[89] Olivas, *supra* note 18, at 482. Stanley G. Tate, a Miami entrepreneur, former Chairman of the federal Resolution Trust Corporation (that took over and liquidated the assets of failed savings and loan association and played a major role in resolving the mid-1980s savings and loan/banking crisis), and financial advisor to Presidents, was highly influential in creation of the Florida Prepaid Tuition Program. In 2006, by Act of the Florida Legislature, Florida's program was renamed the Stanley G. Tate Florida Prepaid College Program. Laws of Florida, §3, ch. 2006-303.

[90] Florida Prepaid College Foundation 2006/2007 Annual Report at 1 (hereinafter "Foundation 2006/2007 Annual Report).

[91] Mr. Tate developed the plan and its standards, worked on the draft legislation and lobbied for its adoption. Once the legislation was adopted, Mr. Tate "put his money where his mouth is" and created the Project STARS Scholarship. He contributed money to the Project then set about raising funds from others for Project STARS and other scholarships created by the donors based on the prepaid tuition scholarship design. Mr. Tate says that his intentions in creating prepaid tuition scholarships were simple; the program is based on the old adage that "you can feed a person for today by giving him a fish, but you can feed person for a lifetime by teaching him to fish" (also referred to by Koenig, *supra* note 86, at 46). Mr. Tate explained that he wished to utilize higher education as a means to lift people out of the cycle of poverty, crime, dependency and lack of personal achievement one child (and his or her family) at a time and believes in the value of educational success, particularly access to higher education, as a means to achieve self-sufficiency and self-fulfillment. Conversation between author and Stanley G. Tate**,** February 4, 2006, followed by Interview with Stanley G. Tate, Chairman, Florida Prepaid College Board, in Miami, FL (July 7, 2006). Notes on file with author.

[92] A strong Democratic governor**,** encouraged nationally prominent Republican Stanley Tate to implement the idea. The Governor used his significant political influence to lobby for its passage. It's passage and

Program states that the program is to "[p]rovide an incentive for economically disadvantaged youth to improve school attendance and academic performance in order to graduate and pursue a postsecondary education."[93] Under Florida's program the legislature annually decides whether and the extent to which public funds are appropriated. The appropriated funds are matched dollar for dollar with privately raised funds.[94] Scholarships, consisting of Florida Prepaid College Plans paid in full, are awarded to economically disadvantaged children selected to receive the scholarships. In order to continue to be eligible to receive his or her scholarship, the beneficiary must continue to meet scholastic requirements, which include both good attendance and academic achievement, and remain "drug free" and "crime free."[95] Upon graduation from high school in continuing compliance with program standards, the recipient has awaiting him or her, the prepaid tuition scholarship selected by the donor. At the time of contribution the private donor selects and funds (in accordance with the 50/50 ratio) the type of scholarship the donor wishes to provide -- a two-year community college prepaid tuition scholarship, a four-year public university prepaid tuition scholarship, or a two-plus-two[96] prepaid tuition scholarship. In addition to the tuition scholarship, the donor can elect to purchase plan supplements that guarantee full payment of certain college fees, and room and board.

The primary vehicle through which Florida's prepaid scholarship program is operated is the Stanley Tate Project STARS Scholarship Program. Project STARS is carried out in conjunction with local community educational organizations throughout the state.[97] These organizations "work cooperatively with their local school districts in the identification and selection"[98] of the recipients. As part of the selection process, recipients must agree to the statutory standards described above and agree to work with a mentor. The community partners provide a variety of support services, including the mentoring of each recipient.[99]

When Project STARS was initiated, recipients tended to be in junior high through the 10th grade.[100] Currently, awards are made as early as the fourth grade.[101] The logic for awarding the scholarship earlier is to incentivize the student and his or her family as early as is reasonable in the student's academic career so that the student is motivated to make the most of his or her preparatory education.[102]

In addition to Project STARS, "[t]he Florida Prepaid College Foundation provides a tax-deductible opportunity for businesses, community groups and

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continuing legislative support is a bipartisan success story.

[93] FLA. STAT. § 1009.984(1) (2007).

[94] FLA. STAT. § 1009.984(2) (2007).

[95] FLA. STAT. § 1009.984(3) (2007). "'Drug free' means not been convicted of, or adjudicated delinquent for, any violation of chapter 983 after being designated a recipient of a Florida prepaid tuition scholarship." FLA. STAT. § 1009.984(3)(a) (2007). "'Crime free' means not being convicted of, or adjudicated delinquent for, any felony or first-degree misdemeanor as defined in sections 775.08 and 775.081 after being designated a recipient of a Florida prepaid tuition scholarship." FLA. STAT. § 1009.984(3)(b) (2007).

[96] Two years at a community college followed by two years at a state university.

[97] Foundation 2006/2007 Annual Report at 1.

[98] *Id.*

[99] *Id.*

[100] Conversation between author and Stanley G. Tate, February 4,, 2006**,** followed by Interview with Stanley G. Tate, Chairman, Florida Prepaid College Board (July 7, 2006). Notes on file with author.

[101] *Id*,.

[102] *Id.*

individuals to purchase prepaid college scholarships for Florida children [through the Florida Prepaid Tuition Plan][103] These organizations may establish the criteria for how they award these scholarships to children in their communities"[104] and select the recipients.

Florida's scholarship program is administered by a statutorily created direct-support organization,[105] the Florida Prepaid College Foundation, in cooperation with the Florida Department of Education.[106] The direct support organization has no staff. The funds are invested like any other Florida Prepaid Tuition Plan funds and the staff of the Prepaid Tuition Plan provides the few staff duties that are required. The directors of the direct support organization receive no pay for their services. Thus, the operating costs of the prepaid tuition scholarship program are minimal.

Since its inception, the Florida Prepaid College Foundation has awarded 19,060 Project STARS Prepaid Tuition Scholarships and another 6,104 Prepaid Tuition Scholarships provided by community organizations.[107] Statistics have been kept for the STARS program as to how many children adhere to the program standards and thus remain eligible for their scholarships throughout their primary and secondary education. The rate of retention is consistently in the 80+ per cent range and has been as high as 89 percent.[108] This is a remarkable record of success, especially in a student population that has exceedingly high dropout rates. The success and effectiveness of this program, together with its low cost of operation, commends it as a model to be replicated in other states.

1. The Rationale for Recommendation 1

Prepaid Tuition Scholarships should not replace need based financial aid. Traditional need based financial aid should be increased.[109] However, Prepaid Tuition Scholarships have certain advantages over need based financial aid that recommend a system that includes both Prepaid Tuition Scholarships and need based financial aid to enhance access to higher education for economically disadvantaged children.

The message inherent in traditional need-based financial aid is generalized, "Do well in school and if we deem your need to be great enough, your qualifications to be good enough, and sufficient funds are available when you need them, you will get a college scholarship." This vague and conditional message is not a particularly

[103] Foundation 2006/2007 Annual Report at 2.
[104] Foundation 2006/2007 Annual Report at 1.
[105] Created under FLA. STAT. § 1009.983 (2007). A direct support organization ("DSO") is much like a foundation created for the support of a public college or university, In fact the statute creating DSO for the prepaid tuition scholarship program reads much like the statutes that create direct support organizations for state universities (FLA. STAT. § 1004.28 (2007)) and community colleges (FLA. STAT § 1004.70 (2007)) in Florida. The chair and executive director of the Florida Prepaid College Board (created pursuant to FLA. STAT. § 1009.971 (2007) to administer Florida's Prepaid Tuition Plan and College Savings Plan) are directors of the DSO for the prepaid tuition scholarship program and jointly name at least three other individuals to serve as directors. FLA. STAT. § 1009.983(5) (2007). Thus, the DSO is monitored carefully by the Florida Prepaid College Board.
[106] FLA. STAT. § 1009.984 (2007).
[107] Foundation 2006/2007 Annual Report at 1
[108] Florida Prepaid College Foundation, 2004/2005 Annual Report, at 7, rate = 89%; Foundation 2006/2007 Annual Report, rate = 86%.
[109] *See* Florida Pappas Report, *supra* note 73 at 12.

motivating incentive in neighborhoods where disappointment, rather than hope, is the norm. Secondly, Professor Olivas has persuasively pointed out that the complexity of the financial aid system with its complicated forms and detailed informational requirements can act as a roadblock to disadvantaged children because their families and support systems lack the sophistication and access to information necessary to tackle successfully the financial aid process.[110] The limited assistance typically available from guidance counselors and admissions personnel is not sufficient to overcome the obstacle.[111] Moreover, Professor Olivas explains that the financial aid forms themselves, which require a prospective estimate of family income, are not designed for the family with sporadic employment or depending on day-labor as is often the case in economically disadvantaged households.[112]

In contrast, the promise of a Prepaid Tuition Scholarship is personal and direct to the prospective recipient. It has incredible motivational power as evidenced by the high retention rate in the Project STARS prepaid tuition scholarship program. It proves the old adage that children perform up to the expectations that are held for them. It is especially powerful for a disadvantaged child who might not believe in his own potential, to know that he, personally, has been "chosen." The child feels "special" in a very positive sense of the word because someone in a position of success, wealth and power believes in him. Even more importantly, the child develops expectations of himself, and achieves in accordance with those expectations. Mentoring reinforces the motivation; it assists with college readiness and helps students overcome the rough spots in secondary education that are faced by most adolescents. The conditions for continuation in the program and actual receipt of the scholarship benefits are clear and depend in great part on the development of individual responsibility by the recipient, a personality trait that is characteristic of successful adults.[113]

A program of Prepaid Tuition Scholarships based on the Florida model also matches very favorably with the best practices and policies identified in the Joint Centers Report.[114] That report offers strategies for cost-effective means of enhancing access and successful completion of higher education in order for the United States to regain first place in the proportion of its population having postsecondary education.[115] It identifies two educational pipelines,[116] one for students of traditional college age (ages

[110] Olivas, *supra* note note 88, at 4. Traditional need-based financial aid must be readily available for economically disadvantaged students who perform well during high school, but the system must be revised so that those students can actually obtain the aid. Although outside the scope of my article, this is an equally important topic for in-depth analysis.

[111] Olivas, *supra* note 88 at 4.

[112] Olivas, *supra* note 88 at 4.

[113] The Florida Pappas Report points out that traits associated with personal responsibility – workplace ethics (integrity, punctuality, work ethic), ability to see "the big picture, critical thinking and problem-solving skills—are among those considered important educational outcomes by employers. Florida Pappas Report, *supra* note 73, at 5.

[114] Callahan et al *supra* note 1.

[115] *Id*. at iv.

[116] Professor Olivas has suggested that the metaphor "river" would be more apt for the admissions process, particularly the quest for minority applicants because a pipeline is an artificial structure capable only of conveying that which is artificially drawn into it, as well as leaking, rusting, bursting or clogging, all with deleterious effects. By contrast, a river is of natural origin, can be fed from many sources, can create or absorb tributaries without losing direction or purpose, can adapt to new flows and can even be reversed or altered by engineering and hydraulic interventions. I personally prefer Professor Olivas' metaphor, but will

18 – 24), and one for reentry adults who are returning to postsecondary education or training.[117] The four key transition points marking students' progress in each of these pipelines are: "1. Preparation [for postsecondary education], typically via high school diploma or General Education Development (GED) Test; 2. Entry into higher education; 3. Persistence in higher education; and, 4. Completion of higher education in a timely manner."[118] Part I of the Joint Centers Report stresses that we must identify strategies for increasing educational attainment and implement their widespread use as strategies of change so that students can successfully move through that pipeline.[119] The Florida Prepaid Scholarship Program obviously helps in achieving all four points in the 18- to 24-year old pipeline for children in our society who are otherwise at high risk of failing to achieve the educational attainment needed in our society.[120] Not only does it encourage completion of high school and enable access to higher education, it also should be helpful in attaining points three and four, persistence and completion. The report notes that "[o]ne of the most important characteristics of effective first-year college programs is 'intensity.' Newly enrolled students have a much greater chance of completing a degree if they take a substantial number of academic credits early in their academic careers. . . following postsecondary entry."[121] It goes on to say that "[p]roviding generous financial aid packages and targeting financial aid to those with financial need can encourage students to take more courses and reduce time spent working outside the classroom."[122] The Florida Prepaid Scholarship Program clearly provides the means to meet these objectives. Depending on the type of scholarship awarded in this innovative public-private venture, the student will have his or her tuition paid and may also have room and board and certain fees paid in full.

Like all financial aid that provides access to those in groups that previously have been excluded from full participation in society, Prepaid Tuition Scholarships are congruent with the inclusive role of higher education. In his book, *The Idea of the University: A Re-Examination*,[123] Jaroslav Pelikan examines the various roles of the modern university in fulfilling its unique position in society.[124] Prepaid Tuition Scholarships reflect and support a number of these essential roles.

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use the more conventional phrase utilized in the Joint Centers Report. Michael A. Olivas, *Law School Admissions After Grutter: Student Bodies, Pipeline Theory, and the River,* 50 J. LEGAL EDUC. 16 (2005).

Although Professor Olivas' article deals with the law school admission process for admission of minorities, he notes in passing some of the societal issues that I attempt to address in this article: "[l]ower Latino and African-American high school completion rates and lower [standardized] test scores," *Id.* at 22. "As a general proposition, it is clear that the U.S. will not sustain its educational system or improve its condition if substantial numbers of its citizens are not properly educated and socialized into the full community." *Id.*

[117] Callahan et al, *supra* note 1 at 4.

[118] *Id*. at 4.

[119] *Id*. at 3.

[120] The Joint Centers Report states that it is not intended as a comprehensive compilation of all best practices that are exemplary means of meeting the four transition points in the educational pipeline. *Id*. at 36. Prepaid tuition scholarships such as the Florida program are another strategy that meets these important objectives.

[121] *Id*. at 10

[122] *Id*. at 10.

[123] *See* JAROSLAV PELIKAN, THE IDEA OF THE UNIVERSITY: A REEXAMINATION (1992).

[124] The book, published in 1992, is a reexamination of the thoughts and issues examined by John Newman in the seminal work, THE IDEA OF THE UNIVERSITY, published in 1859. Both texts examined the character, aims and role of the university at the time of its writing in the context of society and the world as they then existed. Chapter headings in Pelikan's book are informative; they include : Duties to Society, The Business

Among the facets of the university is its duty to society, "to be a path leading to upward social and economic mobility to previously disadvantaged segments of society"[125] without devaluing the educational currency by lowering standards.[126] Prepaid Tuition Scholarships are a perfect match for this characteristic. The students who are recipients of such scholarships under a program utilizing Florida's standards are among the economically disadvantaged who previously would have been excluded from higher education either because they did not have the finances or because they did not develop their academic potential. Yet the academic standards that are an integral part of the Florida program guarantee that the recipients meet the academic threshold and thus do not "devalue" the educational currency.[127]

Pelikan also examines the role of the university as a "Ground of Promise in the Future."[128] This role identifies the university as a key player in the effort to rid society of the vestiges of discrimination and to develop the power of the trained mind as both an intellectual and social force.[129] Without a doubt, a Prepaid Tuition Scholarship program like that adopted in Florida advances this objective of higher education.

Pelikan also identifies the university as a place in which revolutionary ideas and social change can be thoroughly evaluated through careful dialectic.[130] The examination cannot be thorough without voices from different backgrounds and experiences.[131] Prepaid Tuition Scholarships ensure that another voice, the voice of economically disadvantaged persons from at-risk backgrounds, can participate in that examination.

A strong program of Prepaid Tuition Scholarships based on a state's Prepaid Tuition Plan and utilizing a 50/50 match of privately raised funds and state appropriations also makes good financial sense. Aside from reducing the cost to the state, the 50/50 match encourages donations by private benefactors and makes fundraising comparatively easy.[132] The experience in Florida has been that in most years the private pledges to the program have exceeded public appropriations.[133] In addition, the 50/50 match requires that the state legislature annually reaffirm its commitment to providing higher education to economically disadvantaged children who meet the academic standards needed for success in higher education.[134] A well designed and funded Prepaid Scholarship Program increases the proportion of a state's citizens having postsecondary education, and enhances the nation's competitiveness in the global knowledge based economy,[135] while simultaneously reducing the need for social welfare. A well-educated workforce fuels the state's economy because more prosperous

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of the University, University as Ground of Promise in the Future, and the University and the Spread of Revolutionary Ideas.

125 Pelikan, *supra* note 124, at 142.

126 *Id.*, at __.

127 *Id*.

128 *Id.*, at ch. 14.

129 *Id.*, at 153; *see also* Mulleneaux *supra* note 64, at 29.

130 Pelikan, *supra* note 124, at ch. 15.

131 Pelikan, *supra* note 124, at 141-42, 152.

132 Interview with Stanley Tate, July 7, 2006.

133 Response to Questionnaire sent to Florida Prepaid Foundtion. On file with author.

134 It also enables the program to meet the standard, applicable at lease in Florida, that one Legislature cannot bind future legislatures. Neu v. Miami Herald Publ' Co., 462 So.2d 821, 824 (Fla. 1985). In some years, due to budgetary concerns, Florida has not made an appropriation. Texas enacted a statutory framework much like Florida's to create Prepaid Tuition Scholarships, but has never funded it.

135 *See generally,* Callahan et al, *supra* note 1.

individuals tend to obtain more goods and services. The 50-50 balance between public and private funds reduces the cost to the state of providing full scholarships for higher education for these students. Moreover, as stated above, the state's participation in the investment vehicle further reduces the cost to the state by growing the college funds through investment rather than using current revenue to pay for the entire cost of the higher education. If the state were to provide full scholarships for economically disadvantaged at-risk students, it would be paying the full cost, thereby de facto pledging -- and utilizing -- the full faith and credit of the state to cover the entire cost. Thus, in states that commit full faith and credit to private funds that are invested in Prepaid Tuition Plans, the further risk to augment prepaid plans for the poor is almost a de minimis risk. The use of the investment vehicle with the states merely augmenting if necessary makes good economic sense. Moreover, because, as mentioned above, Prepaid Tuition Scholarship plans operated by the Prepaid Tuition Plan of the particular state enjoy negligible operating expenses, virtually all of the state's appropriation goes to fund the scholarships, rather than administrative overhead.

One of the most laudable features of Prepaid Tuition Scholarships is that they generate private commitment, both in terms of financial support and psychological commitment to the worthwhile social goal of helping at-risk, economically disadvantaged students achieve their educational potential. In the course of raising much needed funds, awareness is developed, personal commitment of the donors is generated and an on-going spirit of involvement in the goal is kindled. Mentoring provides valuable guidance to the students and generates continuing connection and commitment by the donor organization. Mentoring helps prepare the student for the transition to college life; this advice is likely not available from the recipient's family because the recipient probably is the first in his or her family to complete secondary school and go to college. In turn, the mentoring may contribute to higher college retention and graduation rates[136] by the students who participate in the program. It likely reduces some of the problems encountered by student life advisors on college campuses who address the needs of students from disadvantaged backgrounds.[137]

Finally, the *best* feature of Florida's model for Prepaid Tuition Scholarships is that they *work.* When low operating costs and community involvement are added, it is a win-win-win combination. What are we waiting for?

2. The Impact of Recommendation 1 on Objections to Prepaid Tuition Plans.

Section 529 Plans are not without their detractors. Objections have been raised as to Section 529 Plans in general and to Prepaid Tuition Plans in particular. Section 529 Plans appear to be a fixture of the higher education landscape for the foreseeable future. Therefore, each new adaptation of Section 529 Plans, in this case, scholarships based on Prepaid Tuition Plans, need to be examined carefully as to whether they exacerbate or ameliorate the valid concerns that have been raised. Scholarships for economically disadvantaged students based on Prepaid Tuition Scholarships help ameliorate many of

[136] An important factor stressed in the Joint Centers Report. *See supra,* notes 117-119 and accompanying text.

[137] It should be noted that Florida's Project STARS Prepaid Tuition Scholarships make participation in mentoring mandatory. If a donor is not in a position to provide mentoring, it can be arranged through a community based educational organization, such as Take Stock in Children.

these objections and thus are a step in the right direction.[138] However, one strong assertion underlies the entire discussion. Section 529 Plans, whether College Savings Plans, Prepaid Tuition Plans, or scholarships based on either variety of Section 529 Plan, *must not* supplant general state appropriations for postsecondary education. Nor should scholarships based on Section 529 Plans supplant traditional need based scholarship financial aid. Prepaid Tuition Scholarships for economically disadvantage students are intended to *augment* existing approaches.

The most scathing criticism of Section 529 plans, and Prepaid Tuition Plans in particular, was by Professor Jeffrey S. Lehman in his 1990 article, *Social Irresponsibility, Actuarial Assumptions, and Wealth Redistribution: Lessons about Public Policy from a Prepaid Tuition Plan*[139] aimed at an early version of Michigan's Prepaid Tuition Plan.[140] Professor Lehman accurately pointed out that the plan[141] benefited only those families who had the money to participate[142] and therefore disproportionately attracted, and benefited, the well-to-do,[143] possibly widening the gap between the affluent and the poor in American society. He contended that if the Michigan plan were unable to meet its obligations for any reason, for example because the product was priced too low to participants or the investment of plan funds did not perform well enough to meet the full cost of tuition, general revenue funds of the state likely would be used to make up the difference.[144] In such event, all taxpayers, even those too poor to participate in the plan, would be subsidizing the middle and upper class plan participants, an inequitable situation.[145]

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[138] Upon careful inspection, some of the objections are not as serious as one might initially fear; others are not well-placed provided that Section 529 Plans are not allowed to supplant either general appropriations for higher educations or need-based financial aid. A full discussion is beyond the scope of this article.

[139] *See generally* Jeffrey S. Lehman, *Social Irresponsibility, Actuarial Assumptions, and Wealth Redistribution: Lessons about Public Policy from a Prepaid Tuition Plan,* 88 MICH. L. REV. 1035 (1990).

[140] Michigan's Prepaid Tuition Plan, formally known as the Michigan Education Trust and sometimes referred to as "MET" in the literature, was the subject of important tax litigation with the IRS that likely paved the way for Congress' adoption of Section 529. *See* Jennings & Olivas, *supra* note 51, at 18.

[141] And by logical extension all other Prepaid Tuition Plans and College Savings Plans.

[142] Lehman, *supra* note 140, at 1051. The early Michigan plan examined by Professor Lehman required that the entire cost of the Prepaid Tuition Plan be paid in a lump sum in order to enroll. Subsequently the plan was revised to allow for purchase based on periodic installment payments. Professor Lehman examined the plan as modified and found that installment payments enabled families with more modest resources to participate, but he also concluded that the increase in participation was not sufficient to eliminate the distributional inequality because families in the lowest income levels were still unable to participate – in short, the modification helped, but in Professor Lehman's opinion, not much. Jeffrey S. Lehman, *The Distribution of Benefits from Prepaid Tuition Programs: New Empirical Evidence About the Effects of Program Design on Participant Demographics*, *in* PREPAID COLLEGE PLANS: PROMISE AND PROBLEMS (Michael A. Olivas ed., 1993).

[143] "The structure of [the early Michigan Prepaid Plan] would seem to favor those who have accumulated enough money to participate – the upper end of the income distribution." Lehman, *supra* note 140, at 1054-55.

[144] Michigan did not pledge the full faith and credit of the state in support of the plan. Nevertheless, participants were advised that the state recognized a moral obligation to fulfill the plan's obligations to participants.

[145] *See generally* Lehman, *supra* note 140. Economists have examined the distributional impacts of various types of subsidies of higher education. *See, e.g.* George M. Vredeveld, *Distributional Impacts of Alternative Methods of Financing Higher Education,* J. HIGHER ED., Jan./Feb. 1978, at 47. In this article, written in 1978, when enrollment in higher education was declining, Professor Vredeveld noted that "Economists recently have begun to analyze the effects of using public funds to subsidize higher education." *Id.,* at 47. In this very interesting work, Professor Vreeland analyzed, *inter alia,* four different types of public subsidies to higher education and their predicted economic impact on enrollment of students from different income

The writings of Professor Olivas express similar distributional concerns on grounds of equity.[146] Low and moderate income families need other types of aid, presumably need based aid, to gain access to higher education.[147] I agree and also express a strong concern that 529 Plans *supplement* state support, *not supplant* appropriations in support of higher education.[148]

Clearly, a strong, well-funded program of Prepaid Tuition Scholarships would assist in the amelioration of the distributional disparities inherent in Section 529 Plans. The larger the scholarship plan, the better the amelioration of disparity. Prepaid Tuition Scholarships would provide an excellent *addition* to a state's comprehensive efforts to enhance college attendance and comnpletion rates because they meet a number of the concerns discussed in the Joint Centers Report. They are particularly effective in incentivizing economically disadvantaged students to maintain the academic and conduct standards that lead to success in college. In short, they are effective for students and they are effective in reducing the disparate impact of Section 529 Plans, particularly Prepaid Tuition Plans. Since the impact of Section 529 Plans is going to be present for the foreseeable future, it is important that Prepaid Tuition Scholarships be instituted, particularly in states that have a Prepaid Tuition Plan.

Professor Olivas expresses concern that access to Section 529 funds under either a Prepaid Tuition Plan or a College Savings Plan could sway universities' admissions

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classes. Some of these alternatives have come into use in recent years. *See genrally Id.*

146 *See genrally* Olivas, *supra* notes**,** 18 and 88. Likewise, Ruth Lynn Buchwalter makes a similar complaint in analyzing several other types of federal education benefits. "Women, especially single mothers, have lower incomes and need higher education more to achieve income levels comparable to men's." Buchwalter, *supra* note 78, at 77. She points out, however, that these benefits do not work well for lower income earner's many of whom are single mothers and similarly do not work well for women who are the secondary wage-earner in two-income families. Her arguments, if extended to Section 529 Plans, would be applicable to these incentives as well, because single mothers typically do not have sufficient disposable income to devote to 529 plans for their children or for themselves.

147 Jennings and Olivas, *supra* note 51, at 1.

148 It is also possible to derive this opinion from Professor Olivas' writings as it is a logical conclusion from to be drawn from his chapter, (along with the propositions that the financial aid process is too complex for less informationally sophisticated lower income families, the information required for financial aid forms tends to have lower income families overestimate their income because it is earned intermittently and is thus hard to predict, and that the financial aid process offers too little assistance to unsophisticated lower income families so that their children have access to higher education) *See* PREPAID COLLEGE PLANS: PROMISE AND PROBLEMS 1–15 (Michael A. Olivas ed., 1993); Baird, *supra* note 17, at 165 (citing James Hines, *National Tax Association Proceedings: Ninety-Third Annual Conference 2000*, NAT'L TAX ASS'N, 2001). Andrew Roth makes a similar point. *See* Roth, *supra* note 82. *See generally* Jennings & Olivas, *supra* note 51. Professor Baird posits that the existence of Section 529 plans could actually result in the increase of tuition because voters who hold these plans (and presumably are more interested in higher education issues than low income voters) will not care if their elected officials allow tuition to be increased in the state's colleges and universities, and those officials will in most instances be more interested in the current year's budget than the long-term fiscal implication of current tuition increases. *See* Baird, *supra* note 17. These models assume that voters and government officials act only out of selfish, immediate self-interest with little regard for the future, their fellow citizens, or the good of the nation as a whole.

In another article, (it appears to present work done by Professor Baird prior to that cited at note 17) Professor Baird reported that larger Prepaid Tuition Plans with more enrollees in a state were still correlated with lower tuition rates but that Prepaid Tuition Plans that had been around longer or had higher account balances were correlated with higher tuition levels suggesting a possible transition in the impact of the plans. Katherine E. Baird, *Do Prepaid Tuition Plans Affect State Support for Higher Education?* J. EDUC. FIN., Winter 2006, at 255 (noting that a version of the article had been presented in July, 2004).

decisions in favor of applicants with such resources.[149] This is an appropriate source of concern given the scarcity of funds for financial aid at most institutions. However, it does not currently appear that this concern will result in elimination of Prepaid Tuition Plans. It certainly is not a reason to reject the idea of Prepaid Tuition Scholarships for economically disadvantaged students. In fact, the opposite is true. These scholarships would help level the playing field for their recipients.

While Professor Olivas' focus is on whether public universities will succumb to an urge to favor students with Section 529 Plans in the admissions process, he also notes that universities do not have the enrollment capacity to accommodate all the students who gain access by virtue of Section 529 Plans.[150] He illustrates his point by highlighting the problem of enrollment capacity in Texas.[151] The change in focus away from undergraduate degrees in Florida was part of a report highly critical of the status of higher education in Florida that was released in early 2007.[152] The Joint Centers Report concurs, indicating that this is a nationwide problem.[153]

If the economic and social needs of the nation require a workforce with more higher education,[154] then more people need to attend college. The states together with the private sector need to find ways to meet the demand for undergraduate education.[155] The problem is not Prepaid Tuition Plans or College Savings Plans.[156] Nor will it be Prepaid Tuition Scholarships if they become widely available. Section 529 Plans simply provide more concrete figures, based on the number of plans that have been purchased, that highlight the enrollment capacity problem.[157] It can no longer be ignored.

There is also an unspoken objection that is evident from the conduct of university administrators.[158] In 1980 Arthur Levine published the results of a study that depicted the characteristics of college students during the period of the late 1970s.[159] He was joined by Jeanette Cureton in conducting and publishing the results of a follow-up

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[149] Olivas, *supra* note 18, at 503-504.
[150] *Id.*, at 503-506.
[151] *Id.*, at 504-505.
[152] It recommended at a new tier of state institutions, state colleges, focusing on undergraduate degrees should be created with incentives for existing institutions to join that tier. Florida Pappas Report, *supra* note 73, at 5-8, 14. This report was also critical of the impact of Florida's Prepaid Tuition Plan on keeping tuition low. *Id.* at 8 -9.
[153] Callahan et al, *supra* note 1 The Florida Pappas Report indicates that various states have unique problems but many suffer from mission "creep" (a slowly growing emphasis on research and graduate rather than undergraduate degrees). Excessive proliferatrion of graduate programs, a rapidly increasing focus on reaseach amounting to mission "leap" (as distinguished from mission creep) and inadequate focus on undergraduate degrees are all critical problems in Florida. See Pappas Report *supra* note 73 (citing College Board's *Trends in College Pricing* 2006 (2006)),
available at http://www.senate.ufl.edu/archives/Homepage/FBOG%20REPORT.PDF.
[154] Callahan et al, *supra* note 1.
[155] The Florida Pappas Report establishes, inter alia, that Florida's state universities' focus on becoming research institutions to the detriment of undergraduate education is exacerbating, not helping the problem. The Florida Pappas Report, *supra* note 73. Moreover, the Florida Pappas Report points out that the number of low income persons is growing in Florida, up from 37% in 1990 to 50% in 2004. *Id*. at 4. This is exactly what can be expected from inadequate opportunities for postsecondary education.
[156] If, in fact, they are increasing college attendance then they may be part of the attendance solution, not part of the problem.
[157] *See* The Florida Pappas Report, *supra* note 73; Callahan et al, *supra* note 1 (noting that although both articles are outside the scope of this article, they discuss some possible solutions).
[158] Interview with Stanley Tate, July 7, 2006. Notes on file with author.
[159] ARTHUR LEVINE, WHEN DREAMS AND HEROES DIED: A PORTRAIT OF TODAY'S COLLEGE STUDENT (1980).

study describing undergraduate college students during the early to mid-1990s.[160] Among the findings was that students, particularly during the latter period, were coming to college with more problems – financial, family and psychological – as a result of troubled backgrounds than in prior decades.[161] They reported that this factor placed greatly increased burdens on student services personnel[162] at a time when university budgets were under pressure. There is no indication that the trend has been reversed;[163] stress on university budgets continues and is worsening in the current economic climate. Generally speaking, children in families that are economically disadvantaged tend to have more financial and family problems, untreated health problems, including psychological problems and have suffered the adverse effects of growing up in high-crime areas.[164] Many lower income persons are immigrants and members of minority groups and have endured the injustice and psychological harm of discrimination.[165] "Students from poorer economic backgrounds are generally less likely than their wealthier peers to complete college degrees."[166]

Stanley Tate states that virtually all higher education administrators claim to want to improve access for the economically disadvantaged;[167] that has been my experience as well. Yet the tuition increases,[168] special fees[169] and emphasis on graduate programs[170]

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160 ARTHUR LEVINE & JEANETTE S. CURETON, WHEN HOPE AND FEAR COLLIDE: A PORTRAIT OF TODAY'S COLLEGE STUDENT (1998).

161 *Id*. at 95 – 96.

162 Levine & Cureton, *supra* note 161; *See* ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? (1999).

163 Today's Student Affairs personnel also have to be more concerned about campus crises such as shootings.

164 *See* notes 66 and 70 and accompanying text.

165 *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1988-89).WILLIAM A.. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 509 (3d. ed. 1995); *See also* DANIEL A. FARBER, THE FIRST AMENDMENT 116, 119 (2d. ed. 2003).

166 Sarah Hebel, *Public Colleges that Serve Many Low-Income Students Can Achieve High Graduation Rates, Report Says* CHRON. HIGHER EDUC., Thursday, May 31, 2007, (citing PELL INST. FOR THE STUDY OF OPPORTUNITY IN HIGHER EDUC., DEMOGRAPHY IS NOT DESTINY: INCREASING GRADUATION RATES OF LOW-INCOME COLLEGE STUDENTS AT LARGE PUBLIC UNIVERSITIES (2005)). Scrutiny of completion rates is likely to increase. (See, e.g., Callahan et al, note 1 at iv stressing that the nation must increase the proportion of its population that completes degree and certificate programs.) According to the Pell Institute Study, Id., and Callahan et al, universities can improve retention and completion rates; however, it takes commitment, programs and effort, which usually translates into expenditures. Will institutions take the easy way out and try to limit the number of students in order to improve university performance outcomes and limit expenditures?

167 Interview with Stanley G. Tate, (July 7, 2006).

168 Among the recommendations of the Florida Pappas Report is that "Florida must resolve its resource (monetary) constraints." It goes on to suggest that Florida re-examine its tuition policy and allow individual institutions greater flexibility in setting tuition. The Florida Pappas Report, *supra* note 73, at 12. Since "Florida is a very low tuition state." *Id*. at 8, it is clear that these recommendations would facilitate large increases in tuition. This borne out by the new fee, that is merely tuition by another name, that was passed in the legislative session following the release of the Florida Pappas Report. *See infra* Part III . However, that report also recommends "major reinvestment in need-based aid." *Id.* at 12.

169 *See* Part III below.

170 Interview with Stanley G. Tate (July 7, 2006). Some college and university leaders prefer to strive for the prestige that comes with being recognized as an institution with strong graduate and research programs. This preference to increase research capacity and graduate programs at the expense of productivity and undergraduate growth, sometimes referred to as "mission creep." (Callahan et al, *supra* note 1, at iv) exists in many states and is a serious problem in meeting economic and societal needs for attainment of undergraduate degrees and postsecondary certificates. The January 2007 Florida Pappas Report asserts that

that many administrators endorse do not help the economically disadvantaged attain an undergraduate college education. It is Mr. Tate's belief that while almost all administrators say the right words, they may not actually want many economically disadvantaged students in *their* institution because they believe that students from economically disadvantaged backgrounds tend to come to college with more problems and tend to need more student affairs support in order to graduate than traditional college students.[171] Moreover, many of these students may not become significant donors to their alma maters because they are likely to need to devote a larger proportion of their incomes to assisting their extended families in overcoming poverty.[172] In view of the need for increased educational attainment among Americans[173] and the importance of higher education in breaking the cycle of problems that accompanies poverty,[174] it is important that these concerns and accompanying trends be reversed. Economically disadvantaged students, particularly minorities, need to be genuinely afforded increased access to higher education; this includes completion of high school[175] with appropriate academic preparation at the secondary school level,[176] and the support needed at the postsecondary level in order for them to persist and be successful at obtaining a degree.[177]

The encouragement, long-term motivation and dedication required of recipients of Florida's Prepaid Tuition Scholarships,[178] most notably its Project STARS program for economically disadvantaged children, together with its exemplary record of retention in the program,[179] shows that it can be a valuable part of the solution. Mentoring that is part of the Project STARS program can better equip economically disadvantaged children for college life. A strong program of Prepaid Tuition Scholarships with mandatory mentoring such as the Florida STARS model can help dispel this objection.

B. Recommendation 2: Privately Funded Prepaid Tuition Scholarships for Students Whose College Savings Have Been Decimated in the Current Economic Downturn.

Florida has undertaken "mission *leap*" as compared to other states and with the result that its increase in degree production has been higher at the graduate level than at the undergraduate level. The report noted that doctorates are expensive to produce and more emphasis should be placed on increasing bachelors degrees. The Florida Pappas Report, *supra* note 73.

[171] Interview with Stanley G. Tate (July 7, 2006).

[172] Interview with Stanley G. Tate (July 7, 2006).

[173] Callahan et al, *supra* note 1, at iv.

[174] *See supra* Part I.

[175] *See generally* Callahan et al, *supra* note 1. The problem is highlighted in the report of a study concerning the state of Florida. Depending on whose figures you use, between approximately 30 to 40 percent of Florida's ninth graders fail to graduate from high school. In urban areas, a study by Education Week puts the number of those who fail to graduate from high school at about 50%. Nirvi Shah, *EDUCATION: Study: Grad Rate is Lower,* The Miami Herald, June 13, 2007, at B1-2.

[176] *See* Callahan et al, *supra* note 1, at 6.

[177] *See Id.*, at 19.

[178] Mentoring that can be afforded to recipients by the donor group would seem to be especially beneficial.

[179] *See supra* note 109 and accompanying text.. These retention, and therefore graduation figures are nothing short of amazing when juxtaposed against the drop-out rates in Florida described *supra* at note 176.

I recommend that tracking of retention, progress and college completion for Prepaid Tuition Scholarship recipients be undertaken. See Part IV.

I recommend that states that already have Prepaid Tuition Plans adopt legislation that would allow Prepaid Tuition Scholarships, funded entirely with private donations, to be awarded to students whose families' college savings have been decimated by the curent economic downturn. Although I am unaware any such program, statutory mechanisms similar to those already in place for the Florida model of Prepaid Tuition Scholarships could be adapted to support this additional type of scholarship. These scholarships could take many forms. Creativity and further discussion of the best formulation(s) are encouraged. However, it is important to proceed without delay; every semester we are likely to fall farther behind in the attainment of higher education because many students will forego or delay higher education because their families have lost a significant portion of their college savings in the extant economic downturn.

The writings of Professors Lehman and Olivas, among others, have already warned of the inequitable distribution of public benefits that could arise if public funds are used to support, or bail-out, a Prepaid Tuition Plan. This is why I recommend that the Prepaid Tuition Scholarships for this second cohort of students be funded entirely by private donations. Moreover, in order to avoid a bail-out, it is important that states review their pricing and reserves in light of the current economic situation; this is necessary regardless of whether any of the scholarships recommended in this article are implemented. Once this is accomplished the following is recommended. Scholarships can be awarded, via privately donated funds, to make up the shortfall created by the economic downturn, in the level of a family's college savings and the cost of a Prepaid Tuition Plan for a specific student. For instance: 1) if a family's College Savings Plan has been reduced as a result of the economic downturn to $X, and the cost of a Prepaid Tuition Plan for that child would cost $X + $Y; and 2) the family is willing to spend the entire balance of the College Savings Plan toward a Prepaid Tuition Plan for that student; then 3) the student could apply for a Prepaid Tuition Scholarship of this type to make up the difference in the cost. The entire balance of the College Savings Account, plus the privately donated scholarship funds would be expended to purchase a Prepaid Tuition Plan for the scholarship recipient.

The involvement of the state should be minimal in order to keep costs down. Students desiring such a scholarship could submit a statement indicating this desire to the state's direct support organization.[180] The list of students could be categorized according to the area of the state in which the student resides. Organizations interested in awarding such a scholarship could obtain a list of students in their area from the direct support organization, or they could initiate an application process of their own. Once a scholarship is awarded, the donor organization would arrange the purchase of a Prepaid Tuition Plan through the state's direct support organization just as is currently done for Florida Prepaid Tuition Scholarships, but utilizing the family's funds and the scholarship funds, without any matching public funds. The involvement of the state would end here; thus the cost to the state would be negligible.

Organizations willing to grant such scholarships could set their own criteria. Do they want to include only those students with College Savings Plans rather than other types of investment vehicles due to the comparative ease of determining the losses and the amount of the shortfall? Do they want to limit their grants to students whose

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[180] *See, supra* note 106 and accompanying text.

College Savings Plan has suffered a loss of a certain percentage? Do they want only those students who are within three years of college matriculation to be eligible? The prospective donor organizations can and should make all of these decisions. Since the donor organization is the source of all funds, the state need not be involved.

The donor organization would set its own application requirements. In this regard there is an especially important concern. The application and any certification of need must be set up so that information that could lead to identity theft would not be provided or would be safeguarded properly. I suggest that the state not be the repository of this information so as to limit the overhead costs to the state and so that the state would not have responsibility for organizations' mishandling of information. In addition, if the state were to have the information it might be necessary to establish an exemption to the state's public records law in order to protect confidentiality.

This particular scholarship program ought to be of relatively short duration, based on public need. Hopefully the economic situation will improve so that losses to College Savings Plans and other college savings vehicles can be recovered and this form of assistance will no longer be needed. For this reason, it is likely that the program would be of interest only to those who will be entering college before there is time for the losses in savings to be recouped. In addition, it would apply only to undergraduate degrees. Moreover, as I envision it, the program would involve expenditure of the entire balance in the College Savings Plan toward the cost of the Prepaid Tuition Plan for that child. The scholarship would make up only the shortfall. However, this decision, as all others, would be up to the donor organization; I make this suggestion only so that donated funds can help a greater number of students and so that families will not be tempted to use the program as a substitute for savings or to try to obtain a windfall from the current economic situation. Thus, a family will have to weigh the costs and benefits carefully. If the College Savings Plan was for graduate school as well as undergraduate school, the family will have to start saving all over again for graduate school. Thus, this program likely would be of interest only to those who cannot obtain the needed undergraduate funds through merit or need based financial aid, and it is likely to be attractive only to those whose College Savings Account is inadequate to pay for even the cost of undergraduate school. However, there are likely many such persons in every state. These are the students whose contributions to the education level of the country ought not be lost.[181]

[181] Some states have developed innovative programs that provide partial matches of a family's deposits to a College Savings Account based on a sliding scale dependent on the family's adjusted gross income.. I believe that such programs are good for families that make enough money to save some of it for college for their children.; at a minimum, such programs may incentivize families to reprioritize their savings. However, such a program would not replace either Recommendation 1 or Recommendation 2 described in this article. Recommendation 1, the primary recommendation in my article, is directed toward a different population of students, those from families too poor to be likely to create a College Savings Account. These students reside in families in which, but for a full scholarship, college is not within the realm of reasonable probabilities. It is doubtful that such a plan would be of sufficient assistance to students who are the subject of Recommendation 2, but for different reasons. The state-funded matches tend to be subject to maximums that make the programs of limited usefulness when one compares it to the cost of college. They would likely not be sufficient to make up the shortfall in the College Savings Accounts of the students who are the target of Recommendtion 2. Moreover, the state matching plans, by definition, require state funds. Recommendation 2 does not require public funds. Finally, the state-augmented College Savings Account is a defined contribution account, not a defined benefit plan. Accordingly, there is no assurance that the sum in the account will be sufficient to pay tuition at any institution of higher education.

As with any new student aid program there are important ancillary concerns. Private funds used for this program represent donations that will not be available for Prepaid Tuition Scholarships for traditional economically disadvantaged students whose families can save nothing and for whom college is unlikely without a program like Project STARS. It is not, however, a foregone conclusion that the donors to whom a Projects STARS-type program would be attractive would reject that social commitment in order to fund this second type of scholarship. In short, different types of giving opportunities are attractive to different donors.

1. The Rationale for Recommendation 2.

The rationale for adding this second type of Prepaid Tuition Scholarship to the higher education assistance programs of states that already have Prepaid Tuition Plans is simple. If the United States is to regain its first place position in the proportion of its population that has attained postsecondary education, we cannot afford to lose students from the traditional college attending cohort because of the current economic crisis. But, based on the valid equity concerns that have been raised about Prepaid Tuition Plans,[182] these scholarships should be privately funded.

2. The Impact of Recommendation 2 on Objections to Prepaid Tuition Plans.

Certainly the equity objections that have been raised against Section 529 Plans, and Prepaid Tuition Plans in particular, would apply with equal force to Prepaid Tuition Scholarships for students whose college savings have been lost in the current economic downturn.[183] Likewise it is possible that universities' admissions decisions could be swayed in favor of applicants with this resource.[184] These are the reasons why I see the program as a short-term stop-gap measure because of the current economic exigency, rather than a permanent, alternate means to fund a student's higher education.
Like all Section 529 plans, these scholarships would serve to highlight that universities have insufficient capacity to serve all who require there services.[185]

Recommendation 2-Type Prepaid Tuition Scholarships would have little impact on the fear of increased burden on student services personnel, other than the burden of additional volume, because these students are traditional college-bound students who would have attended college but for the recent economic crisis..

III. OVERCOMING OBSTACLES

Some states are no longer selling Prepaid Tuition Plans. A number of plans have a variety of problems. They vary from concerns about the financial viability of the plan because the plan was too small,[186] or initially the plans were priced to low[187] or

[182] *See supra* notes 79-82 and 141-149 and accompanying text.
[183] *Id.*
[184] *See supra* note 150 and accompanying text.
[185] *See supra* notes 151-159 and accompanying text.
[186] Olivas, *supra* note 18, at 481, n.22.
[187] The initial problem with the Michigan's MET. *See* Lehman, *supra* note 78 (*Social Irresponsibility*, 1990).

inappropriate actuarial assumptions[188] were made about the future cost of tuition.[189] In each of these situations, the problem is not with the concept of Prepaid Tuition Plans, but with their implementation. I recommend that rather than discarding the concept, legislatures undertake to make the plans operate properly. Most of those states still have ongoing investment programs for the contracts that have already been sold. The creation of Prepaid Tuition Scholarships provides the opportunity to work through the problems on a small scale. At a minimum, Prepaid Tuition Scholarships can be awarded so that their duration is equal to that of funds remaining in the state's trust fund. Moreover, since Section 529 College Savings Plans tend to continue to exist in these states, I suggest that Prepaid Tuition Scholarships ought to exist as a matter of distributional equity to lower income groups.

Currently, states have been unable or unwilling to address the problem of tuition rates rising faster than the rate of inflation. One of the key's to Florida's successful Prepaid Tuition Plan has been the relatively low tuition rates in Florida that were carefully controlled by the Legislature.[190] Other states have not been as willing to control the levels of tuition. When there is no control of tuition and tuition rates have been skyrocketing, it is much more difficult to produce reliable actuarial assumptions to undergird a strong Prepaid Tuition Plan. Texas recently deregulated tuition at its institutions of higher education, coupling the projected increases with promises by the institutions of more need based tuition assistance.[191] Clearly "deregulation" of public tuition is in vogue. The Florida Pappas Report recommended at least partial deregulation of pricing for Florida's higher education system.[192] This may not be the best solution, particularly if the nationwide objective is to increase vastly the number of individuals possessing an undergraduate degree or postsecondary technical certificate in order for the United States to remain competitive in the world market.[193] Moreover, how needy must one be to qualify for this financial aid? One of the reasons for the development of Section 529 Plans in the first place was because the middle class was unable to qualify for aid other than loans[194] and was in fear that it might be priced out of the higher education marketplace.[195] Moreover, Professor Olivas has aptly pointed out that the poor, especially those in minority communities suffering from significant information deficit, are unable to deal with the complexity of the financial aid process and receive less aid than that for which they might be qualified.[196]

The 2007 Florida Legislature, unwilling to totally deregulate tuition as requested by public higher education administrators, passed a "middle ground" type of legislation

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[188] *See* Olivas, *supra* note (2003 article), at 484-485.

[189] In others, the concern may have been that the plans were so popular that the state's colleges and universities were going to be severely oversubscribed and unable to meet the demand. *See*, *e.g.*, Texas. Olivas, *supra* note 18, at 478. Florida, another state with a successful Prepaid Tuition Plan also needs more slots for undergraduates. *See* Florida Pappas Report, *supra* note 73, at 15 (recommending another tier of colleges focusing on undergraduate degrees).

[190] Olivas, *supra* note 18, at 482.

[191] Tex. Stat.

[192] Florida Pappas Report, *supra* note 73.

[193] *See* Callahan et al, *supra* note 1.

[194] Leading to the excessive debt problem that is so often discussed in the media and in general public conversation.

[195] The burden of high student loan debt of former students is another national problem that has repercussions for the national economy as well as for the individual graduate.

[196] *See* notes 111-113 and accompanying text.

that nonetheless complicates matters. The legislation allowed certain high-demand research universities to charge undergraduates an additional fee, called an "undergraduate tuition differential fee" of up to 30 or 40 percent of tuition, depending on the university.[197] This is nothing more than tuition by another name. It was decided that this fee would not be covered by Florida Prepaid Tuition contracts purchased after July 1, 2007.[198] Thus, in future years a student receiving a Prepaid Tuition Scholarship could be unable to attend certain public universities because he or she cannot pay this additional fee. The Florida Prepaid College Program was authorized to sell advance payment contracts for this new fee in addition to the existing optional additional fee contracts that are available. The likely practical impact, however, is that Prepaid Tuition Scholarship recipients will be unable to attend universities charging this fee. Fortunately the Florida Legislature did not destroy Prepaid Tuition Scholarships in their effort to remedy inadequate higher education appropriations, but the pattern of changes is of concern.

The loss of Florida's Prepaid Tuition Scholarship program, or the failure of other states to adopt this program that makes sense from every perspective, would be a terrible shame.[199] States must find a way to come to grips with the problems that threaten these programs, not just for the sake of Prepaid Tuition Scholarships but for the future of students, higher education, the economy and society.

We must find ways to create and protect Prepaid Tuition Scholarships for economically disadvantaged youth.

IV. THE ENABLING STATUTE

The Florida Statutes in effect as of January 1, 2009 provide a good model for statutory language.[200] Since a good model already exists, this section discusses some of the questions to be decided by policymakers before they draft a statute to create Prepaid Tuition Scholarships in a state that already has a Prepaid Tuition Plan. At each decision point I recommend an approach that entails the least administrative cost while meeting the educational, social and economic objectives of the plan.

Florida's statutory framework involves two statutes, one establishing the scholarship[201] and one establishing a fund-raising and administrative board to receive and invest the funds and oversee the program.[202]

The statute creating the scholarship will be addressed first. One point for policymakers to consider is whether the prepaid plans awarded as scholarships are to have the same terms as other Prepaid Tuition Plans in the state; I recommend that they be the same to keep administration costs to a minimum and foster equitable treatment among plan beneficiaries. Another point worthy of special consideration, however, is

[197] Fla. Stat 1009.24 (15), now codified at 1009.24 (16)(2008).
[198] Fla. Stat 1009.24 (16)(c) (2008).
[199] The discussion of who is responsible for the cost of higher education – the student or the government – is beyond the scope of this article. Or, more accurately, to what degree will government subsidize higher education so as to avoid both of the twin evils of debt-ridden college graduates or a society with falling levels of higher education and a less well prepared workforce because the cost is beyond the reach of an ever-increasing number of students.
[200] FLA. STAT. §§ 1009.983, 1009.984 (2008).
[201] FLA. STATE § 1009.984 (2008).
[202] FLA. STAT. § 1009.983 (2008).

whether the private funds are lost if a beneficiary loses eligibility before graduating. In this instance I suggest that loss of the private funds would be an impediment to fund-raising and that the private funds not be lost. Perhaps the public and private matched funds could be directed immediately to a Prepaid Tuition Scholarship for another beneficiary. Or, perhaps, the state funds could be "forfeited" to the trust fund reserves as a hedge against rising costs,[203] with the private funds being redirected to a future scholarship for another beneficiary in the next cycle of matching governmental appropriations. Another point that ought to be addressed is what happens if the beneficiary decides not to attend college or is awarded a different full scholarship and decides to accept the alternate full scholarship. Are the private funds to be "forfeited" to the trust fund? What about the public funds? I suggest an approach similar to those outlined above; however, a state could reach a different conclusion. These issues are not addressed in the Florida Statutes and I would recommend that they be left for the initial directors of the direct support organization to decide in consultation with the state's prepaid college tuition governing board.

Another important group of issues to be decided are the standards to be maintained by a beneficiary in order to remain eligible for the scholarship. Florida's statute has academic, crime-free and drug-free requirements. Policymakers must establish the categories of requirements and establish clear standards of what constitutes compliance or non-compliance. Clarity is very important for everyone involved – the recipients, their parents/guardians, the donor organizations and the administrators of the program. The academic standard in Florida is that the recipient must graduate from high school with a diploma that makes the student eligible to attend college.[204] A state could set a higher standard, perhaps setting a necessary grade point average or other requirements.[205] I recommend that the standard be the minimum that would enable any other graduate of the state's high schools to attend college. Since the participants are low income students who typically have a higher than average dropout rate prior to graduating from high school, staying in school and obtaining a high school diploma that allows advancement into college is an adequate standard. I don't believe a higher threshold than is applicable to other high school graduates be applied to these students just because they are poor and have a scholarship for the economically disadvantaged.

Tracking is another topic that deserves attention. Florida keeps statistics on whether Project STARS recipients continue their eligibility throughout high school. This does not involve significant additional work because the information is derived from the ongoing operations of the program. The decision to keep and publish these statistics was likely made at the level of the Prepaid Foundation Board, an appropriate level for such decisions that I would recommend to other states. It would be more helpful if additional information and statistics were available. Specifically, it would be very helpful to educators, policymakers, and donors alike to know whether recipients complete their

[203] This suggestion of "forfeiture" of the public funds to a reserve account is made in order to protect public funds from the possibility of a bailout, if, like Florida, the specific state's version of Prepaid Tuition Plan would call for a public bailout in the event of insolvency. However, the language of the particular appropriation would need to be examined. If the appropriation would be lost from the Prepaid Tuition Plan it would be preferable if the matched public and private could be directed to another scholarship.

[204] In Florida, this includes passing the controversial FCAT test prior to graduating. (http://fcat.fldoe.org/)

[205] In reaching this decision policymakers should consider the extent to which grade point averages may represent different levels of acumen in different schools and different localities. College admissions personnel are excellent sources for consultation by policymakers on this issue.

degrees or technical certificates once they matriculate. Florida has recently added the requirement that recipients report their progress on a periodic basis.[206] I would recommend that the direct support organizations compile this information, but I would not mandate it by statute.

The Florida Statute allows the direct support organization with the assistance and cooperation of the state's Department of Education to set the school attendance standard that will produce a student likely of being successful in college. Again, whatever standard is set, it must be clear. The standards for drug-fee and crime-free conduct are set forth in the statute. It makes sense that these particular standards be statutorily designated by the policymakers as part of the enactment rather than being left to an administrative body. Review of Florida's statute reveals that both juvenile and adult standards are specified, and that a prior adjudication does not disqualify a student so long as he or she remains crime-free and drug-free after being designated as a recipient of the scholarship. The decision of whether to permit those with prior adjudications to be eligible is another decision for the policymakers.

Finally, the policymakers must decide the economic level that signifies eligibility for the scholarship. I strongly recommend a level such as that used in Florida – one that is already decided as part of the schooling process and does not require any additional process like the federal financial aid application. The objective is to identify eligible students in a family, community and informational setting that does not lend itself to cumbersome processes. The specific economic standard is not specified in Florida's statute; it was set by the Board of the Prepaid College Foundation. It could, however, be included in the statutory language. In Florida, the eligibility level is that the student must be eligible for the free and reduced lunch program.[207]

Florida's statutory framework includes a direct support organization to receive donations, seek and receive state appropriations and enable the purchase of the underlying Prepaid Tuition Plans. As stated earlier, the statutory language is very similar to that used for other direct support organizations in the state, for example the foundations for each of the state universities.[208] While the state agency that operates the Prepaid Tuition Plan could conceivably operate the scholarship program, I recommend that a separate direct support organization be established and that it seek qualification as a Section 501(c)(3) organization under the Internal Revenue Code. The reasons have to do with ease of fund-raising, focus and credibility. Contributions to the state for educational, scientific and charitable purposes are deductible under Section 170 of the Internal Revenue Code without the Section 501(c)(3) status. Nevertheless, people are more familiar with, and comfortable with the, 501(c)(3) designation. With the 501(c)(3) designation, fundraisers can focus solely on the merits of the program and eliminate the possible distraction of having to convince prospective donors of the deductibility of their contributions.

In addition, a separate organization can focus on the scholarship program more completely than a state agency having responsibility for the Prepaid Tuition Plans. The directors, who receive no compensation for their services, can focus on fund-raising and seeking the necessary state appropriations without the daily operational obligations of

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[206] Foundation 2006/2007 Annual Report, at 1.

[207]Foundation 2006/2007 Annual Report, at 4. See also, www.myfloridaprepaid.com/assets/PDFs/Forms/Foundation/foundationprojectstarsp&p.pdf.

[208] FLA. STAT. § 1004.28 (2008).

the state agency. Moreover, the separate status of the direct support organization is of comfort to prospective donors because the organization has no other purpose than operating the scholarship program.

For the protection of state interests,[209] the statute contains a requirement that the Florida Prepaid College Board is entitled, and obligated, to certify annually that the direct support organization is operating in compliance with its statutory duties. If the direct support organization fails to maintain compliance, the funds revert to the Florida Prepaid College Board or to the state. This eliminates the problem of a renegade direct support organization.

Finally, in states that like Florida have a broad Public Records Law, the statute exempts donor information from both the statutory and state constitutional iterations of the public records law for those donors who wish to remain anonymous. This fact can be of importance to prospective donors and I recommend that the enabling statute contain such provisions.

CONCLUSION

Prepaid Tuition Scholarship Programs for economically disadvantaged students, based on a model such as the program currently in existence in Florida, are amazingly effective means of incentivizing disadvantaged lower income students to stay in school, make proper lifestyle choices, and reach their full individual and economic potential through higher education. These plans enjoy low overhead when run in conjunction with a Prepaid Tuition Plan and constitute excellent public policy. They ought to be adopted and annually funded by many more states.

A program based on the Florida model can be adapted to permit additional types of scholarships. A short-term program ought to be created to for students whose families' college savings have been decimated by the recent economic downturn. A scholarship program that uses donated private funds to make up the difference between a family's now insufficient college savings and the cost of a Prepaid Tuition Plan for students who will enter college in the near future will help recipients from having to delay or forego college, or be buried in enormous debt. Such a program will also assist the United States in competing in the global market that requires a more highly educated workforce.

[209] In Florida, this means the state's fifty percent of the cost of the scholarships