TAXPAYERS FOR PUBLIC EDUCATION V. DOUGLAS COUNTY SCHOOL DISTRICT: THE SCHOOL CHOICE MOVEMENT SOLDIERS ON

BRYCE CARLSON*

For nearly a decade, the school choice movement in Colorado has hung in the balance as the fate of the Douglas County School District Choice Scholarship Program worked its way through the courts, even reaching the United States Supreme Court in the process. The main issue at stake was whether Article IX, § 7 of the Colorado Constitution, which prevents public institutions from making any appropriation to a "church or sectarian society," barred students from using a school district scholarship to attend a private religiously affiliated school.

The Colorado Supreme Court in 2015 ruled that the Choice Scholarship Program indeed violated Article IX, § 7. In 2017, the United States Supreme Court granted certiorari, vacated the Colorado Supreme Court's decision, and remanded the case for reconsideration in light of its recent opinion in Trinity Lutheran Church of Columbia, Inc. v. Comer. *But prior to the rehearing, the Douglas County School District Board of Education rescinded the Choice Scholarship Program, and the case was dismissed as moot. In an instant, the effect of years of litigation completely vanished.*

Though the issue was never settled, it will not be long before a similar private school grant program appears somewhere else in Colorado or another state. And because thirty-six other state constitutions include similar provisions to Colorado's Article IX, § 7, otherwise known as a Blaine

* J.D. Candidate, 2018, University of Colorado Law School. Ryann, Drake, Raine, and Skye, thank you does not even begin to capture my gratitude for your enduring love and support. To my colleagues and Professor Frederic Bloom, thank you for your flexibility and creativity along the way. Last but not least, thank you to my Lord and Savior Jesus Christ, to whom I owe it all. Philippians 4:13.

Amendment, it is nonetheless worth analyzing why the Colorado Supreme Court wrongly decided the case. This Note further advocates that the time has come for the United States Supreme Court to squarely address the constitutionality of Blaine Amendments.

Despite the unfortunate end to the Douglas County School District Choice Scholarship Program, the future remains bright, and the school choice movement will no doubt soldier on.

INTRODUCTION 1275
I. BACKGROUND 1278
A. *Background of the Douglas County School District's Choice Scholarship Program and the Ensuing Litigation Surrounding Its Implementation* 1278
B. *History of Blaine Amendments and Article IX, § 7 of the Colorado Constitution* 1281
II. THE COLORADO SUPREME COURT WRONGLY DECIDED THE CASE 1284
A. *The Colorado Supreme Court Misinterpreted Article IX, § 7* 1285
B. *The Colorado Supreme Court Wrongly Dismissed the Supreme Court's Establishment Clause Line of Cases* 1286
C. *The Colorado Supreme Court Wrongly Distinguished Its Decision in* Americans United ... 1290
D. *The Colorado Supreme Court Failed to Look Beyond the Plain Language of Article IX, § 7 to See That the Provision Is Unconstitutionally Discriminatory* 1292
III. THE U.S. SUPREME COURT SHOULD TAKE UP THE ISSUE OF BLAINE AMENDMENTS IN THE CONTEXT OF SCHOOL CHOICE 1294
A. *Regardless of Whether Article IX, § 7 Is More Restrictive than the Establishment Clause, the Colorado Supreme Court's Holding Violates the Free Exercise Clause* 1295
B. *Denying Religious Schools from Participating in the Choice Scholarship Program Is Not a Neutral and Generally Applicable Restriction* 1300

C. Locke v. Davey *Is Distinguishable and Does Not Justify Striking Down the Choice Scholarship Program under Article IX, § 7* 1302
D. Footnote Three of Trinity Lutheran *Does Not Nullify the First Amendment Principles as Applied to Private School Grant Programs* 1304
IV. THE PARTIES' JOINT MOTION TO DISMISS SHEDS LIGHT ON THE IMPACT OF *TRINITY LUTHERAN* ON SIMILAR PRIVATE SCHOOL CHOICE PROGRAMS 1305
A. The Case Was Not Moot Even Though the Douglas County School District Board of Education Ended the Choice Scholarship Program 1306
B. Petitioners' Motion to Dismiss Evidences the Weakness of Their Case on Remand 1307
CONCLUSION 1308

INTRODUCTION

In 2015, after years of anticipation, the Colorado Supreme Court finally issued its opinion on the fate of one of the most robust public/private school choice grant programs in the nation.[1] For supporters of the school choice movement, the court's decision was a disappointment, to say the least. The court struck down Douglas County School District's Choice Scholarship Program (CSP) as violating Article IX, § 7 of the Colorado Constitution.[2]

The CSP was designed to provide greater educational choice for students and parents to meet individualized student needs, improve educational performance through competition, and obtain a high return on investment of the school district's educational spending.[3] The CSP would allow students to attend approved private schools by allocating seventy-five percent of the district's per-pupil revenue to the student's parents in the form of a grant.[4]

Shortly after the Douglas County Board of Education

1. The Douglas County School District adopted the grant program in 2011.

2. Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist. (*Douglas Cty.*), 351 P.3d 461, 465 (Colo. 2015), *vacated*, 137 S. Ct. 2327, *and mandate recalled*, 2017 WL 4052212 (Colo. 2017).

3. DOUGLAS CTY. SCH. DIST., DCSD CHOICE SCHOLARSHIP EXECUTIVE SUMMARY (2011), https://eboardsecure.dcsdk12.org/attachments/7432a5fd-dc5f-43fb-b456-39183197465e.pdf [https://perma.cc/78WS-SGT9].

4. *Id.*

approved the CSP, it was challenged in court.[5] Various non-profit organizations, Douglas County taxpayers, students, and parents filed a lawsuit to enjoin implementation of the CSP.[6] Specifically, the lawsuit alleged that the CSP violated the Colorado Public School Finance Act and multiple provisions of the Colorado Constitution.[7] The court permanently enjoined the CSP following a hearing on the plaintiffs' motion for a preliminary injunction.[8]

The Douglas County School District appealed the decision.[9] In February 2013, the Colorado Court of Appeals issued its opinion in favor of the school district.[10] The court held that the plaintiffs lacked standing to file suit under the Colorado Public School Financing Act[11] and that the CSP did not violate the Colorado Constitution.[12]

In March 2014, the Colorado Supreme Court granted certiorari and a year later rendered its decision.[13] According to the court, the plaintiffs indeed lacked standing to file suit under the Colorado Public School Finance Act.[14] However, the plurality struck down the CSP. Three justices determined that it violated Article IX, § 7 of the Colorado Constitution,[15] which prevents a school district from making any appropriation to a "church or sectarian society."[16]

The Douglas County School District filed a petition for writ

5. *Douglas County Vouchers*, INDEP. INST., https://www.i2i.org/douglas-county-vouchers/ (last updated July 24, 2015) [https://perma.cc/2YMD-MACW].

6. *ACLU and Americans United File Lawsuit to Block Voucher Plan that Would Fund Religious Schools in Colorado*, ACLU (June 21, 2011), https://www.aclu.org/news/aclu-and-americans-united-file-lawsuit-block-voucher-plan-would-fund-religious-schools-colorado [https://perma.cc/H5WH-QQGD] [hereinafter *ACLU and Americans United File Lawsuit*].

7. *Id.*

8. Carlos Illescas & Liz Navratil, *Judge Halts Douglas County School Voucher Program*, DENV. POST (Aug. 12, 2011, 4:21 PM), http://www.denverpost.com/2011/08/12/judge-halts-douglas-county-school-voucher-program/ [https://perma.cc/7Y3X-TD8L].

9. Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 356 P.3d 833, 843 (Colo. App. 2013), *vacated as moot*.

10. *Id.* at 833.

11. The Colorado Public School Financing Act is the statutory mechanism used to allocate and administer state funding to Colorado school districts.

12. *Taxpayers for Pub. Educ.*, 356 P.3d at 842.

13. Douglas Cty., 351 P.3d 461, 465 (Colo. 2015), *vacated*, 137 S. Ct. 2327, *and mandate recalled*, 2017 WL 4052212 (Colo. 2017).

14. *Id.*

15. *Id.*

16. COLO. CONST. art. IX, § 7.

of certiorari to the United States Supreme Court.[17] The Supreme Court granted certiorari, but in the wake of the Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, it vacated judgment and remanded to the Colorado Supreme Court to reconsider in light of its opinion.[18]

Shortly before publication of this Note, and prior to the Colorado Supreme Court rehearing the case, the newly elected Board of Education in Douglas County voted to eliminate the CSP.[19] Accordingly, the Colorado Supreme Court, in response to a joint motion, dismissed the case as moot and vacated all lower court opinions. Thus, in a somewhat odd turn of events, the litigation surrounding the CSP has, in essence, completely evaporated. But the issue of private school choice programs like the one created in Douglas County is not going away. It will not be long before a new private school choice program is created somewhere—whether in Colorado or another state. Because there are thirty-seven state constitutions containing amendments like Colorado's Article IX, § 7,[20] otherwise known as Blaine Amendments, it is not difficult to imagine another state supreme court handing down a similar opinion. Thus, while the court's opinion has been vacated, it is still relevant to understand at least one interpretation of Blaine Amendments in the context of private school choice programs.

This Note explores two main topics. Part I argues that the Colorado Supreme Court wrongly held that the CSP violated the Colorado Constitution. Specifically, the court misinterpreted Article IX, § 7 and its own precedent. Moreover, the plurality opinion does not align with the Establishment Clause[21] of the U.S. Constitution. To understand the Colorado Supreme Court's decision and the issue generally, Part I

17. Petition for Writ of Certiorari, Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ., 137 S. Ct. 2327 (2017) (No. 15-557), 2015 WL 6668469.

18. Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ., 137 S. Ct. 2327 (2017).

19. James Anderson, *Colorado School Board Votes to End Voucher Program*, FOX NEWS (Dec. 4, 2017), http://www.foxnews.com/us/2017/12/04/colorado-school-board-set-to-end-prominent-voucher-program.html [https://perma.cc/2TLH-HKZG].

20. Dick Komer et al., *Answers to Frequently Asked Questions About Blaine Amendments*, INST. FOR JUST., http://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/ (last visited Mar. 11, 2018) [https://perma.cc/7JF7-SUJ9].

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

additionally takes a deep dive into the creation of Article IX, § 7 of the Colorado Constitution and reveals its bigoted history. Part II argues that even though the Douglas County case has been vacated, the U.S. Supreme Court must address the unconstitutionality of Blaine Amendments in the context of private school choice programs, particularly in light of its recent decision in *Trinity Lutheran*. Part II additionally explores the implications of the parties' joint motion to dismiss and argues specifically that the petitioners' willingness to dismiss the case is evidence that their case was vulnerable after *Trinity Lutheran*.

For advocates of school choice, the recent developments with respect to Douglas County and its Choice Scholarship Program represent a significant setback in ensuring that *all* students can receive the very best education possible. However, there is room to remain hopeful, and the school choice movement will, without a doubt, soldier on.

I. BACKGROUND

In order to grasp the details and significance of the Colorado Supreme Court's opinion in *Taxpayers for Public Education v. Douglas County School District*, it is essential to understand both the Douglas County Choice Scholarship Program and the history of Article IX, § 7 of the Colorado Constitution. This part discusses each respectively.

A. Background of the Douglas County School District's Choice Scholarship Program and the Ensuing Litigation Surrounding Its Implementation

In 2011, the Douglas County School District implemented the Pilot Choice Scholarship Program.[22] While some states have created private school choice options, the CSP was likely the only locally enacted one of its kind.[23] Moreover, the program was open, on a limited basis, to all students in the district rather than only low-income students, which made the

22. Douglas Cty., 351 P.3d 461, 465 (Colo. 2015), *vacated*, 137 S. Ct. 2327, *and mandate recalled*, 2017 WL 4052212 (Colo. 2017).

23. *Douglas County Vouchers*, *supra* note 5. By "locally enacted," I am referring to a program created by an individual school district as opposed to one adopted by the state legislature.

CSP more robust than similar programs around the country.[24]

All students who were enrolled in a Douglas County public school for at least a year were eligible to apply for a Choice Scholarship.[25] Initially, the CSP was only open to 500 students.[26] Those students who received a scholarship would be enrolled in the district's newly created Choice Scholarship Charter School and would receive seventy-five percent of the district's per-pupil revenue or the cost of non-public school tuition, whichever was less.[27] The district would pass the amount of the scholarship on to the student's parents by way of a restrictively endorsed check to be used for the sole purpose of paying for non-public school tuition at a Private School Partner.[28]

To become a Private School Partner, schools had to meet myriad requirements, including allowing the district to administer assessments to students in the CSP.[29] Schools were not required to change their enrollment requirements to qualify as a Private School Partner. As of July 31, 2011, the district had contracted with twenty-three schools, sixteen of which were religious schools.[30]

In June 2011, three months after the Douglas County Board of Education approved the CSP, various nonprofit organizations, Douglas County taxpayers, students, and parents filed a lawsuit to enjoin its implementation.[31] The lawsuit alleged that the CSP violated the Public School Finance Act and the Colorado Constitution.[32] A Denver district court judge granted the petitioners' desired relief and permanently enjoined the CSP.[33] Most notably, the court ruled that the CSP violated Article IX, § 7 of the Colorado Constitution.[34] Additionally, the district court ruled that the CSP violated the Public School Finance Act, which provides for a "thorough and *uniform* system of public schools throughout

24. DOUGLAS CTY. SCH. DIST., *supra* note 3.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 356 P.3d 833, 843 (Colo. App. 2013), *vacated as moot*.
31. *ACLU and Americans United File Lawsuit*, *supra* note 6.
32. *Id.*
33. Illescas & Navratil, *supra* note 8.
34. COLO. CONST. art. IX, § 7.

the state."[35]

The Douglas County School District appealed, and the Colorado Court of Appeals reversed, holding that petitioners lacked standing under the Public School Finance Act and that the CSP did not violate Article IX, § 7 of the Colorado Constitution.[36]

The Colorado Supreme Court granted certiorari and in 2015 reversed in part, holding that while petitioners lacked taxpayer standing under the Public School Finance Act, the CSP violated Article IX, § 7 of the Colorado Constitution[37]—also known as a Blaine Amendment.

The school district appealed the decision to the U.S. Supreme Court.[38] While not deciding to hear the case on the merits, the Court granted certiorari, vacated the judgment below, and remanded the case to be reconsidered in light of *Trinity Lutheran*.[39] However, after the Douglas County School District ended the CSP, the parties filed a joint motion to dismiss the case as moot, ending nearly seven years of litigation.[40]

35. COLO. REV. STAT. § 22-54-102(1) (2017) (emphasis added). The argument is that by allowing some students to attend private schools, the "uniform" education mandate of the Public School Finance Act is violated. I do not spend time elaborating on the Public School Finance Act because the Colorado Court of Appeals and the Colorado Supreme Court both held that petitioners lacked standing to bring the claim.

36. Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 356 P.3d 833, 843 (Colo. App. 2013), *vacated as moot*.

37. Douglas Cty., 351 P.3d 461, 465 (Colo. 2015), *vacated*, 137 S. Ct. 2327, *and mandate recalled*, 2017 WL 4052212 (Colo. 2017). As discussed above, the Douglas County School District filed a petition for writ of certiorari to the United States Supreme Court; however, in the wake of the Supreme Court's decision in *Trinity Lutheran*, the Court granted certiorari but vacated judgment and remanded to the Colorado Supreme Court to reconsider in light of its opinion. Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ., 137 S. Ct. 2327 (2017).

38. Petition for Writ of Certiorari, *supra* note 17.

39. *Douglas Cty. Sch. Dist.*, 137 S. Ct. 2327.

40. Erica Meltzer, *The Douglas County Voucher Case Is Finally Over*, CHALKBEAT (Jan. 26, 2018), https://www.chalkbeat.org/posts/co/2018/01/26/the-douglas-county-voucher-case-is-finally-over/ [https://perma.cc/4ZKX-YWZW].

B. History of Blaine Amendments and Article IX, § 7 of the Colorado Constitution[41]

In 1875, during a time of severe anti-Catholic fervor, President Grant urged citizens to "resolve that not one dollar . . . be appropriated to the support of any sectarian schools."[42] At that time, "sectarian" was a direct reference to the Catholic faith and the parochial schools that were attempting to secure state funding similar to the "nonsectarian" Protestant schools.[43] Many Americans viewed the Catholic faith as corrupt and associated with the foreign powers left behind after the revolution.[44] Grant additionally called for a constitutional amendment to ensure that no funding would be directed to "sectarian schools."[45] Representative James Blaine took the president up on his proposal and introduced the amendment.[46] It failed in Congress, but within a year, fourteen states—including Colorado—adopted similar language into their own state constitutions.[47] The Blaine Amendment became Article IX, § 7 of the Colorado Constitution, which states in relevant part, no "school district . . . shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society."[48]

Professor Steven K. Green has been an outspoken critic of those who object to the bigotry of Blaine Amendments and their place in state constitutions.[49] Green has attempted to downplay the significance of Blaine Amendments in several

41. The overall summary of the history of Blaine Amendments elaborated here follows the factual section of the Douglas County School District's Petition for Writ of Certiorari to the U.S. Supreme Court. Petition for Writ of Certiorari, *supra* note 17, at 5–11.

42. Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 507 (2003).

43. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 301 (2001); *see* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 42 (1992).

44. *See* Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMEND. L. REV. 45, 63 (2004).

45. STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION 192–93 (2012).

46. *See* Green, *supra* note 43, at 38.

47. *Id.* at 38–39.

48. COLO. CONST. art. IX, § 7.

49. *See* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295 (2008).

ways.[50] First, in recounting the history of the original Blaine Amendment, proposed in Congress in 1876, Green argues that "[t]he Blaine Amendment had as much to do with the partisan climate of the post-Reconstruction era and related concerns about federal power over education as it did with Catholic animus."[51] Green thus acknowledges the shameful history of the original Blaine Amendment but argues that because there were other factors influencing its design, we should view the bigotry as acceptable.[52]

Green also argues that the subsequent Blaine Amendments adopted in state constitutions are modified from the original in both language and purpose and are thus of little constitutional significance.[53] Specifically, Green points to the fact that not all of the post-1876 Blaine Amendments bear similar language to the original, and

> [d]espite . . . claims to the contrary, opponents of the no-funding principle have generally failed to demonstrate a connection between the Blaine Amendment and the various state provisions from legislative histories, convention records, or other historical sources. Instead, [according to Green] they have sought to taint the various state provisions with the stain of anti-Catholicism through guilt by association with the Blaine Amendment.[54]

A look at Colorado's constitutional convention tells a different story. Colorado's constitutional convention was convened in December 1875, the same month that President Grant delivered his remarks on funding for "sectarian" schools.[55] Green's emphasis that the "Baby-Blaines" (referring to the amendments created by the states) were adopted in the fifty years following the original ignores the fact that fourteen of them came within one year of the original's defeat in

50. *Id.* at 296–99.

51. *Id.* at 296.

52. I doubt Green would take the same position if there were amendments in a majority of state constitutions born of racial animus but that also happened to have some sort of legitimate economic or political justification as well. If such a case existed even in one state constitution, it would not, and should not, be tolerated. Religious animosity should be no different.

53. Green, *supra* note 49, at 297.

54. *Id.* at 298.

55. DALE A. OESTERLE & RICHARD B. COLLINS, THE COLORADO STATE CONVENTION: A REFERENCE GUIDE 1 (2002); Green, *supra* note 43, at 52–53.

Congress.[56] Colorado was one of the fourteen.[57]

The notion that Colorado's Blaine Amendment was simply about neutral principles of appropriate school funding and was free of anti-Catholic bigotry is patently false. Anti-Catholic vitriol was pervasive at the convention.[58] For example, former territorial governor John Evans lobbied to ensure that the constitution would prevent "sectarian" influence in public schools as well as keep funds from being diverted to Catholic schools.[59] His additional support for continued Bible readings at "nonsectarian" public schools sheds light on the true meaning of "sectarian" as it was used in the creation of Blaine Amendments.[60]

On the Catholic side of the debate was the future first Bishop of Denver, Apostolic Vicar Joseph Machebeuf.[61] The future Bishop advocated that his fellow Catholics were loyal American citizens and pushed for the issue of education funding to be decided by future legislatures at a time when the "passions of th[e] hour will have subsided."[62] Machebeuf's remarks were not received well, to put it mildly.[63] Former Governor Evans believed that Machebeuf's statement would give him an opportunity to "stir . . . up" the Protestant majority against the Catholic minority.[64]

Other examples of the swift response to Machebeuf include Colorado newspapers that stoked the fire with anti-Catholic rhetoric. The *Rocky Mountain News* wrote of the "antagonism of a certain church towards our American public school system that threatened to lay our vigorous young republic . . . bound with the iron fetters of superstition at the feet of a foreign despot."[65] The *Boulder County News* asked "whether it were

56. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 573 (2003).

57. Petition for Writ of Certiorari, *supra* note 17, at 8.

58. *See, e.g.*, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION: COLORADO 1875-1876, at 278 (1907).

59. *Id.* at 111–13.

60. *See id.*

61. *See id.* at 235.

62. *Id.* at 330–31.

63. *See* CHARLES L. GLENN, THE AMERICAN MODEL OF STATE AND SCHOOL 172–73 (2012).

64. Donald W. Hensel, *Religion and the Writing of the Colorado Constitution*, 30 CHURCH HIST. 349, 352 (1961).

65. GLENN, *supra* note 63, at 171.

not enough that Rome dominates in Mexico and all of South America?"[66] Additionally, a well-known Protestant minister warned the people that if the amendment was not adopted, Colorado would be excluded from the presidential election of 1876.[67] He went on to say that "the people could feel right in voting up a constitution which the Pope of Rome had ordered voted down."[68] After the amendment was officially adopted in Colorado's constitution, the *Rocky Mountain News* "commended the delegates for their wisdom, noting that, the president's . . . speech and Mr. Blaine's amendment . . . struck a chord in the average American breast that has not yet ceased vibrating such that far more protestants can be got to vote for the constitution on account of this very clause than Catholics for the same reason to vote against it."[69]

Green's argument of the "insignificance" of Blaine Amendments[70] thus clearly does not apply to the one adopted in Colorado. Not only did Colorado adopt Article IX, § 7 on the heels of the original amendment's failure in Congress, its language bears a striking similarity, and the constitutional convention in Colorado reveals the dynamics that went long beyond neutral disagreements on appropriate school funding.

More than a century after Colorado ratified its constitution, Article IX, § 7 reared its head in Douglas County.

II. THE COLORADO SUPREME COURT WRONGLY DECIDED THE CASE

The Colorado Supreme Court made three main errors in reaching its decision in *Douglas County*. First, it interpreted Article IX, § 7's prohibition on expenditures too broadly and in direct contrast to its opinion in *Americans United for Separation of Church and State Fund, Inc. v. State*.[71] Second, the court wrongly distinguished *Americans United* and the U.S. Supreme Court's Establishment Clause line of cases. Finally, and most significantly, the court failed to look beyond the "plain language" of Article IX, § 7 to reveal its origin of

66. *Id.* at 172.
67. Hensel, *supra* note 64, at 356.
68. *Id.*
69. GLENN, *supra* note 63 at 173.
70. Green, *supra* note 49.
71. *See* Ams. United for Separation of Church & State Fund, Inc. v. State, 648 P.2d 1072, 1083–84 (Colo. 1982).

religious discrimination in violation of the First Amendment.

A. The Colorado Supreme Court Misinterpreted Article IX, § 7

In striking down the CSP, the Colorado Supreme Court relied heavily on the language of Article IX, § 7 that proscribes school districts from appropriating funds to aid sectarian institutions. However, a careful analysis of the program reveals that the CSP did not directly aid its private school partners. Thus, the first error committed by the plurality is its overly broad interpretation of the language of Article IX, § 7, which reads:

> Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever.[72]

The plurality gave lip service to the fact that the funds from the CSP were paid directly to students, but then went on to conclude that

> section 7's prohibitions are not limited to direct funding. Rather, section 7 bars school districts from "pay[ing] from any public fund or moneys *whatever, anything* in aid of any" religious institution, and from "help[ing] *support or sustain* any school . . . controlled by any church or sectarian denomination *whatsoever*."[73]

But as Justice Eid pointed out in her dissent, the prohibition in Article IX, § 7 is limited to expenditures that "support or sustain" a sectarian institution—in other words, direct

72. COLO. CONST. art. IX, § 7.

73. Douglas Cty., 351 P.3d 461, 470 (Colo. 2015), *vacated*, 137 S. Ct. 2327, *and mandate recalled*, 2017 WL 4052212 (Colo. 2017) (quoting COLO. CONST. art. IX, § 7) (emphasis added in original).

expenditures.[74] The words "whatever" and "whatsoever" give further emphasis only to the proscription on expenditures as described in section 7.[75] They do not, however, expand or modify the language to prohibit expenditures that incidentally benefit certain schools.[76]

This distinction was articulated in *Americans United for Separation of Church and State Fund, Inc. v. State*, where the Colorado Supreme Court held that a strikingly similar scholarship program in Colorado complied with the Colorado Constitution and the U.S. Constitution.[77] In analyzing Article IX, § 7 of the Colorado Constitution, the court held that where the aid is intended to benefit the student, "[a]ny benefit to the institution appears to be the unavoidable by-product of the administrative role relegated to it by the statutory scheme. Such a remote and incidental benefit does not constitute, in our view, aid to the institution itself within the meaning of Article IX, Section 7."[78] The Douglas County CSP was designed to benefit students and families; thus, any benefit to the private school partners is nothing more than an "incidental benefit" and does not run afoul of Article IX, § 7.

B. The Colorado Supreme Court Wrongly Dismissed the Supreme Court's Establishment Clause Line of Cases

There is a fine line between Colorado's Article IX, § 7 and the Establishment Clause of the U.S. Constitution. For example, in *Americans United*, the court stated:

> [T]he Colorado constitutional provisions relied upon by the [Appellants] . . . address interests not dissimilar in kind to those embodied in the Free Exercise and Establishment Clauses of the First Amendment and, although not necessarily determinative of state constitutional claims, First Amendment jurisprudence cannot be totally divorced from the resolution of these claims. In interpreting the Colorado Constitution, in other words, we cannot erode or undermine any paramount right flowing from the First

74. *Id.* at 481 (Eid, J., dissenting).
75. *Id.* at 480–81.
76. *Id.* at 481.
77. 648 P.2d 1072 (Colo. 1982).
78. *Id.* at 1083–84.

Amendment.[79]

This Section analyzes how the plurality in *Douglas County* seemingly used the available First Amendment arguments when they were helpful to its position and dismissed the First Amendment as irrelevant to Article IX, § 7 when they were not.

In *Americans United*, the Colorado Supreme Court examined a grant program similar to the Douglas County CSP.[80] The Colorado legislature in 1977 passed Senate Bill 398, which created the Colorado Student Incentive Grant Program (CSIG) to provide grants based on financial need to eligible students in order to attend in-state institutions of higher learning.[81] The grants were paid directly to the institution, and the student's tuition bill was reduced accordingly.[82] Because the aid in the CSIG was directly distributed, in some cases, to religious schools, the state legislature took measures to ensure that the program would not violate the U.S. Supreme Court's Establishment Clause line of cases dealing with similar grant programs.[83] That line of cases employed a three-prong test to determine whether aid to religious institutions violated the First Amendment.[84] First, there had to be a secular legislative purpose for the aid.[85] Second, the principal purpose could not be to advance nor inhibit religion.[86] Third, the aid could not create an "excessive entanglement with religion."[87] In light of this test, the Colorado state legislature prohibited grants from being distributed to "pervasively sectarian" institutions.[88] The legislature also built

79. *Id.* at 1078.
80. *Id.* at 1074.
81. *Id.*
82. *Id.* at 1081.
83. *See id.* at 1075.
84. *Id.* at 1079.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 1077. The factors for avoiding designation as "pervasively sectarian" were as follows:

> (a) The faculty and students are not exclusively of one religious persuasion; (b) There is no required attendance at religious convocations or services; (c) There is a strong commitment to principles of academic freedom; (d) There are no required courses in religion or theology that tend to indoctrinate or proselytize; (e) The governing board does not reflect nor is the membership limited to persons of any particular religion; (f) Funds do not come primarily or predominantly from sources

in several other measures, including a provision that prohibited institutions from decreasing their own aid to the student receiving funding through the CSIG.[89]

Because the state legislature went to great lengths to comply with the Establishment Clause, and because the religion clauses of the Colorado Constitution cannot be read in complete isolation from the First Amendment, the Colorado Supreme Court analyzed the CSIG from both perspectives.[90] The court began its analysis of the CSIG by examining it in light of the First Amendment.[91] It paid most of its attention to the second prong of the test.[92] The court compared the aid provided by the CSIG to aid in other programs around the country.[93] For example, the Supreme Court sustained legislation in Connecticut that provided construction grants to colleges and universities, including four Catholic institutions.[94] In another case, the Supreme Court upheld the application of a South Carolina Educational Facilities Authority to a Baptist-controlled college.[95] The Educational Facilities Authority assisted schools in the financing and construction of their facilities.[96] In both cases, the Supreme Court relied on safeguards like the CSIG's prohibition on "pervasively sectarian" institutions to uphold the direct aid provided to the religious institutions.[97] Accordingly, the Colorado Supreme Court in *Americans United* held that the CSIG did not violate the Establishment Clause of the First Amendment.[98]

The Colorado Supreme Court then analyzed Article IX, § 7 separately from the First Amendment.[99] To be clear, the court relied on some of the same factors in its analysis of Article IX, § 7 as it did the First Amendment;[100] however, the court held that the prohibition on "pervasively sectarian" institutions was

advocating a particular religion.

Id. at 1075.

89. *Id.* at 1075.
90. *Id.* at 1078.
91. *Id.*
92. *Id.* at 1079–81.
93. *Id.* at 1080.
94. *Id.* (citing Tilton v. Richardson, 403 U.S. 672 (1971)).
95. *Id.* (citing Hunt v. McNair, 413 U.S. 734 (1973)).
96. *Id.*
97. *Id.* at 1080.
98. *Id.* at 1081.
99. *Id.* at 1083.
100. *See id.* at 1083–84.

not dispositive to the question under the Colorado Constitution.[101] Article IX, § 7 limits all expenditures to "sectarian" institutions, so it is feasible that even a limit on "pervasively sectarian" institutions would not answer the question of whether the CSIG violates the Colorado Constitution.[102] Thus, the *Americans United* court relied on the "pervasively sectarian" limitation in upholding the CSIG on First Amendment grounds but not necessarily on Article IX, § 7 grounds.[103]

This distinction is important when reading the plurality opinion in *Douglas County*. The plurality is quick to dismiss the Establishment Clause line of cases, stating that, "[b]y its terms, section 7 is far more restrictive than the Establishment Clause regarding governmental aid to religion, and the Supreme Court has recognized that state constitutions may draw a tighter net around the conferral of such aid."[104] As discussed below, not only is that a troubling approach to Colorado's religion clauses, but it also calls into question the plurality's reliance on the CSP's lack of a limitation on "pervasively sectarian" institutions. A close reading of *Americans United* indicates that the limit on "pervasively sectarian" institutions was critical to the court's analysis under the First Amendment but significantly less so in the context of Article IX, § 7. Thus, the plurality seemingly reached its decision by selectively reading its own precedent in *Americans United*.

Lastly, the plurality erred by distinguishing the Supreme Court's decision in *Zelman v. Simmons-Harris*[105] and another similar Establishment Clause case.[106] In *Zelman*, the Supreme Court upheld on First Amendment grounds a true private school choice program in Ohio because it determined that "the link between government funds and religious training is broken by the independent and private choice of recipients."[107] In order to avoid the First Amendment discussion, the plurality stated that Article IX, § 7 is "far more restrictive than the

101. *Id.* at 1083.
102. *Id.*
103. *See id.* at 1083–84.
104. Douglas Cty., 351 P.3d 461, 474 (Colo. 2015), *vacated*, 137 S. Ct. 2327, *and mandate recalled*, 2017 WL 4052212 (Colo. 2017).
105. 536 U.S. 639 (2002).
106. *Douglas Cty.*, 351. P.3d at 475.
107. Locke v. Davey, 540 U.S. 712, 719 (2004) (citing *Zelman*, 536 U.S. at 652).

Establishment Clause."[108] But the plurality improperly conflated more specificity with more restriction.[109] In other words, just because Article IX, § 7 includes more specific language about prohibitions of certain expenditures doesn't mean it should be severed from applicable First Amendment case law.[110] In discussing the religion clauses of the Colorado Constitution, the *Americas United* court declared that it read them "to embody the same values of free exercise and government non-involvement secured by the religious clauses of the First Amendment."[111] And because the court determined that the aid was intended to benefit the student and not the institution, the court held that the program was not unconstitutional.[112]

As the *Americans United* court correctly recognized, First Amendment principles cannot be divorced from the analysis of Colorado's religion clauses. The Colorado Supreme Court was wrong to do so in *Douglas County*.

C. The Colorado Supreme Court Wrongly Distinguished Its Decision in Americans United

The plurality also erred in distinguishing *Americans United* on the facts. The plurality opinion went to great lengths to discuss all of the factual differences between the CSP and the CSIG; however, many of the differences between the two grant programs are not really differences at all.[113] For example, in distinguishing *Americans United*, the plurality relied on the fact that the CSIG was different because it awarded grants to students attending both public and private institutions where the CSP only awarded grants to those students attending private schools.[114] The court in *Americans United* determined that the availability of grants for public and private schools "dispell[ed] any notion that the aid is calculated to enhance the ideological ends of the sectarian institution."[115]

108. *Douglas Cty.*, 351 P.3d at 474.
109. *Id.* at 483.
110. *Id.*
111. Ams. United for Separation of Church & State Fund, Inc. v. State, 648 P.2d 1072, 1081–82 (Colo. 1982).
112. *Id.* at 1082.
113. *Douglas Cty.*, 351 P.3d at 482 n.2.
114. *Id.* at 472–73.
115. *Ams. United*, 648 P.2d at 1084.

In reality, the Douglas County CSP involved a de facto public grant option because those students who would not receive a grant to attend a private school would still receive a regular public education in a district-run school. In other words, the public grant option came in the form of the student's per-pupil-revenue from the state, which allowed that student to attend any public school in the district.

The plurality also relied heavily on the fact that the CSIG in *Americans United* included a provision that did not allow an educational institution to decrease its own tuition assistance to offset the grant.[116] However, even though the CSP did not include a similar provision, the Douglas County School District assistant superintendent stated that "if a Private School Partner reduced a recipient's scholarship amount in such a manner, the action would 'go against the intended contract' of the CSP."[117] While the plurality recognized this fact,[118] it chose to take a very formalistic reading by in essence saying to the district: "tough luck, you should have written it down." Even if Private School Partners did adjust their tuition on account of the CSP grant, it is not sufficient to cast aside the legal principle laid down in *Americans United*, which—at its core—is that an indirect benefit to a religious institution does not violate Article IX, § 7.

Other differences pointed out by the plurality are not persuasive in distinguishing *Americans United*. For example, the plurality relied on the difference between higher education and primary/secondary education, stating that, "as a general rule religious indoctrination is not a substantial purpose of sectarian colleges and universities," thus "there is less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education."[119] This ignores the reality that even if there were some form of religious indoctrination, parents are likely choosing the particular school for that very purpose. Thus, the purported danger is mitigated.

With respect to the various differences between the two programs, the plurality also undermined much of its argument. Many of the distinctions pointed out by the plurality are less

116. *Douglas Cty.*, 351 P.3d at 473.
117. *Id.* at 465 n.5.
118. *Id.*
119. *Id.* at 472 (quoting *Ams. United*, 648 P.2d at 1084).

persuasive based on the plurality's admission that it might not have made a difference even had the Douglas County School District included similar provisions in the CSP as were included in the CSIG in *Americans United*.[120] In other words, the plurality in essence admitted that even if the CSP had been identical to the CSIG, the court might still have struck it down. This admission undercuts the plurality's effort to distinguish *Americans United* and the CSIG.

Finally, even if *Americans United* is distinguishable, the CSP is on firmer ground than the CSIG anyhow. While both programs were intended to benefit the student rather than the institution,[121] which was the dispositive factor in *Americans United*, the CSP was one of true private choice because the money was given directly to the student.[122] Conversely, in the CSIG the money was given directly to the institution.[123] Accordingly, striking down the CSP because it did not mirror the CSIG in all respects was inappropriate.

D. The Colorado Supreme Court Failed to Look Beyond the Plain Language of Article IX, § 7 to See that the Provision Is Unconstitutionally Discriminatory

In *Douglas County*, the plurality refused to look beyond the "plain language" of the text of Article IX, § 7 and instead determined that "sectarian" was synonymous with "religion," relying on Black's Law Dictionary.[124] However, the Court was obligated to read the text beyond its "plain language" to determine if it was discriminatory.[125] In avoiding the inquiry, the plurality relied upon *People v. Rodriguez*, which held that "constitutional provisions will be enforced as written whenever their language is plain and their meaning is clear."[126] While that may be sound as a general legal principle, it does not relieve a court of its duty to consider constitutional

120. *Id.* at 472 n.18 (stating that "[w]e do not suggest, of course, that grafting such limitations onto the [CSP] would necessarily render it compliant with section 7").

121. *See* DOUGLAS CTY. SCH. DIST., *supra* note 3.

122. *Id.*

123. *See Ams. United*, 648 P.2d at 1081.

124. *Douglas Cty.*, 351 P.3d at 470.

125. *Id.* at 483–84 (Eid, J., dissenting).

126. *Id.* at 484 (quoting People v. Rodriguez, 112 P.3d 693, 696 (Colo. 2005)) (internal quotation marks omitted).

implications simply because a provision appears neutral on its face.

The U.S. Supreme Court made this point clear in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeth* when it required closer scrutiny of what was alleged to be a neutral city ordinance banning ritual animal sacrifice.[127] In reality, the ordinance was designed to prohibit a central religious practice of the Santeria faith.[128] The Court rejected the argument made by the city that the inquiry "must end with the text of the laws at issue."[129] Instead, the Court held that "[t]he Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. [It] protects against governmental hostility which is masked, as well as overt. The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances."[130] Accordingly, the Court went on to analyze the ordinance under strict scrutiny.[131]

Here, even the plurality in *Douglas County* admitted that if Article IX, § 7 used the word Catholic instead of sectarian, it would be plainly unconstitutional.[132] That is exactly what sectarian meant in Article IX, § 7. The U.S. Supreme Court recognized that fact in *Mitchell v. Helms*, where the opinion discusses the "shameful pedigree" of Blaine Amendments and how "it was an open secret that sectarian was code for Catholic."[133] As Justice Eid pointed out in her dissent, a majority of Justices in *Mitchell* did not join the controlling opinion, but in her concurrence, Justice O'Connor raised no objections to the historical context.[134] Instead, she took issue with the rationale of the plurality opinion.[135]

Despite Chief Justice Rice's assertion to the contrary, the plurality in *Douglas County* was obligated to "wade into the history of section 7's adoption."[136] The fact that "sectarian" has

127. 508 U.S. 520, 534 (1993).
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 546.
132. Douglas Cty., 351 P.3d 461, 471 n.17 (Colo. 2015), *vacated*, 137 S. Ct. 2327, *and mandate recalled*, 2017 WL 4052212 (Colo. 2017).
133. Mitchell v. Helms, 530 U.S. 793, 828 (2000) (internal quotation marks omitted).
134. *See id.* at 837.
135. *Id.*
136. *Douglas Cty.*, 351 P.3d at 471.

been interpreted to mean religion, rather than discriminating against the Catholic faith alone, does not save Article IX, § 7 from Constitutional scrutiny. Discrimination against religion generally is as dubious as singling out a particular faith.[137] In fact, in the wake of *Douglas County*, the Douglas County School District revamped the CSP to exclude all religious private schools from participating but kept most of the CSP intact.[138] As a result, the Institute for Justice, an organization that supported Douglas County in the original lawsuit, sued the school district for excluding all religious schools from participating.[139] The lawsuit alleges that the exclusion of religious schools violates the First and Fourteenth Amendments.[140]

For these reasons, the Colorado Supreme Court wrongly decided the case in *Douglas County*. However, after the U.S. Supreme Court's opinion in *Trinity Lutheran*, it is even clearer that the court made a further fundamental error in its opinion.

III. THE U.S. SUPREME COURT SHOULD TAKE UP THE ISSUE OF BLAINE AMENDMENTS IN THE CONTEXT OF SCHOOL CHOICE

For now, the Colorado Supreme Court's opinion in *Douglas County* is irrelevant in Colorado given the fact that the opinion has been vacated. But the court's opinion is still troubling, particularly in light of the U.S. Supreme Court's recent decision in *Trinity Lutheran*. The case on remand to the Colorado Supreme Court would have been the first opportunity for a state high court to address Blaine Amendments in the context of private school choice programs since *Trinity Lutheran*. Because that opportunity has now passed without resolution, it is time for the U.S. Supreme Court to address the issue when the next opportunity presents itself.

Though the CSP in Douglas County is no longer a live case or controversy, analyzing it in light of *Trinity Lutheran*

137. *See* McDaniel v. Paty, 435 U.S. 618, 621 (1978) (striking down a Tennessee statute barring "Minister[s] of the Gospel, or priest[s] of any denomination whatever" from serving as delegates to the state's limited constitutional convention, as violating the Free Exercise Clause).

138. *Douglas County Religious Exclusion*, INST. FOR JUST., http://ij.org/case/douglas-county-religious-exclusion/ (last visited Feb. 4, 2017) [https://perma.cc/VHR9-K6HF].

139. *Id.*

140. *Id.*

establishes why the U.S. Supreme Court should finally take up the issue. Specifically, Article IX, § 7 of the Colorado Constitution, as applied to strike down the CSP, violates the Free Exercise Clause of the First Amendment.

As discussed in Part I, the Colorado Supreme Court struck down the Douglas County Choice Scholarship Program by holding that it violated Article IX, § 7 of the Colorado Constitution. In large part, the decision was based on the determination that Article IX, § 7 is more restrictive than the Establishment Clause. Thus, even though the CSP does not run afoul of the anti-establishment principles of the U.S. Constitution, according to the Colorado Supreme Court, it nonetheless violated Colorado's state constitution. But after *Trinity Lutheran*, it is clear that striking down the CSP under Article IX, § 7 violates the First Amendment. First, regardless of whether the Colorado Constitution is more restrictive than the Establishment Clause, the court's holding with respect to Article IX, § 7 violates the Free Exercise Clause. Second, denying religious schools from participating in the CSP is not a neutral and generally applicable restriction. Third, *Locke v. Davey* is distinguishable and does not justify striking down the CSP under Article IX, § 7. Finally, footnote three of *Trinity Lutheran*, which limits the scope of the holding, does not nullify the First Amendment principles as applied to private school choice programs.

A. Regardless of Whether Article IX, § 7 Is More Restrictive than the Establishment Clause, the Colorado Supreme Court's Holding Violates the Free Exercise Clause

Article IX, § 7 of the Colorado Constitution, as applied to strike down the CSP, violates the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[141] In declaring that the CSP violated the Colorado Constitution, the court correctly recognized that the Establishment Clause does not preclude students from using public scholarship funds under the program at private religious

141. U.S. CONST. amend. I.

schools.[142] However, the court instead determined that Article IX, § 7, "by its terms . . . is far more restrictive than the Establishment Clause regarding governmental aid to religion."[143] Even if this determination is correct with respect to applying the antiestablishment principles of the Colorado Constitution to the CSP, it does not settle the issue, as the Supreme Court "ha[s] recognized that there is play in the joints between what the Establishment Clause permits and the Free Exercise Clause compels."[144] Here, the Free Exercise Clause indeed compels a finding that Article IX, § 7, as applied to strike down the CSP, is unconstitutional.

The Establishment Clause and the Free Exercise Clause, while written into the same sentence of the First Amendment, are not necessarily coextensive.[145] The "principle at the heart of the Establishment Clause [is] that government should not prefer one religion to another, or religion to irreligion."[146] In contrast, the Free Exercise Clause "protects religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status."[147]

Accordingly, it is firmly established that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'"[148] As the majority opinion in *Trinity Lutheran* points out, this principle of the Free Exercise Clause has been

142. Douglas Cty., 351 P.3d 461, 473–74 (Colo. 2015), *vacated*, 137 S. Ct. 2327, *and mandate recalled*, 2017 WL 4052212 (Colo. 2017). The Supreme Court addressed a similar public school grant program in *Zelman v. Simmons-Harris* and held that it did not violate the Establishment Clause because the Ohio program was one of "true private choice" and was "neutral in all respects toward religion." 536 U.S. 639, 653 (2002).

143. *Douglas Cty.*, 351 P.3d at 474.

144. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017) (internal quotation marks omitted).

145. *See* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting) ("[T]he fact is that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause.").

146. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994).

147. *Trinity Lutheran*, 137 S. Ct. at 2019 (internal quotation marks omitted).

148. *Id.* (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

"repeatedly confirmed" by the Supreme Court.[149] For example, in *Everson v. Board of Education of Ewing*, the Supreme Court was faced with the issue of whether a state law that allowed parents to receive reimbursement for expenses associated with transporting their children to both public and private schools alike, including religious private schools, violated the First Amendment.[150] The appellant, a district taxpayer, filed suit in federal court, arguing that the law "respect[ed] an establishment of religion."[151] Thus, while the Supreme Court upheld the law under the Establishment Clause, it went on to note that the state "cannot hamper its citizens in the *free exercise* of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[152]

More recently, the Supreme Court applied this principle to a free exercise challenge to a state law that prevented ministers from serving as delegates to the state's constitutional convention.[153] The Court held that the free exercise of the petitioner's constitutional liberties was penalized because of his status as a minister.[154] Put another way, he could not "exercise both rights [serving as a minister and serving as a delegate] simultaneously because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is punishing a religious profession with the privation of a civil right."[155] Concurring in the opinion, Justice Brennan elaborated: "[B]ecause the challenged provision requires [McDaniel] to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion."[156]

In *Trinity Lutheran*, the Court applied these First Amendment principles to a preschool that was denied a publicly available state grant simply because it was religiously affiliated. "Like the disqualification statute in *McDaniel*," the

149. *Id.*
150. 330 U.S. 1, 3 (1947).
151. *Id.* at 3, 8.
152. *Id.* at 16 (emphasis added).
153. *See* McDaniel v. Paty, 435 U.S. 618 (1978).
154. *Id.* at 626–27.
155. *Id.* at 626 (internal quotation marks omitted).
156. *Id.* at 634 (Brennan, J., concurring).

Court stated, "the Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution."[157] The Court explained that Trinity Lutheran was of course free to continue to run its preschool, "[b]ut that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified."[158] Accordingly, the Court held that denying Trinity Lutheran the opportunity to compete for a grant imposes a penalty on the free exercise of religion.[159] In order to survive, the restriction would have to be justified by a "state interest of the highest order."[160] The only interest advanced by the State of Missouri was its "policy preference for skating as far as possible from religious establishment concerns."[161] The Court held that the state's interest, when viewed in light of the clear violation of the free exercise of religion, was not sufficiently compelling to justify the infringement.[162]

Here, similar to both *McDaniel* and *Trinity Lutheran*, the Colorado Supreme Court's decision to strike down the CSP under Article IX, § 7 forces individuals—or in this case, religious institutions—to "purchase [their] right to engage in the ministry by sacrificing" their ability to participate in the CSP.[163] In other words, for religious schools to participate as Private School Partners in the CSP (or a similar grant program to be available in the future), they would have to make a choice: "[They] may participate in an otherwise available benefit program or remain a religious institution."[164] Accordingly, by striking down the CSP under Article IX, § 7, the court has imposed a "penalty on the free exercise of religion that must be subjected to the most rigorous scrutiny."[165]

The Colorado Supreme Court's opinion perhaps did more than simply state a policy preference for steering clear of establishment concerns; however, it explicitly refused to look

157. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021–22 (2017).
158. *Id.* at 2022.
159. *Id.* at 2024.
160. *Id.* (citation omitted) (internal quotation marks omitted).
161. *Id.*
162. *Id.*
163. McDaniel v. Paty, 435 U.S. 618, 634 (1978) (Brennan, J., concurring).
164. *Trinity Lutheran*, 137 S. Ct. at 2021–22.
165. *Id.* at 2024 (citation omitted) (internal quotation marks omitted).

any further than the plain language of Article IX, § 7 and thus ignored any free exercise concerns.[166] Specifically, the court stated:

> [Douglas County] . . . encourage[s] us to wade into the history of section 7's adoption and declare that the framers created section 7 in a vulgar display of anti–Catholic animus. We need not perform such an exegesis to dispose of [its] argument. Instead, we need merely recall that constitutional provisions must be declared and enforced as written whenever their language is plain and their meaning is clear.[167]

Accordingly, the court's decision does nothing to address whether there is a state interest sufficiently compelling to justify the clear infringement on the free exercise of religion. Instead, it focused solely on Colorado's own anti-establishment principles and merely distinguished another Colorado Supreme Court opinion, as discussed in Part I, which upheld a strikingly similar grant program.[168] The court's treatment of the CSP in this respect does more than state a policy preference; however, its reasons for departing from its own Article IX, § 7 precedent do not provide sufficient justification to survive the "most rigorous scrutiny" required when the free exercise of religion is infringed. The fact that *Americans United* is still good law in Colorado undermines any argument that there is a "state interest of the highest order" that would justify striking down the CSP, given the nuanced differences between the two grant programs.

The First Amendment principles articulated in *Trinity Lutheran* establish that the Colorado Supreme Court's decision to strike down the CSP under Article IX, § 7 imposes an impermissible penalty on the free exercise of religion that cannot be justified by a sufficient state interest.

166. *See* Douglas Cty., 351 P.3d 461, 471 (Colo. 2015), *vacated*, 137 S. Ct. 2327, *and mandate recalled*, 2017 WL 4052212 (Colo. 2017).

167. *Id.*

168. *Id.* (referencing Ams. United for Separation of Church & State Fund, Inc. v. State, 648 P.2d 1072, 1083–84 (Colo. 1982)).

B. Preventing Religious Schools from Participating in the Choice Scholarship Program Is Not a Neutral and Generally Applicable Restriction

When the Supreme Court has rejected free exercise challenges in similar situations, it typically is because the law in question was "neutral and generally applicable without regard to religion."[169] For example, the Court rejected a free exercise challenge when the government built roads and harvested timber on particular tracts of federal land even though the land was considered sacred by certain Native American Tribes.[170]

Additionally, in *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court similarly rejected a free exercise challenge brought by two Native American church members who were denied unemployment benefits because they had ingested peyote.[171] The Court rejected the argument that "religious motivation for using peyote places [the church members] beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons."[172]

Moreover, it is irrelevant in *Trinity Lutheran* that the state of Missouri had not criminalized the practice of religion like in *Smith*, or had otherwise prevented the preschool from engaging in religious activities. Rather—the argument goes—the state simply declined to extend a subsidy to the preschool, which it was not required to provide anyway. The Court rejected the argument and stated that "the Free Exercise Clause protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions."[173] Put differently, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or

169. *See Trinity Lutheran*, 137 S. Ct. at 2020.

170. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988) (holding that there was no free exercise violation, because "the affected individuals [were not being] coerced by the Government's action into violating their religious beliefs").

171. 494 U.S. 872 (1990).

172. *Id.* at 878.

173. *Trinity Lutheran*, 137 S. Ct. at 2022 (citation omitted) (internal quotation marks omitted).

placing of conditions upon a benefit or privilege."[174]

Here, it is clear that the inability of private religious schools to participate in the CSP is not a neutral and generally applicable restriction. Rather, it applies only to religious schools and is specifically targeted to exclude them because of their status as such. Thus, the prohibition on religious schools here is squarely opposite the facts in *Lyng v. Northwestern Indian Cemetery Protective Association* and *Smith*.

Even if the restriction were neutral and generally applicable, the argument that the private religious schools are not burdened by their exclusion because the grants are awarded directly to students, not schools, fails. First, the Colorado Supreme Court made clear that:

> [T]he CSP does not explicitly funnel money directly to religious schools, instead providing financial aid to students. But section 7's prohibitions are not limited to direct funding. Rather, section 7 bars school districts from "pay[ing] from any public fund or moneys whatever, anything in aid of any" religious institution, and from "help[ing] support or sustain any school . . . controlled by any church or sectarian denomination whatsoever."[175]

Thus, according to the court, there is no real distinction between direct and indirect aid; rather, the inquiry is purely whether the religious school benefits from the aid in any way whatsoever.[176] Accordingly, the court cannot evade the mandates of the First Amendment by relying on an argument that it has already rejected.

Second, even if the court could distinguish its earlier finding from an inquiry under the Free Exercise Clause rather than Article IX, § 7, Supreme Court precedent is clear that "indirect coercion or penalties on the free exercise of religion" are just as offensive to the First Amendment as "outright prohibitions."[177] Thus, it makes no difference here that the aid is awarded directly to students; the private schools are penalized nonetheless from competing on equal footing for

174. Sherbert v. Verner, 374 U.S. 398, 404 (1963).

175. Douglas Cty., 351 P.3d 461, 470 (Colo. 2015), *vacated*, 137 S. Ct. 2327, *and mandate recalled*, 2017 WL 4052212 (Colo. 2017).

176. *See id.*

177. *Trinity Lutheran*, 137 S. Ct. at 2022.

students who have received a grant through the CSP.

Because the exclusion of religious schools is not neutral and generally applicable, it cannot pass constitutional muster, regardless of whether or not the aid is passed directly to the school.

C. Locke v. Davey *Is Distinguishable and Does Not Justify Striking Down the Choice Scholarship Program under Article IX, § 7*

Striking down the CSP under Article IX, § 7 cannot be justified by the holding in *Locke v. Davey*.[178] *Locke* involved a program in the State of Washington, which allowed students to apply for college scholarships that were awarded on the basis of family income and college entrance exam scores.[179] Students were free to use their scholarships at public and private institutions, including religious schools.[180] However, students were not allowed, under the program, to use their scholarship to pursue a degree in devotional theology. Joshua Davey was awarded a scholarship; however, he was refused the funds after he declared a major in pastoral ministries.[181]

The Supreme Court rejected Davey's First Amendment challenge. The Court made clear that the Washington program is not like the earlier line of free exercise cases, like *McDaniel*, where the Court invalidated laws that forced individuals "to choose between their religious beliefs and receiving a government benefit."[182] Rather, the state of Washington simply chose not to fund a particular type of degree program.[183]

In *Trinity Lutheran*, the state of Missouri relied on *Locke* to argue that the state of Washington's restriction on scholarship funds was indistinguishable from Missouri's denial of funds to the preschool.[184] However, in interpreting the holding, the Court distinguished *Davey* by noting that "Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do—use

178. 540 U.S. 712 (2004).
179. *Id.* at 715–16.
180. *Id.* at 716.
181. *Id.* at 717.
182. *Id.* at 720–21.
183. *Id.*
184. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022–23 (2017).

the funds to prepare for the ministry."[185] And—according to the Court—there could be no doubt that Trinity Lutheran was denied funding "simply because of what it is—a church."[186]

The *Trinity Lutheran* Court recognized that the holding in *Locke* gave weight to the state of Washington's anti-establishment interests in rejecting the free exercise challenge.[187] However, the *Locke* Court considered only the state's anti-establishment interests after determining that applicants were not forced to choose between their religion and a publicly available benefit.[188] Rather, the program in Washington explicitly allowed students to use scholarships at private religious institutions.[189] They could even use their scholarships to take religious course offerings; they just could not pursue degrees in devotional theology.[190] *Trinity Lutheran's* reading of *Locke* thus implies that a state's anti-establishment interests are irrelevant if those interests impose a penalty on the free exercise of religion by forcing individuals to choose between their religion and a publicly available benefit.[191]

Here, like in *Trinity Lutheran*, there is no doubt that religious schools are excluded from the CSP simply because of what they are—religious schools—not because of what they propose to do.

For example, the CSP allowed students to waive any required attendance at religious services at the private school.[192] And, the Douglas County School District stated that any private school that reduced its own tuition assistance to offset the CSP grant would "go against the intended contract" of the program.[193] These facts undercut arguments that the exclusion of religious schools is anything but a restriction based on religious status. Relatedly, arguing that the CSP scholarship may not cover the full cost of private school tuition does not rise to the level of a "state interest of the highest order" sufficient to strike down the program, as the Colorado

185. *Id.* at 2023.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 2023–24.
191. *See id.* at 2023.
192. Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 356 P.3d 833, 838 (Colo. App. 2013).
193. Douglas Cty., 351 P.3d 461, 465 n.5 (Colo. 2015), *vacated*, 137 S. Ct. 2327, *and mandate recalled*, 2017 WL 4052212 (Colo. 2017).

Supreme Court has "refuse[d] . . . to venture into the realm of social policy under the guise that there is a fundamental right to education which calls upon us to find that equal educational opportunity requires equal expenditures for each school child."[194]

Moreover, as already discussed in Section III.A, the exclusion of religious schools imposes a penalty on the free exercise of religion that can be justified only by a "state interest of the highest order." And, as *Trinity Lutheran* indicates, simply relying on a state's anti-establishment interests (in this case, Article IX, § 7) is irrelevant if individuals are forced to choose between their religion and a publicly available benefit. Because religious schools here must "purchase [their] right to engage in the ministry by sacrificing" their ability to participate in the CSP,[195] striking down the program based on Colorado's anti-establishment interests is not a sufficiently compelling state interest.

D. Footnote Three of Trinity Lutheran *Does Not Nullify the First Amendment Principles as Applied to Private School Grant Programs*

Regardless of the Supreme Court's decision to limit its holding to "express discrimination based on religious identity with respect to playground resurfacing,"[196] general First Amendment principles apply in equal force to private school grant programs. In other words, footnote three simply states that the Supreme Court is purely deciding the case on its specific facts; it does not give lower courts a free pass to ignore the constitutional mandates articulated in the holding.

Justice Gorsuch correctly noted in his concurring opinion "that some might mistakenly read it to suggest that only 'playground resurfacing' cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion."[197] To emphasize the point that such a reading would be misguided, Justice Gorsuch recalled that "[Supreme

194. Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982).
195. McDaniel v. Paty, 435 U.S. 618, 634 (1978) (Brennan, J., concurring).
196. *Trinity Lutheran*, 137 S. Ct. at 2024 n.3.
197. *Id.* at 2026 (Gorsuch, J., concurring).

Court] cases are governed by general principles, rather than ad hoc improvisations."[198]

As a practical matter, if the Supreme Court believed that its opinion had no application to the CSP in Douglas County, there would be no reason for it to grant certiorari, vacate the Colorado Supreme Court's earlier opinion, and remand the case in light of *Trinity Lutheran*. If that were the case, the briefing on remand with regard to Article IX, § 7 would be fairly straightforward: "*See* Footnote 3." The Supreme Court clearly did not intend that kind of absurd result on remand.

Accordingly, lower courts should faithfully apply the First Amendment principles as articulated in *Trinity Lutheran*, regardless of the limited scope of the Supreme Court's holding.

IV. THE PARTIES' JOINT MOTION TO DISMISS SHEDS LIGHT ON THE IMPACT OF *TRINITY LUTHERAN* ON SIMILAR PRIVATE SCHOOL CHOICE PROGRAMS

It was not surprising that the Douglas County School Board directed its attorneys to end the litigation after it ended the CSP. But it is somewhat peculiar that the petitioners preferred to dismiss the case—returning the law in Colorado to *Americans United*. In other words, while the petitioners finally got what they wanted—the end of the CSP—they spent years of litigation on a case that does not carry any precedential value despite the fact that they prevailed in the end result. Even though Douglas County ended the CSP, petitioners had a strong argument that the case was not moot and could have pressed the Colorado Supreme Court to rehear the case. Prevailing on remand would have gone a long way to cement the petitioners' efforts and block future private school choice programs in Douglas County and Colorado at-large—short of the U.S. Supreme Court intervening of course. The fact that they chose not to pursue further litigation signals the weakness of their argument after *Trinity Lutheran*.

198. *Id.* (Rehnquist, C. J., concurring) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 25 (2004)).

A. The Case Was Not Moot Even Though the Douglas County School District Board of Education Ended the Choice Scholarship Program

Despite the fact that the newly elected Board of Education in Douglas County ended the Choice Scholarship Program,[199] traditional standing doctrine establishes that the case is not necessarily moot. More specifically, the case is moot only if the school district can establish that "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[200] Thus, petitioners could have pressed the Colorado Supreme Court to hear the case.

In *Trinity Lutheran*, days before the Supreme Court was scheduled to hear oral arguments, the Missouri governor reversed the position of the state department responsible for the playground resurfacing program and decided to allow churches like Trinity Lutheran to compete for the grants.[201] It was then uncertain whether the Supreme Court would dismiss Trinity Lutheran's appeal and rule that the case was moot. But the Court correctly determined that the state "ha[d] not carried the heavy burden of making absolutely clear that it could not revert to its policy of excluding religious organizations."[202]

Here, the newly elected Douglas County School District Board of Education voted unanimously to rescind the CSP on December 4, 2017.[203] But the board's decision is factually indistinguishable from the governor's decision in *Trinity Lutheran* to allow religious organizations to compete for playground resurfacing grants. Douglas County remains—notwithstanding the fact that it petitioned the Supreme Court to grant certiorari—the respondent in the case on remand to the Colorado Supreme Court. Thus, the board's decision only makes the pending lawsuit moot if the school district can guarantee that a future board of education could not implement the grant program.

199. Anderson, *supra* note 19.

200. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (internal quotation marks omitted).

201. *Trinity Lutheran*, 137 S. Ct. at 2019 n.1.

202. *Id.* (internal quotation marks omitted).

203. C. Silberman, *DCSD Board Rescinds Choice Scholarship Program*, DOUGLAS COUNTY SCH. DISTRICT (Dec. 6, 2017), https://www.dcsdk12.org/board-of-education/dcsd-board-rescinds-choice-scholarship-program [https://perma.cc/R6XJ-VSY8].

It is without question that the recent election went resoundingly in favor of those who opposed the CSP. But those who supported the CSP controlled the board of education for the better part of a decade. Given the fluid nature of the debate on school choice in Douglas County, the school district cannot establish that it is "absolutely clear that it could not revert to its [former] policy" given that the new board of education has been seated for less than a year. Perhaps if a similarly constituted board of education controls the school district for multiple election cycles to come, it could meet its burden of ensuring that a program similar to the CSP will not materialize; however, that is not the case here. Accordingly, like *Trinity Lutheran*, the case is not moot, and the Douglas County School District could have been forced to defend the lawsuit, notwithstanding the current board's lack of support for the CSP. The fact that the petitioners were content to have the case dismissed and all opinions vacated is strong evidence that they did not believe their chances of winning on remand were good after *Trinity Lutheran*.

B. Petitioners' Motion to Dismiss Evidences the Weakness of Their Case on Remand

For nearly seven years, petitioners have been litigating the case surrounding the Choice Scholarship Program. The drama started in mid-2011 when a Denver district court judge enjoined the CSP, concluding that it violated Article IX, § 7 of the Colorado State Constitution.[204] That decision was reversed in 2013 by the Colorado Court of Appeals,[205] only to be reversed again by the Colorado Supreme Court in 2015.[206] And as the foregoing discussion indicates, that was not the end of the story. In other words, petitioners spent the better part of a decade fighting the implementation of the CSP, no doubt spending millions of dollars in the process. And after all that effort, they prevailed. Yet, they were ostensibly willing to see their entire crusade limited to the narrow result of getting rid of the CSP with no precedent to prevent a similar program

204. Illescas & Navratil, *supra* note 8.

205. Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 356 P.3d 833, 842 (Colo. App. 2013).

206. Douglas Cty., 351 P.3d 461, 465 (Colo. 2015), *vacated*, 137 S. Ct. 2327, *and mandate recalled*, 2017 WL 4052212 (Colo. 2017).

from coming back in Douglas County or somewhere else in the state.

After the Douglas County Board of Education ended the CSP and directed their attorneys to no longer defend the case, Petitioners had two basic options: (1) go along with the school district to end the litigation or (2) argue that the case was not moot and, then on remand, argue that the Colorado Supreme Court's original opinion in *Douglas County* was not inconsistent with the First Amendment principles articulated in *Trinity Lutheran*. The fact that petitioners chose the first option, throwing away years of effort establishing that private school choice programs like the CSP are unconstitutional under Article IX, § 7 of the Colorado Constitution, signals that they did not feel confident in their case after *Trinity Lutheran*. In other words, petitioners likely believed that it would be better to simply live content with the fact that the CSP was gone rather than suffer the likelihood that the Colorado Supreme Court's opinion on remand would open the floodgates for more programs like the CSP throughout the state.

For school districts and state legislators with an appetite to create more high-quality educational options for students, the end of the legal drama surrounding the CSP—while disappointing—suggests that the future of the school choice movement in Colorado remains bright.

CONCLUSION

For supporters of the school choice movement, the Douglas County Choice Scholarship Program was a crown jewel. Its potential success could have served as a model for districts across the nation. Rather than wait around for state legislatures to enact statewide school choice initiatives, innovative school districts could have taken a page from Douglas County to better serve their students.

The ultimate fate of the CSP is an unfortunate setback for the school choice movement. But the legal drama sheds light on the shameful history of Blaine Amendments that still exist in state constitutions across the country. *Douglas County* was a perfect opportunity for the Supreme Court to squarely address the constitutionality of Blaine Amendments. While the Court did not deny certiorari, it unfortunately chose not to hear the case, preferring instead to remand it in light of its opinion in

Trinity Lutheran. Because of the increasingly political nature of school boards, the latest election in Douglas County ushered in a new board explicitly intent on ending the CSP. Consequently, the case has been dismissed, and the opportunity for a state high court to address private school choice programs like the CSP post-*Trinity Lutheran* has evaporated.

Ultimately, the conclusion of the litigation surrounding the CSP in Colorado should encourage school districts and state legislators to press on in creating similar private school choice programs to expand opportunities for all students. But with thirty-seven state constitutions containing Blaine Amendments, it will not be long before another court strikes down a program like the CSP to steer clear of anti-establishment concerns. When that day comes, it will be time for the U.S. Supreme Court to finally address the constitutionality of Blaine Amendments in the context of private school choice programs. Students should no longer be denied the educational experience that meets their needs based on state constitutional amendments that discriminate against religious faith. Until then, the school choice movement will soldier on.