Denver Law Review

Volume 96
Issue 1 *2018*

Article 5

March 2024

Lessons to Be Learned: Taxpayers for Public Education v. Douglas County School District and the Flaws of the Douglas County Choice Scholarship Program

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LESSONS TO BE LEARNED: *TAXPAYERS FOR PUBLIC EDUCATION V. DOUGLAS COUNTY SCHOOL DISTRICT* AND THE FLAWS OF THE DOUGLAS COUNTY CHOICE SCHOLARSHIP PROGRAM

ABSTRACT

With the 2016 election of President Donald Trump, educators, parents, and children across the nation have seen an increased emphasis on school-choice programs. The Trump Administration has specifically touted school voucher programs as one way to increase access to equal education for minority and low-income students. While that goal mirrors the rationale originally provided in support of school vouchers, whether a voucher program actually provides increased access to equal education largely depends upon its structure. Further, many voucher programs allow students to use public funds to attend private religious schools, thereby implicating federal and state religion clause concerns.

These various issues affecting voucher programs come to a head when examining the Douglas County Choice Scholarship Program. In *Taxpayers for Public Education v. Douglas County School District*, the Colorado Supreme Court held that the program violated the Colorado constitution's religion clause because it allowed religious schools to base admissions decisions on a student's religious beliefs. However, the U.S. Supreme Court later remanded *Taxpayers for Public Education* in light of *Trinity Lutheran Church of Columbia, Inc. v. Comer*—a decision that signaled the Colorado Supreme Court's invalidation of the program may have infringed upon the federal Free Exercise Clause. Before the Colorado Supreme Court could address the remanded case, a newly elected Douglas County School Board voted to halt the litigation and rescind the program, thus leaving the program's legal status in limbo and supporters and critics alike wondering about the program's practical effects.

The U.S. Supreme Court's decision to remand *Taxpayers for Public Education* in light of *Trinity Lutheran* arguably left the impression that states and other school districts could implement voucher programs modeled off the Douglas County Choice Scholarship Program without fear of legal troubles. However, the program remains susceptible to federal Establishment Clause challenges as it allows religious schools to base admissions decisions on a student's religious beliefs. And the program includes a worrying structural component, commonly referred to as a "tuition top-up" provision, which allows participating private schools to increase tuition or decrease financial aid to voucher students. Studies have shown that private schools use this feature to purposefully exclude most low-income students, thus undermining the central goal of vouch-

ers—to provide low-income students with access to equal education. The Douglas County Choice Scholarship Program is not beyond repair—it could be amended to remedy both of these identified concerns. However, states and other school districts should not treat the U.S. Supreme Court's decision to remand *Taxpayers for Public Education* in light of *Trinity Lutheran* as a green light to implement similarly structured programs, and should instead carefully consider the program's remaining faults in creating their own voucher programs.

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INTRODUCTION

On February 28, 2017, President Donald Trump stated, "I am calling upon members of both parties to pass an education bill that funds school choice for disadvantaged youth, including millions of African American and Latino children. These families should be free to choose

the public, private, charter, magnet, religious, or home school that is right for them."[1] Since the Trump Administration's establishment of a pro-school-choice educational platform,[2] discussion regarding school voucher programs has surged.[3] President Trump's sentiments echo the traditional justification given by school voucher advocates: that voucher programs provide low-income and minority populations with the same level of education and school choice that other Americans already appreciate.[4]

However, not all voucher programs are created equal. Whether a program actually provides better education and improved school choice to "disadvantaged students" largely depends on the program's structure.[5] In recent years, supporters of comprehensive school choice have amended existing voucher programs—originally only designed for use by low-income families—to allow families with higher incomes to also receive vouchers.[6] One such amendment raised the program's income-eligibility requirements to allow a family of four, with an annual salary of $90,000, to receive a voucher.[7] As demonstrated through this example, states and school districts can design or amend voucher programs to function in ways that are disconnected from a program's original purpose. Further, because voucher programs direct public money to qualifying students who may use their voucher to attend private, religiously affiliated schools, voucher programs inherently implicate federal and state constitutional concerns.[8] Therefore, proponents of vouchers face a twofold challenge in creating successful programs. First, they must create programs that retain the required separation between church and state to survive First Amendment and state religion clause challenges. Second, they must create programs that are structurally capable of providing results faithful to the underlying purpose and intent of vouchers: increased access to equal education for low-income students.

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1. *Address Before a Joint Session of the Congress*, 2017 DAILY COMP. PRES. DOC. 150 (Feb. 28, 2017).

2. *See id.*; *see also* Cory Turner, *School Vouchers 101: What They Are, How They Work—And Do They Work?*, NPR: NPR ED (Dec. 7, 2016, 5:16 PM), http://www.npr.org/sections/ed/2016/12/07/504451460 (describing President Trump's statement that students should be able to use vouchers at any school they choose).

3. *See* Anya Kamenetz & Cory Turner, *Betsy DeVos' 'School Choice' Controversy; Historically Black Colleges and More*, NPR: NPR ED (Mar. 4, 2017, 6:01 AM), http://www.npr.org/sections/ed/2017/03/04/517695605.

4. BRIAN GILL ET AL., RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS 5 (2007).

5. Dennis Epple et al., *School Vouchers: A Survey of the Economics Literature*, 55 J. ECON. LITERATURE 441, 442, 469 (2017).

6. *See, e.g.*, Emma Brown & Mandy McLaren, *How Indiana's School Voucher Program Soared, and What It Says About Education in the Trump Era*, WASH. POST (Dec. 26, 2016), https://www.washingtonpost.com/local/education/how-indianas-school-voucher-program-soared-and-what-it-says-about-education-in-the-trump-era/2016/12/26/13d1d3ec-bc97-11e6-91ee-1adddfe36cbe_story.html.

7. *Id.*

8. Turner, *supra* note 2.

In 2015, the Colorado Supreme Court held in *Taxpayers for Public Education v. Douglas County School District*[9] that the Douglas County Choice Scholarship Program (the DCCSP) violated the Colorado constitution because it funneled public taxpayer funds to religiously affiliated private schools in the form of a school voucher.[10] The school district appealed, and in 2017, the U.S. Supreme Court vacated the Colorado Supreme Court's decision in *Taxpayers for Public Education* and remanded the case in light of its decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*.[11] In *Trinity Lutheran*, the U.S. Supreme Court held that the Missouri Department of Natural Resources' policy of denying religiously affiliated institutions public grant money, solely based upon the institutions' religious status, violated the Free Exercise Clause of the First Amendment.[12]

In December 2017, a newly elected Douglas County School Board voted to rescind the DCCSP and halt the litigation that could have resulted in the program's implementation.[13] However, despite this action by the school board to end the program, the Court's decision in *Trinity Lutheran* arguably left the impression that states and other school districts could implement voucher programs that mirror the DCCSP without fear of legal challenges. This Comment seeks to debunk that assumption by arguing that the DCCSP remains flawed, both from a legal and structural, policy-based standpoint. Part I of this Comment introduces two main theories in support of voucher programs, discusses the advent of modern vouchers, explores the inherent conflict between voucher programs, the First Amendment, and state constitutions, and examines how the DCCSP is structurally different than other programs. Part II provides a summary of the facts of *Taxpayers for Public Education*, as well as the majority, concurring, and dissenting opinions. Part III provides a brief summary of the facts and majority opinion of *Trinity Lutheran*.

Finally, Part IV analyzes the legal and structural flaws of the DCCSP. Part IV first argues that the DCCSP violates the Establishment Clause of the First Amendment because it allows religiously affiliated private schools to base admissions decisions on a student's religious beliefs. Part IV proposes that this program flaw could be remedied if the DCCSP prohibited participating private schools from basing admissions decisions on a prospective student's religious beliefs: a limitation rec-

9. 351 P.3d 461 (2015), *vacated*, 137 S. Ct. 2327 (2017).

10. *Id.* at 471.

11. Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ., 137 S. Ct. 2327, 2327 (2017) (mem.); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

12. *Trinity Lutheran*, 137 S. Ct. at 2024.

13. Monte Whaley, *Douglas County School Voucher Program Now Officially Dead After Case Dismissed by Colorado Supreme Court, Officials Say*, DENV. POST (Jan. 27, 2018, 5:32 PM), https://www.denverpost.com/2018/01/27/douglas (noting the connection between the board's decision to rescind the program and the November 2017 election of four antivoucher school board members).

ommendation that would not offend the Court's interpretation of the Free Exercise Clause in *Trinity Lutheran*. Second, Part IV argues that the DCCSP's inclusion of a "tuition top-up" provision renders the program susceptible to manipulation by private schools in a manner that would undermine the underlying purpose and intent of vouchers. Tuition top-up provisions allow private schools to either increase tuition or decrease financial aid to voucher students: a practice that either partially or completely negates the financial benefit of vouchers.[14] This Comment argues that private schools will use tuition top-ups to exclude the majority of low-income students from using vouchers—thereby negating voucher programs' ability to provide low-income students with improved access to equal education and increasing economic stratification between attendees of public and private schools. Part IV contends that removing the tuition top-up provisions from the DCCSP could remedy this structural flaw. This Comment concludes by recommending that states and other school districts should carefully consider the DCCSP's remaining problems, as well as the solutions proposed in this Comment, before introducing a program similar to the DCCSP.

I. BACKGROUND

A. Theories in Support of Voucher Programs

Economist Milton Friedman first introduced his theory on school vouchers in his 1955 essay *The Role of Government in Education*.[15] In his essay, Friedman declared his support for the public funding of education.[16] However, he envisioned a government funding system that directed public funds to students' parents, not public schools.[17] Parents could then use public funds to send their child to any school of their choice, including private or religious schools.[18] Friedman believed this system enabled the government to provide publicly funded education while also creating competition for students among schools, since schools would no longer be guaranteed student enrollment.[19] Friedman argued that schools would respond positively to this competition by taking steps to bolster school reputation.[20] Thus, Friedman believed voucher programs would provide students with better quality publicly funded education, and also provide parents with greater school choice, particularly among low-income groups.[21]

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14. *See* Epple et al., *supra* note 5, at 458–59.
15. Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST 123, 127 (Robert A. Solo ed., 1955).
16. *Id.* at 130.
17. Epple et al., *supra* note 5, at 456.
18. *See id.*
19. *Id.*
20. *Id.* (arguing that schools would work to bolster their reputations by "operat[ing] [more] efficiently and reward[ing] quality teaching").
21. *Id.*

Friedman's articulation of the benefits of modern school voucher programs draws on tenets of market economics and parental liberty.[22] Other proponents of voucher programs support vouchers as a mechanism for providing low-income students access to equal education.[23] These supporters also view educational choice as a basic parental right.[24] However, they believe the current educational system allows only higher income parents to enroll their child at a higher quality school.[25] Higher income parents currently seek quality education for their child by either sending their child to a private school or living in an area with high-quality public schools, where the cost of housing is also high.[26] In contrast, lower income parents do not have the financial ability to exercise the same degree of control over their child's education, and are thus unable to independently seek a better quality education for their child.[27] Therefore, the existing school system divides student populations along parental-income lines, with the children of higher income parents receiving better quality education.[28] Proponents of voucher programs argue that vouchers offer low-income parents the financial flexibility to obtain better schooling for their children.[29] Vouchers would thus decrease the educational gap between the children of higher income and lower income families by providing lower income students access to better quality education.[30]

B. The Milwaukee Parental Choice Program

Although Friedman first introduced his theory in support of school vouchers in 1955,[31] it was not until 1990 that a school district implemented a modern school voucher program when Milwaukee Public Schools introduced the Milwaukee Parental Choice Program.[32] Milwaukee Public Schools created the program to address Milwaukee's struggling school system.[33] The program specifically targeted low-income African American students and provided families with taxpayer funds to offset tuition at participating nonreligious private schools.[34] Tommy

22. *See id.*
23. GILL ET AL., *supra* note 4.
24. *Id.*
25. *Id.*
26. *Id.*
27. *See id.*
28. Cecilia Elena Rouse & Lisa Barrow, *U.S. Elementary and Secondary Schools: Equalizing Opportunity or Replicating the Status Quo?*, 16 FUTURE CHILD. 99, 100 (2006).
29. GILL ET AL., *supra* note 4.
30. *Id.*
31. Friedman, *supra* note 15, at 123.
32. Marge Pitrof, *Milwaukee Voucher Program Turns 25: The History*, WUWM MILWAUKEE PUB. RADIO (Nov. 17, 2014), http://wuwm.com/post/milwaukee-voucher-program-turns-25-history.
33. *Id.* (noting that, in 1990, less than 60% of freshmen in Milwaukee Public Schools ever graduated high school, and the district-wide grade point average was a D+).
34. *Id.*; Claudio Sanchez, *Lessons on Race and Vouchers from Milwaukee*, NPR: NPR ED (May 16, 2017, 6:04 AM), http://www.npr.org/sections/ed/2017/05/16/523612949/lessons-on-race-and-vouchers-from-milwaukee.

Thompson, the then-Governor of Wisconsin, supported the Milwaukee Parental Choice Program and presented the program as solving a twofold problem.[35] First, Thompson argued that students would use the voucher funds to attend the best schools, thus increasing competition between public and private schools and resulting in higher academic achievement throughout the city.[36] Second, Thompson contended that the program would allow low-income parents the financial flexibility to choose which school their child attended.[37]

In 1995, the Wisconsin Legislature expanded the program to allow families to use voucher funds at religiously affiliated schools: an expansion the Wisconsin Supreme Court held the Wisconsin constitution permitted.[38] The superintendent of the Milwaukee Archdiocese aptly described the perspective in support of the program's expansion when he stated, "It's the parents who have the right to say how they want their children formed. What kinds of values, what kinds of morals do they want to have purposefully and intentionally taught within the schools."[39] Parental support for the expansion is evident when comparing the program's initial success to its growth post-1998. In its first year, Milwaukee Public Schools partnered with seven private schools, awarded vouchers to 337 students, and spent approximately $733,800 on the program.[40] In 2015, the twenty-fifth anniversary of the program, the Milwaukee Parental Choice Program partnered with 117 private schools, awarded vouchers to 26,900 students, and spent at least $190 million on the program.[41]

C. Religion and Voucher Programs

Although many voucher programs, like the Milwaukee Parental Choice Program, are purportedly adopted to provide low-income students access to better academic opportunities, families ultimately choose to participate in voucher programs for a variety of reasons.[42] For example, parents may wish to send their child to a safer school, a school with better athletics or arts programs, a school in a more convenient location, or a religious school.[43] Private school enrollment statistics serve as powerful proof of the importance that parents place on a religious education: in 2013–2014, 78.7% of all students enrolled in private schools attended

35. *See* Pitrof, *supra* note 32.
36. *Id.*
37. *Id.*
38. *Id.*; Sanchez, *supra* note 34.
39. Pitrof, *supra* note 32 (quoting Dr. John Norris, school superintendent of the Milwaukee Archdiocese).
40. Alan J. Borsuk, *25 Years into Milwaukee's Voucher Schools, Lessons for Wisconsin*, MILWAUKEE-WIS. J. SENTINEL (Oct. 24, 2015), http://archive.jsonline.com/news/education/25-years-into-milwaukees-voucher-schools-lessons-for-wisconsin-b99602322z1-336657181.html.
41. *Id.*
42. GILL ET AL., *supra* note 4, at xi, 135.
43. *Id.* at 135.

religiously affiliated institutions.[44] Further, the increased participation in the Milwaukee Parental Choice Program after its 1998 expansion provides a compelling example of the success voucher programs may achieve by allowing families to use voucher funds at private religious schools.[45]

However, opponents of vouchers have challenged programs that partner with private religious schools under the Establishment and Free Exercise Clauses of the First Amendment, as well as under state constitutions' religion clauses.[46] Therefore, while a voucher program's success may hinge on participating families' ability to use voucher funds to attend private religious schools, this feature can, if not carefully structured, become a program's Achilles' heel.

1. The Establishment Clause

The Establishment Clause prohibits Congress from passing legislation "respecting an establishment of religion."[47] The Court has interpreted the Establishment Clause such that "a law may be one 'respecting an establishment of religion' even though its consequence is not to promote a 'state religion,' and even though it does not aid one religion more than another but merely benefits all religions alike."[48] Voucher programs typically provide public money to families in the form of a check, which families then apply to either partially or entirely cover the cost of tuition at a private school.[49] Programs that allow families to use vouchers at religious schools are susceptible to Establishment Clause challenges because these programs funnel public funds to religious schools—and thus "benefit" religion.[50] In 2002, the Supreme Court addressed whether voucher programs that direct public funds to private religious schools violated the Establishment Clause in *Zelman v. Simmons-Harris*.[51]

In *Zelman*, the Court examined Ohio's Pilot Project Scholarship Program (the Pilot Program).[52] Ohio introduced the program in light of

44. STEPHEN P. BROUGHMAN & NANCY L. SWAIM, U.S. DEP'T OF EDUC., CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2013–14 PRIVATE SCHOOL UNIVERSE SURVEY 7 tbl.2 (2016).

45. *See* Borsuk, *supra* note 40 (examining school enrollment data after the implementation and expansion of the voucher program).

46. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 644 (2002) (addressing an Establishment Clause challenge to an Ohio program); Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461, 464 (Colo. 2015) (discussing whether a Douglas County voucher program violated the Colorado constitution), *vacated*, 137 S. Ct. 2327 (2017).

47. U.S. CONST. amend. I.

48. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973) (citation omitted) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

49. Turner, *supra* note 2.

50. *See* Richard T. Foltin, *Religion and Education: Consensus and Conflict*, HUM. RTS. MAG., Summer 2006, at 12.

51. 536 U.S. 639 (2002).

52. *Id.* at 643–44.

Cleveland City School District's educational struggles.[53] The Pilot Program provided "financial assistance to families in any Ohio school district that is or has been 'under federal court order requiring supervision and operational management.'"[54] At the time of the Court's decision, Cleveland was the only district to meet the Pilot Program's standards of a "covered [school] district."[55]

The Pilot Program applied to students in kindergarten through third grade and provided families with either tuition assistance to attend a different school or tutorial aid for students who chose to remain in Cleveland public schools.[56] Ohio determined student eligibility according to family income: families with incomes below 200% of the federal poverty line received priority for program participation—the program provided these families 90% of private school tuition, with a cap of $2,250.[57] The Pilot Program partnered with any private school, religious or nonreligious, located within the boundaries of a covered school district that passed statewide educational standards.[58] The program required that "[p]articipating private schools must agree not to discriminate on the basis of race, religion, or ethnic background."[59] The Pilot Program also allowed students to attend any public school located in a school district adjacent to Cleveland public schools.[60]

In 1999, a group of Ohio taxpayers filed suit seeking to enjoin the Ohio voucher program because it violated the Establishment Clause.[61] The Supreme Court held that the Ohio program did not violate the Establishment Clause because it was a "program of true private choice."[62] The court reasoned that when "a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program does not violate the Establishment Clause."[63] The Court concluded that Ohio's voucher program satisfied these requirements for three reasons.[64] First, the program allowed all schools within the district, whether religious or nonreligious, to participate in the program, subject only to nondiscriminatory testing, (i.e., testing based purely on a school's quality of

53. *Id.* at 644 (noting that Cleveland's public schools were ranked among the worst performing public schools in the nation for over a generation).
54. *Id.* at 644 (quoting OHIO REV. CODE ANN. § 3313.975(A) (West 2018)).
55. *Id.* at 644–45.
56. *Id.* at 645.
57. *Id.* at 646.
58. *Id.* at 645.
59. *Id.*
60. *Id.*
61. *Id.* at 648.
62. *Id.* at 653.
63. *Id.* at 652.
64. *Id.* at 653.

instruction).[65] Second, the program provided educational assistance to any parent of a school-age child who met the income-based participation requirements and resided within Cleveland City School District.[66] Third, the Pilot Program's benefits were available to participating families on neutral terms, with no reference to religion and no financial incentives that would prompt parents to more readily direct voucher funds to religious schools, because participating private schools could not "discriminate on the basis of race, religion, or ethnic background."[67]

The Court's decision in *Zelman* had a widespread impact on voucher programs as it provided states and school districts direction on how to structure a voucher program to include private religious schools without violating the Establishment Clause.[68] However, *Zelman* did not hold that all voucher programs that include private religious schools are constitutionally permissible.[69] Post-*Zelman*, voucher programs that include private religious schools must satisfy *Zelman*'s three-pronged Establishment Clause test *and* comply with both the federal Free Exercise Clause and the relevant state constitution's religion clauses.

2. The Free Exercise Clause

While the Establishment Clause prohibits Congress from passing legislation respecting an establishment of religion, the Free Exercise Clause also precludes Congress from passing legislation "prohibiting the free exercise" of religion.[70] The Supreme Court has recognized that the text of the First Amendment allows for some "play in the joints" between these two Clauses.[71] Thus, states and school districts must walk a fine line by creating voucher programs that limit private religious schools' receipt of public funding to the extent required by the Establishment Clause while including private religious schools to the extent required by the Free Exercise Clause.

In *Colorado Christian University v. Weaver*,[72] the Tenth Circuit explored the relationship between these two clauses in the context of school vouchers when it determined the constitutionality of several scholarship programs administered by the Colorado Commission on Higher Education.[73] To receive a scholarship, students were required to attend an "institution of higher education."[74] However, students were prohibited from

65. *Id.*
66. *Id.*
67. *Id.* at 645, 653.
68. *See* Gia Fonté, Zelman v. Simmons-Harris*: Authorizing School Vouchers, Education's Winning Lottery Ticket*, 34 LOY. U. CHI. L.J. 479, 554 (2003).
69. *Id.* at 555.
70. U.S. CONST. amend. I.
71. Locke v. Davey, 540 U.S. 712, 718 (2004) (quoting Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 669 (1970)).
72. 534 F.3d 1245 (10th Cir. 2008).
73. *Id.* at 1250–51, 1254.
74. *Id.* at 1250 (quoting COLO. REV. STAT. § 23-3.5-102(2)).

the using the scholarships to attend any institution considered "pervasively sectarian," a classification determined by the Commission according to a six-part analysis.[75]

The Tenth Circuit held that the scholarship programs violated the Free Exercise Clause.[76] The court noted that the scholarship programs expressly discriminated among religious groups by only excluding "pervasively sectarian" institutions.[77] The court concentrated upon the scholarship programs' six-part analysis that the Colorado Commission on Higher Education used to determine whether an institution was "pervasively sectarian."[78] The court concluded that the Commission's application of the six-part analysis impermissibly intruded into the free exercise of religion in violation of the Free Exercise Clause as it required "intrusive governmental judgments regarding matters of religious belief and practice."[79] Therefore, *Colorado Christian University* stands as an example of the difficult task proponents of voucher programs face in creating programs that include religious institutions to the degree required by the Free Exercise Clause but retain the required degree of nonsecular application mandated by the Establishment Clause.

3. State Religion Clauses

States and school districts responsible for creating constitutionally permissible voucher programs only partially succeed by creating programs tailored to survive Establishment and Free Exercise Clause challenges. Voucher programs must also conform with state religion clauses. State religions clauses typically include either a Compelled Support Clause or a Blaine Amendment, and sometimes both.[80] State constitutions containing Compelled Support Clauses predate the ratification of the U.S. Constitution and Bill of Rights.[81] These Clauses do not mirror

75. *Id.* at 1250–51 ("An institution of higher education shall be deemed not to be pervasively sectarian if it meets the following criteria: (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 advocating a particular religion." (quoting COLO. REV. STAT. § 23-3.5-105 (repealed 2009)).

76. *Id.* at 1250.

77. *Id.* at 1258.

78. *Id.* at 1256.

79. *Id.*

80. Richard D. Komer, *School Choice and State Constitutions' Religion Clauses*, 3 J. SCH. CHOICE 331, 335, 338 (2009). Approximately thirty state constitutions contain religion clauses modeled after the federal Blaine Amendment. 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, 576 (2003).

81. Komer, *supra* note 80, at 335.

the language of the First Amendment; however, they guarantee the same essential freedoms.[82]

Blaine Amendments are named for, and modeled after, nineteenth century Congressman James G. Blaine's failed proposed federal amendment to the U.S. Constitution.[83] Proposed in 1876, Blaine's amendment sought to prohibit states from: (1) passing laws respecting the establishment of religion or prohibiting the free exercise thereof; and (2) using public taxpayer funds to support public schools under the control of any "religious sect."[84] Many contend that Blaine proposed his amendment in response to criticism among his supporters that Catholic schools were receiving public funding.[85] At the time, the majority of religious schools were Catholic, and thus many believed that Blaine used the general phrase "religious sects" specifically because it would primarily affect Catholic schools.[86] Although the allegations regarding Blaine's motivation for proposing his federal amendment remain unconfirmed, the Blaine Amendments successfully added to state constitutions are still dogged by this rumored anti-Catholic bigotry.[87]

The Colorado constitution contains a Blaine Amendment: article IX, section 7. This section prohibits "any county, city, town, township, school district or other public corporation" from "mak[ing] any appropriation, or pay[ing] from any public fund or moneys whatever . . . to help support or sustain any school . . . controlled by any church or sectarian denomination whatsoever."[88] Thus, the state legislature and Colorado school districts must create voucher programs that comport with article IX, section 7 in addition to complying with the Establishment Clause and the Free Exercise Clause.

In 1982, *Americans United for Separation of Church & State Fund, Inc. v. State*[89] presented the Colorado Supreme Court with an opportunity to determine whether the Colorado Student Incentive Grant Program violated article IX, section 7.[90] The grant program used public money to provide assistance to instate students of higher education.[91] However, as mentioned above, the program prohibited students from using grant funds to attend "pervasively sectarian" or "theological" institutions.[92]

82. *See id.* at 336 (stating that the states adopted such language to prevent or end the establishment of official religions).

83. Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 63 (2005).

84. *Id.* at 63–64 (quoting Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 47–48 (1992)).

85. *See id.*

86. *See id.* at 64.

87. *Id.*

88. COLO. CONST. art. IX, § 7.

89. 648 P.2d 1072 (Colo. 1982).

90. *Id.* at 1074, 1076.

91. *Id.* at 1074.

92. *Id.* at 1075.

Americans United argued that the grant program violated article IX, section 7 because it still allowed students to use public funds at religiously affiliated schools that were not considered "pervasively sectarian" or "theological."[93]

In holding that the grant program did not violate article IX, section 7, the court identified several structural aspects of the program that rendered it permissible under the Colorado constitution.[94] First, the court concluded that the program was ultimately designed to render assistance to the students receiving grants, and that qualifying religious institutions only received public funds as an unavoidable by-product of the assistance given to the students.[95] Second, the court noted that the program only provided funds to students of higher education—that is, to students attending post-secondary educational institutions.[96] The court reasoned that religious indoctrination is not as central a purpose of sectarian colleges or universities as it is at elementary and secondary schools; therefore, qualifying institutions were less likely to use grant funds in furtherance of religious teachings.[97] Third, the court noted that the grants were available to students attending either public or private institutions, thus lessening any danger that the legislature specifically designed the program to funnel aid to religious institutions, as all public universities are nonreligious.[98] Fourth, the grant program prohibited universities from decreasing the amount of financial aid that a grant student would otherwise receive.[99] The court concluded that this requirement prevented secular schools from using grant funds for solely religious purposes.[100] Finally, the court noted that the program prohibited students from using the grant at a university that restricted board membership to persons of a particular religion or whose board reflected a particular religion.[101]

D. Current Voucher Programs in the United States

Despite the challenges that states and school districts face in creating voucher programs that do not offend either the First Amendment or state religion clauses, the popularity of voucher programs has grown tremendously since Milwaukee introduced the Milwaukee Parental Choice Program in 1990.[102] Although current voucher programs vary in

93. *Id.* at 1074–75.
94. *Id.* at 1083–84.
95. *Id.*
96. *Id.* at 1084.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *See School Choice—School Choice in America Dashboard*, EDCHOICE, https://www.edchoice.org/school-choice/school-choice-in-america (last visited Sept. 18, 2018) (identifying twenty-six voucher programs operating in sixteen states).

specifics, several trends have emerged in program structure, specifically in how programs determine student eligibility.

First, a program may limit participation to students with special needs. Typically, these programs determine participation in one of three ways: (1) by limiting participation to students with a specific disability;[103] (2) by providing an exhaustive list of disabilities that participating students must have to receive a voucher;[104] or (3) by requiring that a student have an individualized education plan.[105]

Second, a program may limit participation to low-income students. These programs typically set family income levels at which students can no longer receive a voucher.[106] Income levels are usually calculated according to either the federal poverty level or the free and reduced price school meal guidelines.[107] Some income-based programs decrease the amount of voucher funds a student may receive as the student's family income level increases.[108] Additionally, several programs that determine eligibility by family income also consider the quality of a student's neighborhood school. If a student's school is considered low-performing, students may qualify for voucher program participation.[109]

Finally, a program may limit participation based on school access. First introduced in Vermont in 1869, and later implemented in Maine in 1873, "town-tuitioning" programs limit participation to students living in areas lacking a school that offers educational instruction at the student's grade level.[110]

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103. *See School Choice Mississippi—Mississippi Dyslexia Therapy Scholarship for Students with Dyslexia Program*, EDCHOICE, https://www.edchoice.org/school-choice/programs/mississippi (last visited Sept. 18, 2018).

104. *See School Choice Louisiana—School Choice Program for Students with Exceptionalities*, EDCHOICE, https://www.edchoice.org/school-choice/programs/louisiana-school (last visited Sept. 18, 2018).

105. *See School Choice Florida—John M. McKay Scholarships for Students with Disabilities Program*, EDCHOICE, https://www.edchoice.org/school-choice/programs/florida-john (last visited Sept. 18, 2018).

106. *See, e.g.*, *School Choice District of Columbia—Opportunity Scholarship Program*, EDCHOICE, https://www.edchoice.org/school-choice/programs/district (last visited Sept. 18, 2018) [hereinafter *D.C. Program*]; *School Choice Ohio—Cleveland Scholarship Program*, EDCHOICE, https://www.edchoice.org/school-choice/programs/ohio-cleveland (last visited Sept. 18, 2018) [hereinafter *Cleveland Program*].

107. *See D.C. Program*, *supra* note 106.

108. *See Cleveland Program*, *supra* note 106.

109. *See School Choice Ohio—Educational Choice Scholarship Program*, EDCHOICE, https://www.edchoice.org/school-choice/programs/ohio-educational (last visited Sept. 18, 2018).

110. *See School Choice Maine—Town Tuitioning Program*, EDCHOICE, https://www.edchoice.org/school-choice/programs/maine (last visited Sept. 18, 2018); *School Choice Vermont—Town Tuitioning Program*, EDCHOICE, https://www.edchoice.org/school-choice/programs/vermont (last visited Sept. 18, 2018).

The DCCSP was the only voucher program that did not determine student eligibility using one of these three approaches.[111]

II. *TAXPAYERS FOR PUBLIC EDUCATION V. DOUGLAS COUNTY SCHOOL DISTRICT*

A. Facts

Douglas County School District (DCSD) implemented the DCCSP in 2011.[112] Unlike other voucher programs, the DCCSP contained minimal student eligibility criteria, only requiring that prospective participants be currently enrolled at a Douglas County public school and have lived in Douglas County for at least one year.[113] To receive voucher funds, the DCCSP required students to enroll at the Choice Scholarship Program Charter School (the Charter School).[114] The Charter School functioned as a purely nominal public school: it did not have a formal building, teachers, or curriculum.[115] However, under Colorado's Public School Finance Act (the PSFA), school districts receive funding on a per-pupil basis.[116] By requiring that students enroll at the Charter School, DCSD received per-pupil funding for each voucher student: money that DCSD then used to fund the voucher program.[117] For each student enrolled at the Charter School, DCSD retained 25% of the per-pupil funding to cover the DCCSP's administrative costs.[118] DCSD gave the remaining 75% directly to students' parents, who were then required to use the funds "for the sole purpose of paying for tuition" at any of the "Private School Partner[s]" that DCSD approved for participation in the DCCSP.[119]

DCSD only partnered with private schools—"Private School Partners"—that met certain requirements. However, once qualified, the DCCSP did not mandate that Private School Partners alter their admissions criteria.[120] The DCCSP expressly allowed Private School Partners to make "enrollment decisions based upon religious beliefs."[121] Additionally, the DCCSP did not prohibit Private School Partners from either increasing tuition costs or decreasing financial-aid offers for voucher

111. Leslie Hiner, *A Frank Description of What Really Happened with Douglas County, Colorado's School Voucher Program*, EDCHOICE, https://www.edchoice.org/blog/frank-description (last visited Sept. 18, 2018).

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

113. Whaley, *supra* note 13.

114. *Taxpayers*, 351 P.3d at 465.

115. *Id.*

116. COLO. REV. STAT. § 22-54.5-201 (2018).

117. *Taxpayers*, 351 P.3d at 465.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* (quoting the DCCSP).

recipients.[122] In 2011, the DCCSP awarded 271 scholarships for students to attend twenty-three different private schools, sixteen of which were religiously affiliated.[123]

B. Procedural History

In June 2011, a group of Douglas County residents, the "Taxpayers for Public Education" (the Taxpayers), filed suit in state court against the Colorado Board of Education, the Colorado Department of Education, the Douglas County Board of Education, and DCSD (referred to collectively as DCSD).[124] The Taxpayers sought declaratory and injunctive relief, and argued that the DCCSP violated both the PSFA and the Colorado constitution.[125] The trial court granted the Taxpayers' requests for declaratory and injunctive relief, finding that: (1) the Taxpayers had standing to sue under the PSFA; (2) the DCCSP violated the PSFA; and (3) the DCCSP violated several provisions of the Colorado constitution, including article IX, section 7.[126]

DCSD appealed the trial court's decision, and the Colorado Court of Appeals reversed.[127] The court of appeals concluded that the Taxpayers did not have standing to sue under the PSFA and that the DCCSP did not violate the Colorado constitution.[128] Judge Bernard dissented, contending that the DCCSP violated article IX, section 7 and describing the DCCSP as a "pipeline that violates [article IX, section 7's] direct and clear constitutional command."[129] The Taxpayers appealed the court of appeals' decision to the Colorado Supreme Court.[130]

C. Majority Opinion

Writing for the Colorado Supreme Court, Chief Justice Rice held that: (1) the Taxpayers did not have standing to sue under the PSFA;[131] (2) the DCCSP violated article IX, section 7 of the Colorado constitution;[132] and (3) the court's decision to invalidate the DCCSP did not offend the First Amendment.[133]

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122. *Id.*
123. *Id.* at 465–66.
124. *Id.* at 466.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* (quoting Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 356 P.3d 833, 855 (Colo. App. 2013) (Bernard, J., dissenting)).
130. *Id.*
131. *Id.* at 469.
132. *Id.* at 471.
133. *Id.* at 475.

Chief Justice Rice concluded that, for the Taxpayers to have standing to sue under the PSFA, they needed to establish that: (1) they had suffered an injury in fact; and (2) the PSFA conferred upon the Taxpayers a legally protected interest, by either expressly or impliedly authorizing a claim for relief, to which their injuries pertained.[134] The court assumed that the Taxpayers suffered an injury in fact; however, Chief Justice Rice concluded that the PSFA neither expressly nor impliedly authorized a claim for relief.[135] Thus, the court concluded that the Taxpayers lacked standing to sue under the PSFA, and therefore did not address the Taxpayer's contention that the DCCSP violated the PSFA.[136]

However, the court also concluded that the DCCSP violated article IX, section 7 of the Colorado constitution because it funneled taxpayer money to religious schools in the form of a voucher.[137] Chief Justice Rice noted that the DCCSP partnered with both religious and nonreligious private schools.[138] However, the court concluded that because private religious schools rely on student tuition payments to operate, payments that the DCCSP used taxpayer money to subsidize, the DCCSP worked to "support or sustain" private religious schools in violation of article IX, section 7.[139] Chief Justice Rice identified the DCCSP's failure to prohibit Private School Partners from either increasing tuition or decreasing financial aid for DCCSP scholarship students as rendering the program especially violative of article IX, section 7.[140] The court concluded that this provision potentially allowed religious Private School Partners to increase tuition or decrease financial aid by an amount equivalent to the student's voucher, so that a voucher student's the out-of-pocket cost for attending the school would be the same as a nonvoucher student.[141] Instead, religious schools could more directly use this taxpayer money to further religious teachings in violation of article IX, section 7.[142] Finally, the court rejected DCSD's argument that, in light of article IX, section 7's history as a Blaine Amendment, the court should consider it a "vulgar display of anti-Catholic animus" and interpret the term "sectarian" to mean "Catholic."[143] The court declined to adopt DCSD's interpretation of sectarian and enforced section 7 as written.[144]

Additionally, Chief Justice Rice distinguished the DCCSP from the Colorado Student Incentive Grant Program, which the court upheld three

134. *Id.* at 467.
135. *Id.*
136. *Id.* at 466–67.
137. *Id.* at 471.
138. *Id.* at 470–71.
139. *Id.* at 470.
140. *Id.* at 471.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*

decades earlier, in *Americans United*, as constitutional under article IX, section 7.[145] The court identified several structural differences between the two programs that supported the court's disparate conclusions regarding the programs' constitutionality.[146] First, the court noted that the grant program in *Americans United* prohibited students from using the grant at any "pervasively sectarian" institution.[147] In contrast, the DCCSP did not contain a similar limitation. Not only were religiously affiliated private schools permitted to participate in the DCCSP, these religiously affiliated Private School Partners were expressly allowed to make admissions decisions based upon a student's religious beliefs.[148] Second, the court noted that unlike the DCCSP, the *Americans United* grant program allowed students to apply the grant at either public or private institutions, a feature that demonstrated the program was not "calculated to enhance the ideological ends of the sectarian institution."[149]

Third, the court identified as critical the fact that the *Americans United* program prohibited universities from decreasing a student's financial aid because of the student's use of the grant program, a feature the court concluded "created a disincentive for an institution to use grant funds other than for the purpose intended—the secular educational needs of the student."[150] The DCCSP contained no such safeguard.[151] Fourth, the court noted that, also unlike the *Americans United* program, the DCCSP did not prohibit a Private School Partner's board from reflecting a particular religion.[152] Chief Justice Rice concluded that these structural differences sufficiently distinguished the *Americans United* grant program from the DCCSP to support the court's disparate findings of constitutionality under article IX, section 7.[153]

Finally, the court concluded that its decision to invalidate the DCCSP did not offend the federal First Amendment.[154] Specifically, the court concluded that neither *Zelman* nor *Colorado Christian University* affected the legality of the DCCSP under the Colorado constitution.[155] The court first distinguished *Taxpayers for Public Education* from *Zelman* by noting that the Taxpayers challenged the DCCSP's constitutionality under the Colorado constitution, whereas the plaintiffs in *Zelman* challenged Ohio's voucher program under the Establishment Clause of

145. *Id.* at 469–70.
146. *Id.* at 471–73.
147. *Id.* at 472 (quoting Ams. United for Separation of Church & State Fund, Inc. v. State, 648 P.2d 1072, 1081 (Colo. 1982)).
148. *Id.*
149. *Id.* at 472–73 (quoting *Ams. United*, 648 P.2d at 1084).
150. *Id.* at 473 (quoting *Ams. United*, 648 P.2d at 1084).
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

the First Amendment.[156] The court then noted that, in *Colorado Christian University*, the Tenth Circuit held that the scholarship programs violated the First Amendment because the program's method of determining whether an institution was "pervasively sectarian" involved inappropriately "intrusive judgments regarding contested questions of religious belief or practice."[157] DCSD had argued that in granting the Taxpayers declaratory and permanent injunctive relief, the trial court inappropriately delved into the nature of the religiously affiliated Private School Partners to determine whether the schools were in fact religious institutions.[158] However, the court disagreed with DCSD's characterization of the trial court's analysis, noting that, in *Taxpayers for Public Education*, the trial court merely recognized the Private School Partner's obvious religious character.[159] Therefore, the court determined that neither *Zelman* nor *Colorado Christian University* rendered its decision to invalidate the DCCSP impermissible under the First Amendment.[160]

D. Justice Márquez's Concurrence in the Judgment

In contrast to the majority opinion, Justice Márquez concluded that the Taxpayers had standing to sue under the PSFA.[161] Although Justice Márquez declined to address the Taxpayer's constitutional challenge, she concurred in the court's judgment, concluding that the DCCSP violated the PSFA by "funneling public funds through a nonexistent charter school to finance private education."[162]

E. Justice Eid's Dissent

Justice Eid, joined by Justices Coats and Boatright, concurred with the majority's holding that the Taxpayers lacked standing to sue under the PSFA.[163] However, Justice Eid also concluded that the DCCSP did not violate the Colorado constitution.[164] Justice Eid contended that the DCCSP only funnels public funds to religious schools contingent on a participating student's decision to enroll at a religiously affiliated institution.[165] Therefore, Justice Eid concluded that, like the programs in *Americans United* and *Zelman*, the DCCSP is a program of "true private choice," and constitutional under article IX, section 7.[166] Further, Justice Eid contended that, as a Blaine Amendment, article IX, section 7 was

156. *Id.* at 473–74.
157. *Id.* at 474 (quoting Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1261 (10th Cir. 2008)).
158. *Id.*
159. *Id.* at 474–75.
160. *Id.* at 475.
161. *Id.* (Márquez, J., concurring in the judgment).
162. *Id.*
163. *Id.* at 480 & n.1 (Eid, J., concurring in part and dissenting in part).
164. *Id.* at 480.
165. *Id.*
166. *Id.*

originally drafted to discriminate against Catholic institutions, and that this history required the court to examine whether it violated the Free Exercise Clause.[167]

F. DCSD's Appeal

DCSD appealed the Colorado Supreme Court's decision to the U.S. Supreme Court and, in July 2017, the Supreme Court vacated the Colorado Supreme Court's decision and remanded *Taxpayers for Public Education* in light of the Court's decision in *Trinity Lutheran*.[168]

III. *TRINITY LUTHERAN CHURCH OF COLUMBIA, INC. V. COMER*

A. Facts

In 2012, Trinity Lutheran Church (Trinity Lutheran) sought to use a grant from the Scrap Tire Program of the Missouri Department of Natural Resources (the Department) to install a new rubber playground surface for its preschool and daycare programs.[169] The goal of the Scrap Tire Program is to reduce the amount of used tires placed in landfills and dump sites by offering reimbursement grants to qualifying nonprofits that purchase playground surfaces manufactured from used tires.[170] The Department funds the grant program through a fee imposed on the sale of new tires in Missouri.[171] Trinity Lutheran's playground area is used by preschool and daycare students enrolled at the Trinity Lutheran Child Learning Center (Child Learning Center).[172] The Child Learning Center operates as a ministry of Trinity Lutheran and is located on church property; however, the Child Learning Center admits students regardless of their religion.[173] The Child Learning Center disclosed its affiliation with Trinity Lutheran in its Scrap Tire Program application.[174]

When the Child Learning Center applied for its grant, the Department followed an internal policy of "denying grants to any applicant owned or controlled by a church, sect, or other religious entity."[175] The Department formulated this policy in an effort to not violate article I, section 7 of the Missouri constitution, which states that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of

167. *Id.*
168. Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ., 137 S. Ct. 2327, 2327 (2017) (mem.).
169. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*

any church."[176] The Department adhered to this policy and denied the Child Learning Center's reimbursement request.[177]

B. Procedural History

Trinity Lutheran sued the Director of the Department, alleging that the Department's categorical refusal to approve the Child Learning Center's application violated the Free Exercise Clause of the First Amendment.[178] The Department filed a motion to dismiss, which the district court granted.[179] In its decision, the district court relied on the U.S. Supreme Court's decision in *Locke v. Davey*,[180] in which the Supreme Court held that Washington state's decision to not fund devotional theology degrees as part of a state scholarship program did not violate the Free Exercise Clause.[181] The district court concluded that the Department's refusal to provide scrap-tire grants to religious institutions was "nearly indistinguishable" from Washington's refusal to fund devotional theology degrees, and so the Department's policy did not violate the Free Exercise Clause.[182]

Trinity Lutheran appealed, but the Eighth Circuit affirmed the district court's dismissal.[183] The Eighth Circuit concluded that, although the Establishment Clause did not require the Department to award the Child Learning Center a tire-scrap grant, the Free Exercise Clause likewise did not require the Department to disregard the Missouri constitution's anti-establishment principles.[184] Thus, the Eighth Circuit held that the federal Constitution permitted the Department to reject the Child Learning Center's grant application based on its status as a religiously affiliated institution.[185]

C. Majority Opinion

Trinity Lutheran appealed from the Eighth Circuit to the Supreme Court. Writing for the Court, Chief Justice Roberts held that the Department's policy of categorically denying Scrap Tire Program grants to any church, sect, or religious entity violated the Free Exercise Clause of the First Amendment.[186] The Court noted that denying a group a "generally available benefit solely on account of [the group's] religious identity

176. *Id.* (quoting MO. CONST. art. I, § 7).
177. *Id.* at 2018.
178. *Id.*
179. *Id.*
180. 540 U.S. 712 (2004).
181. *Trinity*, 137 S. Ct. at 2018.
182. *Id.* (quoting Trinity Lutheran Church of Columbia, Inc. v. Pauley, 976 F. Supp. 2d 1137, 1151 (W.D. Mo. 2013)).
183. *Id.*
184. *Id.*
185. *Id.* at 2018–19.
186. *Id.* at 2017, 2025.

imposes a penalty on the free exercise of religion."[187] The Court concluded that the Department's actions in denying the Child Learning Center's grant application imposed a penalty on the Child Learning Center because the Department's decision effectively forced the Child Learning Center to choose between operating as a ministry of Trinity Lutheran or receiving the grant.[188] The Court then reasoned that because the Free Exercise Clause "protect[s] religious observers against unequal treatment,"[189] any law that "imposes a penalty on the free exercise of religion" is subject to strict scrutiny.[190]

The Court held that the Department's policy failed to pass strict scrutiny because the Department's proffered interest of "skating as far as possible from religious establishment concerns" did not justify the Department's refusal to consider the Child Learning Center for grant money solely because of its status as a religious institution.[191] The Court was convinced that the Department's proffered interest was sufficiently compelling to survive strict scrutiny because "the state interest . . . in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause."[192] Thus, the Court concluded that the Department's decision to reject the Child Learning Center's scrap-tire grant application solely because of its status as a religiously affiliated institution violated the Free Exercise Clause of the First Amendment.[193]

IV. ANALYSIS

As the Trump Administration works to introduce and expand voucher programs on a national scale,[194] it is important for states and school districts to understand and avoid the structural pitfalls that undermine voucher programs' constitutionality and effectiveness. The U.S. Supreme Court's decision to remand *Taxpayers for Public Education* in light of *Trinity Lutheran* called into question the finality of the Colorado Supreme Court's invalidation of the DCCSP.[195] After the Supreme Court's decision, a newly elected Douglas County School Board voted to rescind the DCCSP and end the litigation in front of the Colorado Supreme Court.[196] This action by the school board left the validity of the

187. *Id.* at 2019.
188. *Id.* at 2024.
189. *Id.* at 2019 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993)).
190. *Id.*
191. *Id.* at 2024.
192. *Id.* (quoting Widmar v. Vincent, 454 U.S. 263, 276 (1981)).
193. *Id.* at 2025.
194. *See* Valerie Strauss, *What 'School Choice' Means in the Era of Trump and DeVos*, WASH. POST (May 22, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/05/22/what-school-choice-means-in-the-era-of-trump-and-devos.
195. *See* Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ., 137 S. Ct. 2327, 2327 (2017) (mem.).
196. Whaley, *supra* note 13.

DCCSP in limbo, as the U.S. Supreme Court's decision to remand *Taxpayers for Public Education* in light of *Trinity Lutheran* indicated the program might still pass constitutional muster. Thus, although the DCCSP is currently defunct, states and other school districts could interpret the U.S. Supreme Court's decision as a greenlight to implement other voucher programs that are structured similarly to the DCCSP. However, this Part argues that, despite the Supreme Court's remand, the DCCSP remains seriously flawed as a matter of both constitutional law and policy.

First, this Part argues that, under *Zelman*, the DCCSP violates the Establishment Clause of the First Amendment because it allows Private School Partners to base admissions decisions on a student's religious beliefs. Second, this Part argues that private schools would likely use the DCCSP's "tuition top-up" provision to exclude the majority of low-income students from using the vouchers—a practice that undermines voucher programs' goal of providing low-income and minority students increased access to equal education. However, this Part recognizes that the DCCSP is not fatally flawed, and thus proposes two amendments that would remedy these two key defects.

A. The DCCSP Violates the Establishment Clause

The DCCSP violates the Establishment Clause by permitting Private School Partners to make admissions decisions based on a student's religious beliefs.[197] The DCCSP therefore grants participating private schools the power to discriminate because of religion in violation of the Establishment Clause as construed in *Zelman*. Recall that in *Zelman*, the Court announced a three-pronged structural framework that voucher programs must follow to survive an Establishment Clause challenge.[198] First, the program must be neutral with respect to religion.[199] Second, the program must provide assistance directly to a broad class of citizens.[200] And third, the program must allow voucher recipients to direct government aid to religious schools wholly as a result of the recipients' independent choice.[201] The Court concluded that Ohio's Pilot Program satisfied these requirements and thus did not violate the Establishment Clause.[202] First, Ohio's program allowed all schools within Cleveland City School District—whether religious or nonreligious—to participate in the voucher program, subject only to nondiscriminatory testing.[203] Second, Ohio's program provided educational assistance to any parent of a school-age child who met the income-based participation requirements and resided

197. *See supra* text accompanying note 148.
198. Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 653.
203. *Id.*

within Cleveland City School District.[204] Finally, the Ohio program's requirement that "[p]articipating private schools must agree not to discriminate on the basis of race, religion, or ethnic background" guaranteed that the program's "benefits [we]re available to participating families on neutral terms, with no reference to religion."[205] The Court thus concluded that Ohio's program was "a program of true private choice," in which religious schools only received public funding incidental to a family's independent choice to enroll their child at a private religious school.[206]

The DCCSP does not violate *Zelman*'s first two prongs. First, like the Ohio program, the DCCSP allows both religious and nonreligious schools to qualify as Private School Partners.[207] Second, the DCCSP provides tuition assistance to a broad class of citizens: any yearlong resident of Douglas County whose child is currently enrolled in DCSD schools.[208] However, in contrast to the Ohio program, which requires that "[p]articipating private schools must agree not to discriminate on the basis of race, religion, or ethnic background,"[209] the DCCSP expressly allows religiously affiliated Private School Partners to consider a student's religious beliefs in making an admissions decision.[210] Thus, the DCCSP grants private religious schools, not students, the power to ultimately decide whether students will attend the private school of their choice, and religious schools can make this decision based upon a student's religious beliefs.[211] Therefore, the DCCSP fails *Zelman*'s third prong and violates the Establishment Clause because it does not allow voucher recipients to direct government aid to religious schools wholly as a result of the recipients' genuinely independent choice.

This First Amendment violation could be remedied by amending the DCCSP to prohibit religiously affiliated Private School Partners from basing admissions decision on students' religious beliefs. Amending the DCCSP in this manner would allow the program to offer benefits to all participating families on neutral terms, with no reference to religion. The DCCSP would thus comply with *Zelman*'s third prong and no longer violate the Establishment Clause. Further, this suggested amendment would not put the program in violation of the Free Exercise Clause as interpreted in *Trinity Lutheran* because it would not require schools to choose between participating in the DCCSP or retaining their religious affiliation.[212] Private School Partners could still incorporate religion into

204. *Id.*
205. *Id.* at 645, 653.
206. *Id.* at 653.
207. *See* Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461, 470, 473 (Colo. 2015), *vacated*, 137 S. Ct. 2327 (2017).
208. Whaley, *supra* note 13.
209. *Zelman*, 536 U.S. at 645.
210. *Taxpayers*, 351 P.3d at 465.
211. *See id.*
212. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017).

their teachings and remain affiliated with churches or religions. The proposed amendment would only require that, when determining whether to admit a prospective student who plans to pay tuition with a publicly funded voucher, religious schools cannot consider the student's religious beliefs. Further, such an amendment would not interfere with the purported goal of voucher programs to provide low-income families with greater school choice and increased access to equal education.

B. Tuition Top-Up Provisions and the Effectiveness of Vouchers

The DCCSP allows Private School Partners to increase tuition or decrease financial aid by the amount of a student's voucher.[213] Commonly referred to as a "tuition top-up," this provision essentially negates the financial benefits of a voucher: it allows private schools to force voucher recipients to pay full tuition, despite the student's receipt of a voucher that is specifically meant to offset tuition costs.[214] Additionally, tuition top-ups grant private schools discretion to determine voucher recipients' tuition on a student-by-student basis.[215] Therefore, private schools can use tuition top-ups to force some voucher recipients to pay full tuition, while allowing other recipients to apply their voucher funds to offset tuition costs.[216]

Private schools use tuition top-up provisions to exclude low-income students: schools raise low-income students' tuition or decrease their financial aid such that students can no longer pay tuition, despite their receipt of a voucher.[217] The only low-income students immune to this are high-achieving students, whom private schools consider an attractive addition to the classroom.[218] Thus, voucher programs with tuition top-ups fail to provide most low-income students with improved access to equal education. Additionally, this continued exclusion of most low-income students from higher quality schools results in continued economic stratification between higher and lower income groups.[219] Therefore, voucher programs with tuition top-ups are structurally designed to work against the purported underlying purpose and intent of vouchers.

1. Tuition Top-Ups and Low-Income Voucher Recipients

Private schools use tuition top-up provisions to exclude most low-income voucher recipients.[220] Voucher programs that include tuition top-ups allow private schools to determine each student's tuition individ-

213. *See Taxpayers*, 351 P.3d at 465.
214. *See* Epple et al., *supra* note 5, at 445, 486.
215. *Id.* at 458.
216. *See id.*
217. *See id.* at 458–59.
218. *Id.*
219. *See id.* at 463; Rouse & Barrow, *supra* note 28, at 110, 112–13.
220. *See* Epple et al., *supra* note 5, at 458–59.

ually.[221] A study by Epple and Romano predicted that private schools participating in voucher programs that allow tuition top-ups charge high-achieving students lower tuition rates.[222] Private schools maintain lower tuition costs for high-achieving students by not invoking the tuition top-up provision and instead applying voucher funds to offset the high-achieving student's tuition costs.[223] Conversely, private schools charge higher tuition rates for lower achieving students by invoking the tuition top-up provision to either increase a student's tuition or decrease a student's financial aid.[224] Epple and Romano believe that private schools are likely to use tuition top-ups in this manner because injecting high-achieving voucher recipients into existing classroom environments results in peer effects that increase academic achievement for the entire class.[225] This process of using tuition top-ups to exclude all but the most high-achieving voucher students is referred to as "cream skimming" because private schools use tuition top-ups to skim away the "cream" of the public school population.[226]

Private schools use tuition top-ups in this way to exclude lower performing voucher recipients, unless a student's family is able to pay more in tuition.[227] Many current voucher programs in the United States determine student eligibility according to family income, typically using either the federal poverty line or the free and reduced price school meal guidelines as benchmarks.[228] Thus, the possibility of private schools using tuition top-ups to exclude the same population that a voucher program is designed to benefit might seem slight. However, school districts or states that create voucher programs initially designed to serve low-income families can gradually expand student eligibility requirements to include students from higher income backgrounds.[229] The po-

221. *Id.* at 458.
222. *Id.* at 459.
223. *Id.* at 458–59.
224. *See id.* at 459.
225. *Id.* at 458–59.
226. *Id.*
227. *Id.* at 459. Although the Epple and Romano study based its findings on a "universal" voucher system, a program where participation is not limited by family income, *id.*, this information is still salient when examining the potential effects of tuition top-ups in the income-restricted voucher programs more popular in the US. The Nechyba study concluded that a "small non-means-tested voucher targeted to residents of low-income districts is largely equivalent to a universal voucher that is not targeted, due to household mobility." *Id.* at 461. Nechyba concluded that in a universal system, most households using vouchers were still living in low-income districts. *Id.* Thus, although universal vouchers don't specifically target low-income communities, both types of voucher programs are typically used by the same population. *Id.* Therefore, the conclusions from the Epple and Romano study remain relevant in examining the effects of tuition top-ups in the United States. *See id.* at 458–59, 461.
228. Turner, *supra* note 2; *see also Voucher Programs: Student Eligibility Requirements*, EDUC. COMMISSION STS. (Mar. 2017), http://ecs.force.com/mbdata/mbquestRTV1?rep=V1702.
229. *See* Brown & McLaren, *supra* note 6.

tential for cream skimming becomes real when these higher income families are also made eligible to receive vouchers.[230]

For example, Indiana launched a state-wide voucher program in 2011.[231] Then-Governor Mitch Daniels stated that the program was targeted to benefit low-income, minority students.[232] The state capped program enrollment at 7,500 students and required that students be currently enrolled in public schools.[233] Full vouchers were only made available to families earning less than the highest qualifying income to receive free or reduced price school meals.[234] Thus, families only qualified to receive a full voucher if they earned, at most, the same as a family of four living off an annual income of $45,000.[235] However, in 2013, the newly elected Governor—and now Vice President—Mike Pence expanded the program dramatically by: (1) eliminating the cap on student enrollment; (2) eliminating the requirement that students attend a public school prior to receiving a voucher; and (3) raising the family income cutoff to allow a family of four with an annual income of $90,000 to receive a voucher covering half of a student's private-school tuition.[236] Student eligibility ballooned, with an estimated 60% of all Indiana students eligible to receive a voucher.[237]

Therefore, because tuition top-up provisions allow private schools to vary tuition on an individual basis, private schools will use tuition top-ups to admit only high-achieving and higher income voucher recipients.[238] Voucher programs that contain tuition top-up provisions are thus structurally designed to allow private schools to exclude most low-income voucher students, the group that voucher programs were, in theory, originally intended to assist.[239]

2. Tuition Top-Ups and Improved Access to Equal Education for Low-Income Students

Private schools use tuition top-ups to force low-income, lower ability students to remain in their preassigned public school.[240] Most Americans send their children to the school assigned to them by their local

230. Epple et al., *supra* note 5, at 458–59.
231. Brown & McLaren, *supra* note 6.
232. Stephanie Mencimer, *Mike Pence's Voucher Program in Indiana Was a Windfall for Religious Schools*, MOTHER JONES (Dec. 2, 2016, 11:00 AM), http://www.motherjones.com/politics/2016/12/mike-pence-voucher-program-religious-schools.
233. *Id.*
234. *Id.*
235. *Id.*
236. Brown & McLaren, *supra* note 6; Mencimer, *supra* note 232.
237. Brown & McLaren, *supra* note 6.
238. Epple et al., *supra* note 5, at 458–59.
239. *Id.*
240. *Id.*

government: an assignment determined by where a family lives.[241] Higher income families work within this school-assignment system to independently exercise school choice: these families either send their children to private schools or move to neighborhoods with higher quality public schools.[242] In contrast, lower income families do not have the financial freedom to independently choose which school their child attends because they can afford neither private school tuitions nor the cost of housing in neighborhoods with higher quality public schools.[243] Thus, private schools and higher quality public schools tend to almost exclusively serve students from higher income families.[244]

School quality tends to correlate with the family income level of the surrounding area.[245] Title I of the Elementary and Secondary Education Act of 1965 has, to a degree, both decreased the per-pupil spending gap and reconciled class size between schools serving higher and lower income populations.[246] Nonetheless, public schools serving higher income families continue to employ more experienced teachers, use better quality facilities, and have higher peer quality than schools serving lower income families.[247] This adversely affects student educational outcomes, which in turn adversely affect students' economic prospects in life.

For example, students from lower income families attend schools in which, on average, 56% of the student population enrolls in college, whereas students from higher income families attend schools in which an average of 75% of the student population enrolls in college.[248] Further, there is evidence that schools serving lower income families do not spend their already scant resources as efficiently as schools serving higher income families.[249] Thus, the quality of a student's education depends significantly on the income level of the surrounding area.[250]

Proponents of voucher programs cite this continued discrepancy in school quality between higher and lower income areas as justification for vouchers, which they argue will allow lower income students to escape their lower quality neighborhood schools.[251] By using a voucher to attend a higher quality private school, so the theory goes, low-income students will receive an education commensurate with their peers from higher income families, who either independently attend private schools or

241. WILLIAM G. HOWELL & PAUL E. PETERSON WITH PATRICK J. WOLF & DAVID E. CAMPBELL, THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS 5 (2002).
242. GILL ET AL., *supra* note 4, at 131–32.
243. HOWELL & PETERSON, *supra* note 241.
244. *See* GILL ET AL., *supra* note 4; HOWELL & PETERSON, *supra* note 241.
245. Rouse & Barrow, *supra* note 28, at 112.
246. *Id.* at 111, 113.
247. *Id.* at 111–12.
248. *Id.* at 112.
249. *Id.*
250. *See id.*
251. GILL ET AL., *supra* note 4.

higher quality public schools.[252] However, if private schools use tuition top-ups to exclude most low-income students, the ability of vouchers to provide low-income students with better quality education is significantly diminished.[253] Further, private schools use tuition top-ups to skim away high-achieving students from public schools.[254] Thus, tuition top-ups diminish the overall peer quality in public schools serving lower income families, further exacerbating any discrepancy in educational quality.[255] Therefore, voucher programs that contain tuition top-up provisions are structurally incapable of providing most low-income students with access to education commensurate with their higher income peers.[256] Indeed, voucher programs with tuition top-ups are structured such that they inevitably exacerbate the education gap.

3. Tuition Top-Ups and Increased Economic Stratification

Private schools' use of tuition top-ups to exclude most low-income students will also further perpetuate the economic gap between the children of higher and lower income families. A study by MacLeod and Urquiola showed that employers believe that the school a job candidate attended is a reflection of the candidate's inherent skills and ability.[257] MacLeod and Urquiola argued that employers assume that schools can best evaluate an individual's innate ability; thus, employers treat a job candidate's attendance at a particular school as a signal of the candidate's skill.[258] MacLeod and Urquiola contended this interaction between the education and labor markets explains student motivation for attending schools with better reputations.[259] This model also explains how private schools' use of tuition top-ups to exclude most low-income students could perpetuate the economic stratification between the children of higher and lower income families.[260]

As explained in Part B, private schools will use tuition top-ups to maintain the current educational status quo. Except for the most high-achieving voucher recipients, only the children of higher income families will receive a high-quality education. Further, tuition top-ups will perpetuate the gap in educational quality between private schools and lower quality public schools. Cream skimming will introduce high-achieving voucher recipients into private-school classrooms, thus increasing quality peer effects and improving academic performance of the entire class. Conversely, by removing these high-achieving students

252. *Id.*
253. *See* Epple et al., *supra* note 5, at 458–59.
254. *Id.*
255. *Id.* at 459.
256. *Id.*
257. *Id.* at 463.
258. *Id.*
259. *Id.*
260. *Id.* at 458–59, 463.

from public schools, cream skimming will result in inverse peer effects that negatively impact student achievement in lower quality public schools.[261] Therefore, as private school student achievement benefits from tuition top-ups, student achievement in lower quality public schools will suffer.[262]

Institutions of higher education bolster school reputation by attracting talented students.[263] Similarly, cream skimming will boost the reputations of private elementary, middle, and high schools, while simultaneously lowering the reputation of public schools serving low-income populations. If employers typically determine a job candidate's skill regarding the reputation of the school the individual attended, candidates who attended private schools or higher quality public schools are more likely to be considered qualified applicants. These individuals will therefore economically benefit from their school's better reputation when seeking jobs.[264] In contrast, candidates who attended public schools that predominantly serve low-income families are less likely to benefit from their school's reputation in a job selection.[265] Tuition top-ups will only allow high-achieving voucher recipients and the children of higher income families to benefit from a school's better reputation. Lower income students will be left to contend with their schools' lower reputation and thus be left behind economically.

It is important to note that by using tuition top-ups to exclude low-performing students, private schools would be appraising student ability in a manner similar to the way as employers expect: while not evaluating innate ability, private schools are at least appraising students' current educational performance.[266] However, when skimming high-achieving students from public schools, private schools will necessarily limit their student selection to those students with already demonstrated academic ability.[267] This process of student selection fails to recognize the potential for lower achieving students to achieve academic success if they attend a higher quality school on a voucher.[268] Thus, when employers examine an individual's abilities based upon school reputation, cream skimming does not function to provide employers with an accurate assessment of a student's skills or innate ability.[269]

Because employers use school reputation to assess a job candidate's quality, students' later economic success depends on what school they

261. *See id.* at 459.
262. *See id.*
263. *See, e.g., id.* at 456, 463, 481.
264. *See id.* at 463.
265. *Id.*
266. *Id.* at 458–59, 463.
267. *Id.* at 458–59.
268. *See* GILL ET AL., *supra* note 4, at 90–92.
269. *See id.*; Epple et al., *supra* note 5, at 458–59.

attend now. If private schools use tuition top-ups to exclude most low-income students, private schools deny most low-income students the opportunity to attend a school with a better reputation.[270] Further, private schools thereby would deny low-income students the chance to establish themselves as a high-achieving student deserving of a school's better reputation.[271] Therefore, voucher programs with tuition top-ups cause students' later economic success to depend upon their family's income, and thus fail to level the playing field between children from higher and lower income families.

CONCLUSION

In light of the present political support for school choice, it is important that voucher programs work to fulfill, not undermine, the central goals of vouchers—namely, to decrease the education quality gap between rich and poor families, and consequently increase the future economic prospects of lower income students. The U.S. Supreme Court's decision to remand *Taxpayers for Public Education* in light of *Trinity Lutheran* signifies that a voucher program mirroring the DCCSP may be constitutionally permissible. However, despite the Supreme Court's decision to remand, the DCCSP is doctrinally and structurally flawed. As currently written, the DCCSP violates the Establishment Clause of the First Amendment because it allows religiously affiliated private schools to base admissions decisions on a student's religious beliefs. Further, the DCCSP's tuition top-up provision renders the program susceptible to manipulation by private schools—manipulation that could exclude most low-income students from participation. As the Trump Administration continues to pursue a pro-school-choice platform, it is important that states and school districts understand the DCCSP's remaining faults.

Nonetheless, despite its flaws, the DCCSP is not beyond repair. For the DCCSP to survive an Establishment Clause challenge, it must prohibit participating private schools from basing admissions decisions on a student's religious beliefs: an amendment that would not offend the Supreme Court's interpretation of the Free Exercise Clause in *Trinity Lutheran*. And to prevent private schools from excluding low-income students from program participation, the DCCSP must omit the tuition top-up provision. The Douglas County School Board is no longer actively seeking to implement the DCCSP. However, an examination of the DCCSP's shortcomings is essential to provide states and other school districts that may wish to model new voucher programs off the DCCSP with an understanding of the potential constitutional and policy-based pitfalls that could accompany the imposition of a DCCSP-like program. If states and other school districts incorporate these two amendments into

270. *See* Epple et al., *supra* note 5, at 458–59, 463.
271. *See* GILL ET AL., *supra* note 4, at 90–92; Epple et al., *supra* note 5, at 458–59, 463.

their own programs, vouchers are more likely to function as they were originally intended and thus positively impact the American education system.

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