A MANDATE TO DISCRIMINATE?: WHY THE ESTABLISHMENT CLAUSE DOES NOT JUSTIFY THE EXCLUSION OF RELIGIOUS CHARTER SCHOOLS.

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INTRODUCTION

In a pair of consolidated cases, *Oklahoma Statewide Charter School Board v. Drummond* and *St. Isidore of Seville Catholic Virtual School v. Drummond*, the Supreme Court will consider whether the Establishment Clause authorizes Oklahoma to discriminate against religious groups who seek to participate in the state's charter-school program alongside secular groups.

Oklahoma invites any individual or organization to apply to operate a charter school. In 2023, St. Isidore of Seville, a nonprofit organization composed of two Catholic dioceses, applied to be a virtual charter school. The Statewide Virtual Charter School Board found that St. Isidore's application satisfied all the statutory criteria and approved the school. But the Supreme Court of Oklahoma rescinded that approval, finding that the Establishment Clause required the state to single out religious charter schools for exclusion. Indeed, the court used the Establishment Clause as a get–out–of–strict–scrutiny–jail–free card, ruling that this discrimination was mandatory even if the state had violated St. Isidore's Free Exercise rights.

The Oklahoma Supreme Court fundamentally misinterpreted the Establishment Clause, distorting its meaning to justify unconstitutional discrimination against religion. Not only did the Court improperly put St. Isidore in a "vise between the Establishment Clause on one side and the . . . Free Exercise Clause[] on the other,"[1] but the Court failed to apply the Establishment Clause in accordance with recent Supreme Court precedent, which demands that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[2] Properly interpreted, this means that "'the line' that courts and governments 'must draw between the permissible and the impermissible' has to 'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'"[3]

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[1] Kennedy v. Bremerton School District, 142 S. Ct. 2407, 2427 (2022) (quoting Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 768 (1995)) (citing Shurtleff v. Boston, 142 S. Ct. 1583, 1605–1606 (2022) (Gorsuch, J., concurring in judgment)).

[2] *Kennedy*, 142 S. Ct. at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)) (citing American Legion v. American Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (plurality opinion)).

[3] *Kennedy*, 142 S. Ct. at 2428 (alterations in original) (quoting *Galloway*, 572 U.S. at 577).

This essay will argue that a religious charter school does not violate the Establishment Clause. Part I will discuss *Drummond*'s background and the reasoning behind the Oklahoma Supreme Court's conclusion that St. Isidore must be excluded from a publicly available program. Part II will examine the original understanding of religious establishment and show that the purported tension between the Establishment Clause and the Free Exercise Clause is inconsistent with original meaning. Part III will then turn to the extensive history of state and federal education funding in America, demonstrating that governments consistently partnered with religious groups to accomplish their educational goals. It will show that during the eighteenth and nineteenth centuries, religious education was viewed as integral to good government, not as a threat to be excluded on antiestablishment grounds. Finally, Part IV will examine the Supreme Court's current caselaw to demonstrate that an antiestablishment interest does not justify excluding religious organizations from an otherwise generally available benefit, especially when parents have discretion to send their children to the religious school and the school benefits only upon the exercise of that private choice.

I. THE OKLAHOMA SUPREME COURT HELD THAT A CATHOLIC CHARTER SCHOOL VIOLATES THE ESTABLISHMENT CLAUSE.

Oklahoma ranks second to last in the nation in education today and has struggled for decades.[4] In 1999, in an attempt to improve student learning and increase educational options, the Oklahoma legislature authorized the Oklahoma Charter Schools Act. The Act invites any individual or private organization to submit an application to run a brick–and–mortar or a virtual charter school.[5] Any charter school must be free and open to any Oklahoma child.[6] To encourage innovative teaching and additional academic choices, the Act exempts charter schools from the majority of the bevy of regulations that apply to public schools.[7] Each school is also free to adopt its own "personnel policies, personnel qualifications, and method of school governance."[8] In fact, charter schools are independently governed by a self-selected board.[9]

Thanks to the Oklahoma Charter Schools Act, charter schools in Oklahoma are improving educational outcomes and offerings. Students who attend charter schools in Oklahoma outperform students in local, government-run public schools on national achievement tests.[10] Today, there are over thirty charter schools in Oklahoma that provide Oklahoma families access

[4] ANNIE E. CASEY FOUND., 2024 KIDS COUNT DATA BOOK: STATE TRENDS IN CHILD WELL-BEING 27 (2024), bit.ly/4bD84QT [perma.cc/SV7G-B48W]. *See also* Ben Felder, *A generation after education reform, Oklahoma is facing familiar issues*, THE OKLAHOMAN (March 27, 2016), www.oklahoman.com/story/news/politics/2016/03/27/a-generation-after-education-reform-oklahoma-is-facing-familiar-issues/60683965007 [perma.cc/Y6PY-9CBM] (noting the challenged public education system in 1990 due to "low academic achievement and teacher pay").

[5] OKLA. STAT. tit. 70, § 3-134(C) (2024).

[6] *Id.* at § 3-136(A)(9).

[7] *Id.* at §3-136(A)(1).

[8] *Id.* at § 3-136(C).

[9] *Id.* at § 3-136(A)(7); *accord* OKLA. ADMIN. CODE 777:10-1-3(c)(1) ("Charter schools . . . shall be governed by a board . . . .").

[10] Paul E. Peterson & M. Danish Shakeel, *The Nation's Charter Report Card*, EDUCATION NEXT, Winter 2024, at fig. 4, https://www.educationnext.org/nations-charter-report-card-first-ever-state-ranking-charter-student-performance-naep [perma.cc/5VVR-G7NZ].

to a range of educational options, including schools that focus on science, engineering, math, fine arts, language immersion, tribal identity, and more.[11]

There is just one catch: Oklahoma's Charter School Act, as well as the Oklahoma Constitution, disqualifies religious groups from the otherwise open invitation for individuals and private entities to apply. The Act bans any charter school "affiliated with a nonpublic sectarian school or religious institution."[12] And the law mandates that charter schools "be nonsectarian in [their] programs, admission policies, employment practices, and all other operations."[13] The Oklahoma Constitution similarly requires "a system of public schools . . . free from sectarian control."[14] The state's constitution also provides that no "public money" shall be used "for the use, benefit, or support of any sect, church, denomination, or system of religion . . . or sectarian institution as such."[15]

Believing these religious exclusions to violate the Free Exercise Clause, two private religious entities, the Archdiocese of Oklahoma City and the Diocese of Tulsa, created a nonprofit corporation, St. Isidore of Seville Virtual Charter School ("St. Isidore"), and submitted a charter school application. In its application, St. Isidore was upfront about its desire to provide a high-quality religious education. St. Isidore sought to create a school "dedicated to academic excellence" that would "'educate the entire child: soul, heart, intellect, and body' in the Catholic tradition."[16] St. Isidore promised to welcome "any and all students," including "those of different faiths or no faith."[17]

It is "undisputed" that St. Isidore met the "requirements for operating a charter school aside from its religious affiliation."[18] Furthermore, the State Charter School Board has a "dut[y]" to "[a]pprove quality charter applications that meet identified educational needs and promote a diversity of educational choices."[19] Selection criteria include "high quality academic programming," a record of operating successful charter schools, and "the collective experience" of the school's governing board.[20] St. Isidore's application set out its intention to use a high-quality curriculum, and its two Diocesan members have experience running schools with a proven track record of academic success.[21]

The State Charter School Board approved the application, concluding that the statutory and constitutional exclusion of religious groups was unconstitutional.[22] But shortly after, the

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[11] *See* Current Charter Schools of Oklahoma, OKLA. ST. DEP'T OF EDUC., https://oklahoma.gov/education/services/school-choice/charter-schools/current-charter-schools.html [perma.cc/P4KZ-QVYL].

[12] OKLA. STAT. tit. 70, § 3-136(A)(2).

[13] *Id.*

[14] Act of June 16, 1906, § 3, 34 Stat 267, 270.

[15] OKLA. CONST. art. 2, § 5.

[16] Petition for Writ of Certiorari at 11, Okla. Statewide Charter Sch. Bd. v. Drummond *ex rel.* Okla., No. 24-394 (U.S. Oct. 7, 2024), 2024 WL 4468129, at *11.

[17] *Id.*

[18] Drummond *ex rel.* State v. Okla. Statewide Virtual Charter Sch. Bd., 558 P.3d 1, 17 (2024) (Kuehn, J., dissenting), *cert. granted sub nom.*, Okla. Statewide Charter Sch. Bd. v. Drummond *ex rel.* Okla., No. 24-394, 2025 WL 288306 (U.S. Jan. 24, 2025) (first consolidated case), and *cert. granted sub nom.*, St. Isidore of Seville Cath. Virtual Sch. v. Drummond *ex rel.* Okla., No. 24-396, 2025 WL 288308 (U.S. Jan. 24, 2025) (second consolidated case).

[19] OKLA. STAT. tit. 70, § 3-134(I)(3).

[20] OKLA. ADMIN. CODE § 777:10-3-3(c)(1)–(2) (2024).

[21] Petition for Writ of Certiorari at 196-97a, St. Isidore v. Drummond *ex rel.* Okla., No. 24-396 (U.S. Oct. 7, 2024).

[22] *Drummond*, 558 P.3d at 6–7.

Oklahoma Attorney General filed a mandamus petition with the Oklahoma Supreme Court that asked the Court to rescind that approval.[23] He warned that the Board had violated the Establishment Clause and "pave[d] the way for an onslaught of sectarian applicants for charter[ ]" schools, including religions he thought that Oklahomans "would find reprehensible," such as "extreme sects of the Muslim faith."[24]

The Oklahoma Supreme Court rescinded St. Isidore's approval, finding that it violated the Oklahoma Constitution, the Charter School Act, and the federal Establishment Clause.[25] The court found that St. Isidore was "a governmental entity and a state actor" and thus unable to claim any protection from the Free Exercise Clause.[26] While that conclusion is outside the scope of this essay, it is wrong; the Supreme Court has cautioned against depriving private parties of their constitutional rights by labeling them as state actors.[27] But the court's fundamental error, and the focus of this essay, was its erroneous interpretation of the Establishment Clause. Even after assuming for the sake of argument that St. Isadore was a private actor possessing Free Exercise rights, the Oklahoma Supreme Court hewed to an outdated no-aid view of the Establishment Clause and embraced a misguided theory of the Religion Clauses that pits them against one another. It held that St. Isidore's free exercise rights could "not override the legal prohibition under the Establishment Clause."[28] It viewed the Establishment Clause as forbidding the use of public money for a religious charter school and thus found that Oklahoma's antiestablishment interest justified any Free Exercise violation because it was "a compelling governmental interest that satisfies strict scrutiny."[29] In short, the Oklahoma Supreme Court pitted the Religion Clauses against one another, using the Establishment Clause to trump St. Isidore's Free Exercise Clause protections.

II. HISTORICAL UNDERSTANDING OF THE ESTABLISHMENT CLAUSE

According to the Oklahoma Supreme Court, the Establishment Clause is in tension with the Free Exercise Clause.[30] However, this formulation does not reflect the Religion Clauses' original understanding. The Framers intended the Clauses to work in tandem to protect liberty of

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[23] *Id.* at 6.

[24] *See* Petition for Writ of Certiorari at 77a, *Okla. Statewide Charter Sch. Bd.*, No. 24-396 (U.S. Oct. 7, 2024), 2024 WL 4468129 (Oklahoma Attorney General's Brief in Support of Motion for Mandamus, filed in the Oklahoma Supreme Court on Oct. 20, 2023).

[25] Drummond *ex rel.* State v. Okla. Statewide Virtual Charter Sch. Bd., 558 P.3d 1, 7 (2024).

[26] *Id.* at 11 (first citing Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988), and then citing United States v. Ackerman, 831 F.3d 1292, 1295-1300 (10th Cir. 2016)).

[27] *See, e.g.*, Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 814–15 (2019) ("Numerous private entities in America obtain government licenses, government contracts, or government-granted monopolies. If those facts sufficed to transform a private entity into a state actor, a large swath of private entities in America would suddenly be turned into state actors and be subject to a variety of constitutional constraints on their activities."); *see also* Rendell-Baker v. Kohn, 457 U.S. 830, 841–42 (1982) (holding a private charter school was not a state actor in the § 1983 context because the actions at issue were not compelled by the state); S. Ernie Walton, *Charter Schools and State Action: An Analysis Through the Lens of Agency Law*, 77 OKLA. L. REV. __, at *11–*13, *16 (forthcoming 2025), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4912082 [https://perma.cc/Z389-ZRYN] (contending that past iterations of the entwinement test clash with the Court's core state action doctrine and advocating for application of the rule in *Lindke v. Freed*—that private actions are attributable to the state only in the presence of actual authority and intent to exercise said authority).

[28] Drummond *ex rel.* State v. Okla. Statewide Virtual Charter Sch. Bd., 558 P.3d 1, 14–15 (2024).

[29] *Id.* (citing Widmar v. Vincent, 454 U.S. 263 (1981)).

[30] *See Drummond*, 558 P.3d at 14–15.

conscience; the Establishment Clause was meant to oppose coercion that diminished religious freedom, not to place limits on free exercise protections. The historical understanding of establishment shows that an antiestablishment interest was never thought to justify discrimination against religious education. This explains why generations of Americans saw no issue with the public funding of religious schools. In fact, it was common practice "in the founding era and the early 19th century" for both federal and state governments to "provide[] financial support to private schools, including denominational ones."[31] The nation's storied tradition of funding religious schools shows that St. Isidore's approval would not violate the Establishment Clause.

A. The Religion Clauses were intended to work in tandem to support religious liberty, not to be weighed by courts as competing interests.

In *Drummond*, the Oklahoma Supreme Court pitted the Establishment Clause against the Free Exercise Clause, ruling that the Oklahoma's antiestablishment interest outweighed St. Isidore's free exercise protections.[32] This interpretation of the Religion Clauses diverges significantly from their original meaning. As originally understood, the Religion Clauses have fundamentally complementary purposes.

The Religion Clauses provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[33] As the Supreme Court has recently explained, the most "natural reading" of the sentence that contains the Religion Clauses is that the Clauses have "complementary purposes, not warring ones."[34] Further, the Bill of Rights was enacted to limit the power of the federal government and to prevent the sort of abuses that early Americans suffered at the hands of the British government.

Yet some today argue, as the Oklahoma Supreme Court held, that the Establishment Clause is different from the other protections in the Bill of Rights and authorizes the government to violate rights that are protected by other Bill of Rights' provisions.[35] The strict "no-aid" view forces the conclusion that the Founders intentionally set the Religion Clauses on a collision course. This theory posits that the Clauses are in "inherent tension," with the Free Exercise Clause protecting religious liberty while the Establishment Clause authorizing the *violation* of those Free Exercise rights and the exclusion of religious people from public programs and benefits.[36]

The twentieth-century Supreme Court endorsed this no-aid absolutism when it was in vogue to erase all traces of religion from the government. In *Everson v. Board of Education*, the Supreme Court interposed a "wall of separation" that "must be kept high and impregnable" between church and state.[37] Yet the *Everson* Court also concluded that faith was not grounds to deny "the benefits of public welfare legislation" and the Court was hesitant to embrace the consequences of

[31] Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 480 (2020).

[32] *Drummond*, 558 P.3d at 14–15.

[33] U.S. CONST. amend. I.

[34] *Kennedy*, 597 U.S. at 533.

[35] Linda Greenhouse, *The Urgent Supreme Court Case*, N.Y. TIMES (March 9, 2025), https://www.nytimes.com/2025/03/09/opinion/school-catholic-supreme-court-constitution.html [https://perma.cc/6642-JSNZ].

[36] *Id.*; *see also Drummond*, 558 P.3d at 14–15 (implying tension in the Religion Clauses by stating that even if St. Isidore could claim Free Exercise rights, Oklahoma's disestablishment interest overrode any such right).

[37] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

its imagined wall of separation, allowing New Jersey to fund parochial school bus fare.[38] It was not until *Lemon* that no-aid absolutism became dominant with government action held to violate the Establishment Clause *unless* it: (1) had a "secular legislative purpose," (2) its "principal or primary effect" neither promoted nor "inhibit[ed]" religion, and (3) did not foster "excessive government entanglement with religion."[39] No-aid absolutism was on full display in Justice O'Connor's endorsement gloss on *Lemon* which posited that the Establishment Clause was violated whenever religious participation in generally available programs could be viewed as the government endorsing religion.[40]

Just last term, in *Kennedy v. Bremerton School District*, the Supreme Court clarified that, due to its "shortcomings" [41] and "ahistorical" reasoning, the Court had "long ago abandoned *Lemon* and its endorsement test offshoot."[42] The Court held that the Establishment Clause does not "compel the government to purge from the public sphere" anything that might be viewed as an endorsement of religion.[43] In place of *Lemon*, the Supreme Court "instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[44] The Court noted that "coercion" was "among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[45] Yet it explained that there had been disagreement on the Court as to what "qualifies as impermissible coercion in light of the original meaning of the Establishment Clause," and it declined to lay out a precise test. [46]

This leaves current Establishment Clause jurisprudence—in a word—"unsettled."[47] Yet while jurists and scholars may disagree over the precise original understanding of the term "establishment,"[48] this essay will show that it cannot support the sort of no-aid absolutism on display in *Drummond*. In cases involving the Establishment Clause, the Supreme Court has instructed that the "line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding

[38] *See id*. at 16–18 (holding that New Jersey's statute "ha[d] not breached" the asserted wall of separation).

[39] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (first citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968), and then citing Walz v. Tax Commission, 397 U.S. 664, 674 (1970).

[40] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

[41] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) (quoting American Legion v. American Humanist Ass'n, 139 S. Ct. 2067, 2101 (2019) (plurality opinion)) (citing Town of Greece v. Galloway, 572 U.S. 565, 575–577 (2014)).

[42] *Kennedy*, 142 S. Ct. at 2427.

[43] *Id.* (quoting Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in judgment)).

[44] *Kennedy*, 142 S. Ct. at 2428 (quoting *Galloway*, 572 U.S. at 576) (citing *American Legion*, 139 S. Ct. at 2087).

[45] *Kennedy*, 142 S. Ct. at 2429 (footnote omitted).

[46] *Id.* (comparing Lee v. Weisman, 505 U.S. 577, 593 (1992) with id. at 640–41 (Scalia, J., dissenting).

[47] Vincent Phillip Muñoz, *What Is an Establishment of Religion? And What Does Disestablishment Require?*, 38 CONST. COMM. 219, 219 (2023), [perma.cc/MS4Q-8MKN] (reviewing NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE (2023)).

[48] Professor Donald Drakeman, for example, has argued that "establishment" was used in a variety of ways at the Founding. DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 225 (2010). Justice Thomas has expressed a federalism view of the amendment (which has much to recommend it as an historical matter) stating that Congress has no power to make any law respecting state establishments. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J, concurring in judgment) ("[T]he Establishment Clause is a federalism provision, which, for this reason, resists incorporation."). Phillip Muñoz similarly advocates for this view. Muñoz, *supra* note 47, at 246–47.

Fathers"—and the original understanding of the Religion Clauses confirms that they are meant to preserve religious liberty, not destroy it.[49]

The historical record shows that the purpose of the Establishment Clause was to protect freedom of conscience.[50] At the time of the Founding, there was "broad agreement that liberty of conscience was a basic, inalienable right."[51] And there was also agreement that the "establishment" of religion, meaning a government-preferred church, violated liberty of conscience "because it led to compelled actions against conscience."[52]

Professor Noah Feldman has demonstrated that the Founding generation opposed "establishment" precisely because they viewed it as threatening freedom of conscience.[53] Indeed, during the ratification debates the "predominant" argument "against established churches was that they had the potential to violate liberty of conscience."[54] Those opposed to establishment directly linked its vices to violations of religious liberty. At the Pennsylvania ratifying convention, for example, one delegate argued against ratification because "[t]he rights of conscience are not secured . . . . Congress may establish any religion."[55] These concerns follow from the Lockean idea that it violated conscience rights for the government to coerce religious adherence.

Various ratification-era proposals expressly derived their opposition to establishment from religious liberty concerns. In proposing draft language for the Bill of Rights, the states advocated for language that linked liberty of conscience with nonestablishment. For instance, Virginia's state ratifying convention adopted a provision that read:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others.[56]

This provision—as well as nearly identical proposals from North Carolina and Rhode Island—echoed Madison's claims that the inalienable right to conscience meant that no religion ought to be established or preferenced in law.[57] New York's proposal similarly linked liberty of conscience with the need for nonestablishment: "That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of

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[49] *Kennedy*, 597 U.S. at 535–36 (quoting Town of Greece v. Galloway, 572 U.S. 565, 577 (2014)).

[50] Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 398–405 (2002); *see also* Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 89 (2005) (citing Professor Feldman in concluding that "the celebrated tension" in the religion clauses is "overblown" and "if the Establishment Clause exists to serve the Free Exercise Clause, then in the event of conflict, the former must yield").

[51] Feldman, *supra* note 50, at 405.

[52] *Id.*

[53] *Id.* at 381–84, 398–402.

[54] *Id.* at 398. Feldman errs, however, by concluding that the idea of liberty of conscience supports an essentially no-aid position. To the contrary, while states disestablished churches, they routinely funded religious education. *See* Mark Storslee, Church Taxes and the Original Understanding of the Establishment Clause, 169 U. PENN. L. REV. 111, 143–44, 150–63 (2020).

[55] *Id.* (quoting Proceedings and Debates of the Pennsylvania Convention, *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 326, 592 (Merrill Jensen ed., 1976)).

[56] *Id.* at 401 (quoting 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787, 659 (Jonathan Elliot ed., 1901)).

[57] *Id.*

conscience; and that no religious sect or society ought to be favored or established by law in preference to others."[58] New Hampshire drafted language providing that "Congress shall make no laws touching religion, or to infringe the rights of conscience"—again, highlighting the ratifying generation's view of nonestablishment as protecting religious liberty.[59] Maryland likewise proposed that "there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty."[60]

Madison's first draft of the First Amendment also melded establishment and free exercise concerns, reading: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[61]

This draft language confirms that, for Madison, establishment and free exercise are the opposite sides of the same coin. Both were meant to secure conscience from coercion. And as Professor Feldman has explained, the final language of the Religion Clauses did not abandon the idea of liberty of conscience. Rather the "protection of free exercise and a ban on establishment, taken together, were thought to cover all the ground required to protect the liberty of conscience."[62] In short, Professor Feldman's rigorous examination of the historical record concludes that "liberty of conscience was the basic principle that underlay the arguments for no establishment at the federal level."[63] An honest purveyor of history struggles to conclude otherwise.

The "logical connection between protection of liberty of conscience and establishment" motivated the Founders to craft the First Amendment as they did.[64] The congruence between the First Amendment's protections and the Founding-era design that both phrases protect liberty of conscience discredits the theory that the Establishment Clause is in "tension" with the Free Exercise Clause.[65] While the inherent-tension theory uses the Establishment Clause to excuse violations of the Free Exercise Clause, that misunderstands the construction of the First Amendment. The Religion Clauses were enacted *together* to preserve liberty of conscience. The history and tradition of the Establishment Clause show that it was also meant to serve the religious liberty protected by the Free Exercise Clause.[66] Where the Free Exercise Clause requires protection for religious activity and condemns discrimination, an historical understanding of the Religion Clauses means that the Establishment Clause ought to permit that same activity.[67]

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[58] *Id.* at 401 n. 309 (quoting 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 328 (John P. Kaminski & Gaspare J. Saladino eds.,1990)).

[59] *Id.* at 401 (quoting 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 326 (John P. Kaminski & Gaspare J. Saladino eds., 1990)).

[60] Convention of the Delegates of the People of the State of Maryland, Apr. 28, 1788, *reprinted in* 2 THE DEBATE ON CONSTITUTION 552, 554 (Bernard Bailyn ed., 1993).

[61] 1 ANNALS OF CONG. 451 (1789).

[62] Feldman, *supra* note 50, at 404. For a granular account of the opposing theological figures who gave rise to the natural rights "freedom of conscience" consensus, see generally PHILLIP HAMBURGER, SEPARATION OF CHURCH AND STATE 21–64 (2002).

[63] Feldman, *supra* note 50, at 405.

[64] *Id.* at 398.

[65] Linda Greenhouse, *The Urgent Supreme Court Case*, N.Y. TIMES (March 9, 2025), https://www.nytimes.com/2025/03/09/opinion/school-catholic-supreme-court-constitution.html [https://perma.cc/6642-JSNZ].

[66] Natelson, *supra* note 50 at 90.

[67] *Id.*

In sum, there is no inherent tension between the Free Exercise and Establishment Clauses as originally understood. The Founders did not anticipate that the Establishment Clause would be used as a sword to deprive individuals of their Free Exercise rights.[68] Indeed, Madison repeatedly explained the clauses as working in concert to protect religious liberty, interpreting the phases together to mean "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[69] As shown below, moreover, the Founding generation—including Presidents Jefferson and Madison—repeatedly partnered with religious organizations to provide education. This history shows that the Founding Fathers did not view the Establishment Clause as an impediment to religious participation in government programs, much less as a justification for violating Free Exercise rights.

B. The original understanding of "establishment."

Moreover, the six indicia of "establishment" identified by Justice Gorsuch and Professor McConnell focus on the sort of coercion that would have made an establishment anathema to freedom of conscience and further demonstrate that funding religious schools would not (and did not) constitute "establishment" in the eyes of the Founders.

"To make sense of the Establishment Clause, one must understand the historical background that informed the Framers' use of the word 'establishment.'"[70] At the time of the Founding, as Professor Michael W. McConnell explained in his seminal article, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religi*on, "establishment" involved coercion.[71] "Force and funds to the church were what animated the drafters of the Establishment Clause."[72]

Building on Professor McConnell's article, Justice Gorsuch identified six indicia of establishment in his concurrence in *Shurtleff*.[73] He explained that that "founding-era establishments often bore . . . telling traits," most of them "reflect[ing] forms of coercion:"

> First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established church to carry out

[68] Muñoz, *supra* note 47, at 247 ("Madison seems to have associated religious establishments with the legal compulsion of religion.").

[69] 1 ANNALS OF CONG. 758 (1789); *see also* Muñoz, *supra* note 47, at 245 (reproducing the same quote from Madison).

[70] Felix v. City of Bloomfield, 847 F.3d 1214, 1215 (10th Cir. 2017) (Kelly, J., dissenting).

[71] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2119 (2003) [hereinafter *Establishment*]. Professor McConnell has summarized the general features of most establishments: "(1) [state] control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church." *Id.* at 2131.

[72] NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE 119 (2023).

[73] Shurtleff v. City of Bos., 596 U.S. 243, 286 (2022) (Gorsuch, J., concurring).

> certain civil functions, often by giving the established church a monopoly over a specific function.[74]

An originalist understanding of the Establishment Clause must be guided by history and tradition, and as Justice Gorsuch and Professor McConnell have written, the Framers were particularly concerned about coercion, not vague notions of entanglement or endorsement.[75] The Establishment Clause was meant to "forestall[] compulsion by law of the acceptance of any creed or the practice of any form of worship."[76] As James Madison put it during the debates over the language of the First Amendment, the Establishment Clause sought to prevent sects from "establish[ing] a religion to which they would compel others to conform."[77] History and tradition confirm that the Clause prevents Congress from doing coercive things—establishing a national church and controlling its doctrine, compelling religious tithes, coercing religious observance, forbidding and punishing minority religious observance, handing over taxing authority to the established church and requiring test oaths. The prohibition of all of these things shows that the framers expressly linked nonestablishment with freedom of conscience and the preservation of religious liberty. That's because preventing coercion facilitates religious liberty.

Indeed, the six factors identified by Justice Gorsuch and Professor McConnell focus primarily on limiting coercion as a means to protect religious liberty.

First, establishment at the founding often meant that the "government exerted control over the doctrine and personnel of the established church."[78] The colonists were familiar with Europe's state churches, where the King's religion was the realm's religion.[79] Under Erastianism, (named for Thomas Erastus, the 16th-century theologian who promoted a theory that placed civil authority over the Church), "the monarch was the supreme head of the Church; Parliament controlled the liturgy and articles of faith; the government appointed the bishops; [and] government offices were confined to members of the Church."[80]

In the colonies, government control over the church was exercised through the appointment of clergy and passage of laws that governed church doctrine.[81] The "central feature" of early Anglican establishments in America "was control" by the church.[82] The government not only selected the clergy but also dictated the religious doctrines that they taught. This control of church doctrine helps explain why disestablishment was often promoted as a means to enhance religious liberty.[83]

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[74] *Id.*

[75] *See* Kennedy v. Bremerton School District, 597 U.S. 507, 535–36 (2022).

[76] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[77] *Kennedy*, 597 U.S. at 537 n. 5 (citing 1 ANNALS OF CONG. 730–31 (1789)).

[78] *Shurtleff*, 596 U.S. at 286 (2022) (Gorsuch, J., concurring).

[79] Steven D. Smith, *Fixed Star" or Twin Star?: The Ambiguity of* Barnette, 13 FIU L. REV. 801, 803 (2019) (conveying the principle of *cuius regio, eius religio*, meaning "whose realm, his religion," as enshrined in the Peace of Westphalia, determining that the religion of a ruler determined the religion of his subjects).

[80] McConnell, *Establishment, supra* note 71, at 2189.

[81] *Id.*

[82] *Id.* at 2131.

[83] *See* NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE 58 (2023) (examining how, in response to losing public tax support and ecclesial independence, the Anglican church in Virginia petitioned the legislature "for the repeal of the laws

Second, in England, as well as the colonies, compelled religious observance was a ubiquitous part of the established church. Indeed, vestrymen in Virginia and throughout the South were authorized "to bring misdemeanor charges against persons caught swearing, Sabbath-breaking, skipping church, slandering, 'backbiting' or committing the 'foule and abominable sins of drunkenness[s,] fornication[,] and adultery.'"[84] And a 1662 Virginia law even fined "scismaticall persons" who declined to baptize their children.[85]

Third and fourth, the Supreme Court has detailed how the exclusivity of established churches in the eighteenth century often resulted in the "prohibition of other forms of worship" and the exclusion of dissenters from the political process.[86] Even small deviances from dominant doctrines were punished. In fact, a young James Madison was inspired to pen his first defense of religious liberty when he saw Baptist ministers imprisoned for failing to follow religious orthodoxy:

> That diabolical, hell-conceived principle of persecution rages among some . . . . There are at this time in the adjacent county not less than five or six well-meaning men in close jail, for publishing their religious sentiments, which in the main are very orthodox . . . . So I must beg you to . . . pray for liberty of conscience to all.[87]

Moreover, when the Constitutional Convention assembled in Philadelphia, most of the original thirteen colonies included religious tests as a qualification for office in their constitutions.[88] Convention delegates pointed out the dangers of excluding religious dissenters from civic life[89] and adopted a federal constitutional provision providing that "no religious test shall ever be required as a qualification to any office or public trust under the United States."[90]

Fifth, the established church of colonial America was funded by the government. "In addition to revenues from land grants, all nine of the American colonies with established churches imposed compulsory taxes for the support of churches and ministers."[91] The "financial support" that amounted to an establishment "took very specific forms: government land grants to the established church, direct grants from the public treasury, and compulsory taxes or 'tithes'

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setting the doctrine, liturgy, and clergy qualifications of the church, giving the church the right to govern itself in all these respects").

[84] McConnell, *Establishment*, *supra* note 71, at 2118 (quoting GEORGE MACLAREN BRYDON, VIRGINIA'S MOTHER CHURCH AND THE POLITICAL CONDITIONS UNDER WHICH IT GREW 121 (1947)).

[85] *Id.* at 2119.

[86] Walz v. Tax Comm'n of New York, 397 U.S. 664, 668 (1970). The exclusion of religious dissidents was nothing new. In England, even the Toleration Act of 1689, which granted freedom of worship to some denominations, left in place criminal penalties against Catholic, Jewish, and Unitarian dissenters. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421–22 (1990).

[87] McConnell, *Establishment*, *supra* note 71, at 2166. Relatedly, if one did not follow church teachings, they were excluded from important parts of civic life. McConnell writes that central to establishment was the limitation of public office to church members. *Id.* at 2178 ("Even after Independence, every state other than Virginia restricted the right to hold office on religious grounds."). The Constitution, however, expressly forbade the federal government from requiring a religious test. *See* U.S. CONST. art. VI, cl. 3.

[88] Carl Zollman, *Religious Liberty in the American Law*, 17 MICH. L. REV. 355, 355 (1919).

[89] *Id.* at 356.

[90] U.S. CONST., art. VI, cl. 3.

[91] McConnell, *Establishment*, *supra* note 71, at 2152.

for the support of churches and ministers."[92] Establishment, then, involved targeted financial support for the established church, often but not exclusively through coercive means.[93] South Carolina's Founding-era establishment, for example, delegated taxing authority to churches.[94] And in the New England states, the states "collected and distributed solely to churches specific religious taxes for the support of ministers and church facilities."[95]

As Professor Mark Storslee has explained, in the years immediately following the Founding, Americans largely came to agree that "government could not rightfully compel people to engage in specific forms of religious worship" and that this objection extended to church taxes as a form of compelled tithe.[96] Accordingly, by 1801, nine states had either forbidden church taxes or rejected proposals to require them.[97] Yet the idea that states should never aid religion fails to square with Founding-era practice. Indeed, the states that ended church taxes almost invariably funded religious schools and did so "seemingly without controversy."[98] As Professor Muñoz has explained, prohibiting an establishment did not mean "forbidding every form of public aid or support for religion."[99] To the contrary, "many Americans at the time of the Founding thought tax support of religion legitimate insofar as the purpose and scope of such support was to foster the self-governing moral character necessary for republican government."[100]

And sixth, the government sometimes used the established church "to carry out certain civil functions, often by giving the established church a monopoly over a specific function."[101] Establishment also often involved the "[d]elegation of government's coercive authority to churches, especially in matters of taxation and financial contribution."[102] As noted above, for example, the 1778 South Carolina Constitution, delegated its taxing power to the established church.[103] In South Carolina, "[l]egally established churches could utilize the state's coercive power to collect 'pew assessments' and other financial obligations imposed on their members."[104]

An originalist reading of the Establishment Clause thus shows that St. Isidore's does not constitute an unconstitutional "establishment" because there is no coercion. The Oklahoma government is not exerting control over church doctrine or personnel. It is not mandating attendance at any church, much less forcing anyone to attend St. Isidore. Parents exercise an

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[92] Hannah C. Smith & Daniel Benson, *When A Pastor's House Is A Church Home: Why the Parsonage Allowance Is Desirable Under the Establishment Clause*, 18 FEDERALIST SOC'Y REV. 100, 102 (2017) (quoting McConnell, *Establishment*, supra note 71, at 2146–59). As the Supreme Court has explained, the "establishment' of a religion" at the Founding meant "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Comm'n of New York, 397 U.S. 664, 668 (1970).

[93] Muñoz, *supra* note 47, at 259–60.

[94] *Id*.

[95] *Id.* at 260.

[96] Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PENN. L. REV. 111, 118 (2020).

[97] *Id.* at 150.

[98] *Id.*

[99] Muñoz, *supra* note 47, at 259.

[100] *Id.* (citing NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE 69–74 (2023)).

[101] Shurtleff v. City of Bos., 596 U.S. 243, 286 (2022) (Gorsuch, J., concurring).

[102] Muñoz, *supra* note 47, at 260; *see also Shurtleff*, 596 U.S. at 286 ("[T]he government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.").

[103] Muñoz, *supra* note 47, at 259–60.

[104] *Id.* at 258.

independent choice as to whether they would like to send their kids to an additional privately run educational option or keep them in traditional government-run public schools. Further, the government is not punishing those who choose not to attend St. Isidore nor in any way restricting political participation based on that choice. The government is not providing targeted financial support for worship in a preferred church. And finally, St. Isidore does not exercise government taxing power or have a monopoly on any civil function.

III. HISTORY OF RELIGIOUS EDUCATION FUNDING

A. States regularly funded religious schools from the Founding through Reconstruction.

From the ratification of the Bill of Rights to the turn of the nineteenth century, the states not only funded religious education, but believed that such education was key to good government.[105] Historical evidence shows that the Founding generation thought that religion, schools, and good government were "inextricably linked."[106] "[M]ost members of the founding generation believed deeply that some type of religious conviction was necessary for public virtue, and hence for republican government."[107] Thus, in the early days of the Republic, religious schools were the primary means to the desired end of a moral society. And as McConnell and Chapman have explained, support for education was not thought to violate the Establishment Clause even where "the education had religious components and was conducted under denominational auspices."[108]

Primary education in the young Republic was "haphazard, private, and almost invariably religious."[109] Primary schools prior to 1830 were "conducted under religious auspices, often by clergy," even when local or state government shouldered the costs.[110] Town schools of the era were "virtually Congregational parochial schools."[111] Indeed, Alexis de Tocqueville remarked after his tour of the Eastern States in 1831 that "[a]lmost all education is entrusted to the clergy."[112] Local and state governments almost always funded this religious education.[113]

In New York, for example, a diverse collection of schools was organized by various denominations and received state funding.[114] Between 1800 and 1830, New York funded Presbyterian, Methodist, Quaker, Catholic, Dutch Reformed, Baptist, Lutheran, Episcopalian, Jewish, and Lutheran schools.[115]

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[105] JAMES W. FRASER, BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN A MULTICULTURAL AMERICA 23 (1999).

[106] *Id*.

[107] McConnell, *Establishment*, *supra* note 71, at 2109.

[108] NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE 119 (2023).

[109] *Id*.

[110] *Id*.

[111] RICHARD J. GABEL, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS 183 (1937).

[112] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 395 (Francis Bowen, ed., Henry Reeve, trans., Cambridge, Sever and Francis 2d ed. 1862) (1835).

[113] *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 299 (2001).

[114] FRASER, *supra* note 105, at 51.

[115] CHAPMAN & MCCONNELL, *supra* note 108, at 119.

In a similar vein, Massachusetts and Maine granted public land to private schools based on neutral and generally applicable criteria.[116] Many of the schools that received such funding were operated by churches, and those that weren't made faith a centerpiece of the curriculum.[117]

The original thirteen states also subsidized private religious colleges in the early 1800s. As with primary education, nearly every private college was affiliated with a religious denomination.[118]

The primary school textbook of choice in eighteenth and early nineteenth century America, *The New England Primer*, reveals the thoroughly religious nature of Revolutionary-era education. Nicknamed "The Little Bible of New England,"[119] various adaptations included the Lord's Prayer,[120] the Apostles' Creed,[121] the Ten Commandments,[122] and the Westminster Catechism.[123] The youngest readers were taught to recognize their letters with memorable rhymes from A ("In Adam's Fall, We sinned all") to Z ("Zacheus he did climb the Tree, Our Lord to see").[124]

The catechetical drill for older students asked, inter alia:

Q: "What is the chief end of man?

A: "Man's chief end is to glorify God and enjoy Him forever."[125]

Q: "Who is the Redeemer of God's elect?"

A: "The only Redeemer of God's elect, is the Lord Jesus Christ, who being the eternal son of God, became man, and so was, and continues to be God and man, in two distinct natures, and one person forever."[126]

The *New England Primer* reflected the thoroughly religious nature of early American education. Even those schools that were not denominationally religious employed a curriculum that was decidedly so.

This religious nature permeated the genesis of publicly funded education, too. In 1837, Horace Mann, the father of modern public schools (then called "common schools"), became the first secretary of the Massachusetts State Board of Education. Mann began the common school movement's push for free public education and sought to standardize—but not secularize—education. He believed that "common schools should provide 'religious education' of a general and tolerant nature."[127] For Mann, learning religion in publicly funded schools was a way for a

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[116] GABEL, *supra* note 111, at 186.

[117] *Id*.

[118] CHAPMAN & MCCONNELL, *supra* note 108, at 118.

[119] The New England Primer, BRITANNICA, https://www.britannica.com/topic/The-New-England-Primer [perma.cc/Q3HW-7VST].

[120] FRASER, *supra* note 105, at 10.

[121] NEW ENGLAND PRIMER: A HISTORY OF ITS ORIGIN AND DEVELOPMENT 25 (Paul Leicester Ford, ed., Dodd, Mead, and Co. 1897) [hereinafter "NEW ENGLAND PRIMER"] [perma.cc/3YG3-RTWB] (late nineteenth century edition containing a full reproduction of the first edition).

[122] *Id.* at 74–78.

[123] FRASER, *supra* note 105, at 10.

[124] NEW ENGLAND PRIMER, *supra* note 105, at 65, 68.

[125] *Id.* at 96.

[126] THE IMPROVED NEW ENGLAND PRIMER 28–29 (Roby, Kimball & Merrill 1841).

[127] FRASER, *supra* note 105, at 24.

child to discern his "religious obligations."[128] Common schools were to ensure that every student heard the Bible while leaving the doctrinal niceties to parents and churches. This left "the core of religion, the heart of Christianity . . . alive and well in the [public] schools."[129]

The centerpiece of common-school instruction was "least-common-denominator Protestantism."[130] Mann and the other members of his State Board of Education recommended "the daily reading of the Bible, devotional exercises, and the constant inculcation of the precepts of Christian morality in all the Public schools."[131] And Mann claimed success: by 1848, he ventured that there was not "a single town in the Commonwealth in whose schools [the Bible] is not read."[132]

Mann's position on the Bible was no outlier. As late as 1869, and coinciding with the ratification of the Fourteenth Amendment, the National Teachers Association (the forerunner to the National Education Association) opined that "the Bible should not only be studied, venerated, and honored … but devotionally read and its precepts inculcated in all the common schools of the land."[133] This notion reflected common school ideology that education should be both nonsectarian *and* thoroughly religious: "A generalized Protestantism became the common religion of the common school."[134] Common schools "featured Bible reading, prayer, hymns, and holiday observance, all reinforced by … the pervasive Protestantism of the texts."[135]

Indeed, historians rank McGuffey's Readers as the "most consistent element in the nineteenth-century common school classroom."[136] An estimated 122 million copies were purchased between 1836 and 1920.[137] McGuffey, an ordained Presbyterian minister, "preached to the nation" through his Readers.[138] He acknowledged that "the Sacred Scriptures" were his primary inspiration and believed that no one could "honestly object to imbuing the minds of youth with the language and the spirit of the Word of God."[139]

The Readers taught recitation through the learning of Psalms: "Oh, that men would praise the Lord for his goodness, and for his wonderful works to the children of men."[140] The Primer for the youngest students concludes with a lesson on the omnipotence of God: "Look at the sun! See it sinks in the West. Who made the sun? It was God, my child. He made the sun, the moon, and the stars."[141] The First Reader gives a clear presentation of the Gospel ("All who take care of you and help you were sent by God. He sent His Son to show you His will, and to die for your

[128] *Id.*
[129] *Id.* at 25.
[130] *Espinoza*, 591 U.S. at 502 (Alito, J., concurring) (citation omitted).
[131] CHARLES L. GLENN, THE MYTH OF THE COMMON SCHOOL 166 (1988).
[132] *Id.*
[133] Jeffries & Ryan, *supra* note 113, at 301 (citation omitted).
[134] *Id.* at 299.
[135] FRASER, *supra* note 105, at 122.
[136] *Id.* at 35.
[137] *Id.* at 36.
[138] *Id.*
[139] *Id.*
[140] WILLIAM HOLMES MCGUFFEY, MCGUFFEY'S FIFTH ECLECTIC READER 76 (H.H. Vail 1920).
[141] WILLIAM HOLMES MCGUFFEY, MCGUFFEY'S ECLECTIC PRIMER 59 (H.H. Vail 1909).

sake"),[142] and the Third extols the virtues of scripture ("The scriptures are especially designed to make us wise unto salvation through faith in Christ Jesus").[143]

These "omnipresent"[144] textbooks taught "a clearly religious outlook"[145] to common school students "for much of the nineteenth and early twentieth centuries."[146] This helps to explain why historians describe "public schools of the first half of the nineteenth century" as "Protestant religious establishment."[147] This religiosity persuaded Protestant parents to entrust their children to state common schools, making them "confident that education would be religious still."[148] While common schools were not religious in status, faith "'permeated' everything they" did.[149] As Professor McConnell has explained, in early America, "there was no concept of a 'secular' school."[150]

This historical record thus makes clear that from the Founding through Reconstruction, religious education was actively supported by state and local governments. Founding-era education was almost invariably private and almost exclusively religious. And the common school movement, which educated a majority of American children around the time of the Fourteenth Amendment,[151] shows that even early public schools included religious elements. Far from being seen as a violation of the Establishment Clause, religious instruction was widely regarded as essential to forming virtuous citizens and sustaining republican government.

B. The federal government regularly funded religious schools from the Founding through Reconstruction.

Because the federal government was the only entity subject to the Establishment Clause until incorporation, the Supreme Court has stated that the federal historical record is crucial to the

[142] William Holmes McGuffey, McGuffey's First Eclectic Reader 76 (H.H. Vail 1920).

[143] McGuffey, *supra* note 140, at 74.

[144] FRASER, *supra* note 105, at 40.

[145] *Id.* at 43.

[146] *Id.* at 40.

[147] *Id.* at 41. To be sure, the focus on plain vanilla Protestantism was unacceptable to many religious minorities, including Jews and Roman Catholics. Mark Storslee, *History and the School Prayer Cases*, 110 VA. L. REV. 1619, 1688 (2024). Courts of this era also wrongly overlooked the Free Exercise rights of students in compulsory government-run schools. *See id.* at 1688–90. As the Supreme Court has explained, the government may not "make a religious observance compulsory" under the Establishment Clause, as that would violate the hallmark coercion principle. Zorach v. Clauson, 343 U.S. 306, 314, (1952). Further, it "was an open secret that 'sectarian' was code for 'Catholic.'" *Espinoza*, 591 U.S. at 482 (quoting Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion)). This "shameful pedigree" of exclusion runs counter to Founding-era nondiscrimination Establishment Clause principles and should not "inform our understanding" of the Establishment Clause. *See id.* Still, the history of early public schools makes clear that the generation that ratified the Fourteenth Amendment did not believe that the Establishment Clause justified the exclusion of religious people from government programs, like education. *See* Shurtleff v. City of Bos., Massachusetts, 596 U.S. 243, 273–74 (2022). In St. Isidore's case, there is no coercion or compulsion; any Establishment Clause link is severed by the parents' choice to send the child to the virtual charter school.

[148] FRASER, *supra* note 105, at 31.

[149] *Espinoza*, 591 U.S. at 477 (quoting State *ex rel.* Chambers v. School Dist. No. 10, 472 P.2d 1013, 1021 (1970)) (holding Montana's Blaine Amendment unconstitutional despite the state's putative concern that funds would be used for religious purposes).

[150] McConnell, *supra* note 71, at 2171 ("[T]here was no such thing as a secular school; all schools used curriculum that was imbued with religion.").

[151] Indeed, in 1830, over one-half of American children aged five to fourteen were enrolled in public schools; by 1870, that number had grown to 78 percent. PETER LINDERT, GROWING PUBLIC: SOCIAL SPENDING AND ECONOMIC GROWTH SINCE THE EIGHTEENTH CENTURY 92 (2004).

Clause's proper interpretation[152]—and history demonstrates that Congress funded public schools that were "no less religious than those supported by the states."[153]

Three historical federal programs demonstrate that from the Founding through the nineteenth Century, the Establishment Clause was not believed to pose any obstacle to government-funded religious education. First, the First Congress partnered with missionaries to educate Native Americans. Second, Congress funded religious education in federal enclaves until 1848. And third, the Reconstruction Congress created the Freedmen's Bureau to partner with religious organizations to provide religious instruction to newly freed children in the South.

1. The Government-Missionary Alliance

From the Founding Era through the ratification of the Fourteenth Amendment, the federal government "made contracts for sectarian schools for the education of the Indians."[154] Not only were funds channeled almost exclusively to religious denominations, but "specific conversion to Protestant Christianity [w]as one of the key ingredients" of federal policy.[155] Indeed, the United States worked so closely with missionaries for the express purpose of sharing the gospel that Native Americans "viewed Church and State as one."[156]

In 1776, the First Continental Congress adopted a resolution seeking to encourage "a friendly commerce" between the Colonies and Native Americans and to "propagat[e] the gospel."[157] To effectuate these twin policies, the Committee on Indian Affairs paid "a minister of the gospel, to reside among the Delaware Indians, and instruct them in the Christian religion."[158] And at General Washington's request, Congress funded Reverend Samuel Kirkland's mission to evangelize the Tuscarora and Oneida nations.[159]

This government-missionary partnership continued after ratification of the Constitution. President George Washington dispatched missionaries to Native American Tribes to "teach[] them the great duties of religion and morality, and to inculcate a friendship and attachment to the United States."[160] And "despite his famous metaphor of the 'wall of separation' between church and state," President Thomas Jefferson "did not . . . hesitate to sign a treaty in 1803 with the Kaskas[k]ia Indians of Illinois."[161] That treaty obligated the United States to pay $100 per year for seven years "towards the support of a priest of [the Catholic] religion, who will engage to perform for the said tribe the duties of his office and also to instruct as many of their children as

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[152] Marsh v. Chambers, 463 U.S. 783, 790–91 (1983).

[153] CHAPMAN & MCCONNELL, *supra* note 108, at 120.

[154] Reuben Quick Bear v. Leupp, 210 U.S. 50, 78 (1908).

[155] FRASER, *supra* note 105, at 90.

[156] ROBERT H. KELLER, JR., AMERICAN PROTESTANTISM AND UNITED STATES INDIAN POLICY, 1869–1882 8 (1983).

[157] 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 111 (1776) [perma.cc/323D-VA3S]. The Journal records the passage of this resolution on Feb. 5, 1776. *Id.* at 109. Like the other recorded items of business, only a description is given, without official titles or numbers: "The committee to whom the memorial of Samson Occum, one of the Mohegan Indians, in Connecticut, was referred, brought in their report . . . ." *Id.* at 111.

[158] CHARLES L. GLENN, AMERICAN INDIAN/FIRST NATIONS SCHOOLING: FROM THE COLONIAL PERIOD TO THE PRESENT 31 (2011) [hereinafter American Indian Schooling].

[159] Rev. Samuel Kirkland Continued in His Mission Among the Indians (Nov. 11, 1775), *in* 3 AMERICAN ARCHIVES ser. 4, at 1918 (Peter Force ed., Washington, M. St. Clair Clarke & Peter Force 1840), [perma.cc/6BC2-4KZW].

[160] George Washington & Henry Knox, Instructions to the Commissioners for Treating with the Southern Indians (Aug. 29, 1789), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 66 (1832).

[161] GLENN, *supra* note 158, at 51.

possible in the rudiments of literature."[162] This funding was not a one-time occurrence. President Jefferson also approved funding for a Cherokee mission school where "children were taught to read from the Bible and catechism, to say Christian prayers daily, and to sing Christian hymns."[163]

In 1819, the government-missionary partnership became a full-blown federal program with the passage of the Civilization Fund Act.[164] The Act allocated $10,000 per year to fund instructors of "good moral character" to "introduc[e] among [the Native Americans] the habits and arts of civilization."[165] These federal funds went almost exclusively to Christian mission associations and involved direct funding of religious schools on a per capita basis.[166]

Federal funding for missionary schools continued into the late nineteenth century.[167] Until then, "virtually no one seemed to be troubled by the constitutional implications of the federal government's longstanding policy of trying to convert the Indians to Christianity."[168] In response to opposition, the Secretary of the Interior defended ongoing (but gradually diminishing) support for government-missionary educational partnerships: "It would be scarcely just to abolish [government-missionary partnerships] entirely—to abandon instantly a policy so long recognized."[169]

In short, during the Founding-era up through the ratification of the Fourteenth Amendment, the federal government paid missionaries to run religious schools on Native American reservations and no one blinked an Establishment Clause eye.[170] This evidence suggests that funding private religious education was permissible because it was not a targeted effort to fund religious worship. Recognition of that historical fact does not condone the United States's late nineteenth-century assimilation policy or the forcible removal of Native American children from their homes. And while the relationship between Native Americans and the Constitution adds complexity, other historical examples show that federal funding for religious education was commonplace in the nineteenth century.

2. Funding of religious schools in federal enclaves and jurisdictions

From the Founding, Congress funded religious schools in federal territories and enclaves. The First Congress reenacted the Northwest Ordinance of 1787, which set aside lands for the use

[162] A Treaty Between the United States of America and the Kaskaskia Tribe of Indians, Kaskaskia Tribe–U.S., Aug. 13, 1803, 7 Stat. 78, 79, [perma.cc/Y8M9-5B4X].

[163] GLENN, *supra* note 158, at 52 (citation omitted).

[164] Act of Mar. 3, 1819, ch. 85, §1, 3 Stat. 516, 516–17.

[165] *Id.* at 516.

[166] GLENN, *supra* note 158, at 53–54; Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 NOTRE DAME L. REV. 677, 684 (2020).

[167] *Reuben Quick Bear*, 210 U.S. at 81 (considering a request for injunctive relief against performance on government contracts with the "Bureau of Catholic Indian Missions").

[168] DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 307 (2010); *Reuben Quick Bear*, 210 U.S. at 78 (noting that it was not until 1894 that "opposition developed against appropriating public moneys for sectarian education").

[169] *Reuben Quick Bear*, 210 U.S. at 78.

[170] In 1879, the United States moved towards an assimilation policy and opened the first off reservation boarding school. *See* Haaland v. Brackeen, 599 U.S. 255. 329 (2023) (Gorsuch, J., concurring). Congress even authorized the Secretary of the Interior to "prevent the issuing of rations or the furnishing of subsistence" to Native American families who resisted sending their children off to school. *Id.* (citing Act of Mar. 3, 1893, 27 Stat. 628, 635). Historians have catalogued the "devastating effects" the dissolution of the Indian family had on children and their parents. *Id.*

of schools including "church-affiliated sectarian institutions."[171] The text of the Northwest Ordinance expressly linked religion and education, providing that "religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[172] "[T]his aspiration was probably largely fulfilled" given "the religious character of the curriculum and the common practice of employing the minister as the schoolmaster."[173]

Similarly, in the District of Columbia, Congress supported denominational schools until at least 1848.[174] And D.C.'s early public schools were infused with religion; the Bible served as the "standard reader and speller."[175] An 1813 schoolmaster's report, the first surviving record of a D.C. public school, describes how, of the 91 pupils, "55 have learned to read in the Old and New Testaments, . . . 26 are now learning to read Dr Watts' Hymns and . . . 20 can now read the Bible."[176]

3. The Freedmen's Bureau

In 1865, Congress established the Freedmen's Bureau to, among other objectives, establish schools for formerly enslaved children.[177] Congress directed the agency to partner with "private benevolent associations."[178] The Bureau created a generally applicable grant program and awarded most of those grants to religious organizations.

The Bureau's principal partner was the American Missionary Association.[179] The Association received over $1 million in federal funds, about one-fifth of the Bureau's total spending.[180] Its schools were comprehensively religious. Teachers were required to "furnish credentials of Christian standing."[181] The goal was that the "Christ-like mission of the teachers" would break down prejudice until "there shall be no Blacks and no Whites, no North and no South, but when all shall be one in Christ Jesus."[182] Schools routinely began and ended the day with Bible reading and prayer.[183] At one Mississippi school, for instance, students began the day with an hour of Scripture reading, prayer, and hymns.[184] The Freedmen's Bureau continued until 1872 when the unfortunate collapse of Reconstruction pretermitted the Bureau.

Ultimately, these three examples clearly demonstrate that the federal government did not view the creation, funding, or promotion of religious schools as an antiestablishment problem.

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[171] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 862 (1995) (Thomas, J., concurring).

[172] Ordinance of 1787: The Northwest Territorial Government art. 3 (July 13, 1787).

[173] McConnell, *Establishment, supra* note 71, at 2151.

[174] *Espinoza*, 591 U.S. at 481.

[175] GABEL, *supra* note 111, at 179 n.75.

[176] J. Ormond Wilson, *Eighty Years of the Public Schools of Washington—1805 to 1885*, 1 RECS. COLUM. HIST. SOC'Y 119, 127 (1896).

[177] *See Espinoza*, 591 U.S. at 481 ("After the Civil War, Congress spent large sums on education for emancipated freedmen, often by supporting denominational schools in the South through the Freedmen's Bureau.") (citation omitted).

[178] Act of July 16, 1866, § 13, 14 Stat. 173, 176 (renewing the Freedmen's Bureau).

[179] CHARLES L. GLENN, AFRICAN-AMERICAN/AFRO-CANADIAN SCHOOLING: FROM THE COLONIAL PERIOD TO THE PRESENT 56 (2011).

[180] Jacqueline Jones, Soldiers of Light and Love: Northern Teachers and Georgia Blacks, 1865–1873, at 92 (1980).

[181] Joe M. Richardson, Christian Reconstruction: The American Missionary Association and Southern Blacks, 1861–1890, at 44 (2009).

[182] *Id*.

[183] *Id*. at 166.

[184] *Id*. at 44.

C. Historical counterarguments are unavailing.

In the past, the Supreme Court has found that historical evidence supports a no-aid interpretation of the Establishment Clause. Such arguments, however, rely on a selective reading of history that fails to account for the broader historical record, which demonstrates that public funding of religious education has long been a part of American tradition.

1. Madison's "Memorial and Remonstrance Against Religious Assessments"

The voluminous history of the public funding of religious schools cannot be overcome by looking to Madison's "Memorial and Remonstrance Against Religious Assessments."[185] To begin, Madison's Remonstrance was a response to one particular piece of Virginia legislation—it predated the Establishment Clause by years. The Remonstrance does not support the Oklahoma Supreme Court's no-aid view of the Establishment Clause for three reasons.

First, the Remonstrance was directed at a compelled-support-to-clergy statute, not a generally available program that received public funds only through private choice. The relevant Virginia legislation, a "Bill Establishing a Provision for Teachers of the Christian Religion," otherwise known as "the Virginia Assessment," imposed a tax for the support of Christian clergy.[186] The proceeds could be used by Christian leaders for the "provision for a Minister or Teacher of the Gospel of their denomination, or the providing places of divine worship."[187] While compelled tithes to an established church for the payment of clergy salaries or building a church violate the Establishment Clause for obvious reasons, Justice Thomas has explained that there is no indication that Madison endorsed the "extreme view that the government must discriminate against religious adherents by excluding them from more generally available financial subsidies."[188] And as Professors McConnell and Chapman have shown, even "the most vocal opponents of the Virginia Assessment" supported public subsidies for denominational schools.[189]

Second, the Virginia Assessment preferenced some religious faiths over others by awarding preferential aid to certain churches. The compelled tithe aided only Christian ministers. Madison seized on this defect: "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects."[190] As Professor McConnell has noted, the debate surrounding the Virginia Assessment "was not so much a debate about establishment as a debate about which of several possible arrangements should replace the 'church by law established' in Virginia prior to the Revolution."[191] Thus, the Virginia Assessment is entirely unlike St. Isidore in that there is no religious preference nor the payment of clergy salaries.

Third, the best evidence from the congressional record suggests that—far from viewing the federal Establishment Clause as a no-aid mandate—Madison "associated religious

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[185] JAMES MADISON, THE PAPERS OF JAMES MADISON, vol. 8, 10 March 1784–28 March 1786, 297–306, (Robert A. Rutland & William M. E. Rachal, 1973).

[186] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 852–53 (1995) (Thomas, J., concurring).

[187] *Id.*

[188] *Id.* at 857.

[189] CHAPMAN & MCCONNELL, *supra* note 108, at 119.

[190] James Madison, Memorial and Remonstrance Against Religious Assessments ¶3 (ca. June 20, 1785), *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1, 65 (1947).

[191] McConnell, *Establishment, supra* note 71, at 2108.

establishments with the legal compulsion of religion."[192] Madison twice explicated this view during the framing of the Establishment Clause. An early version of the Religion Clauses provided that "no religion shall be established by law, nor shall the full and equal rights of conscience be infringed," and as noted above, Madison interpreted this language to mean "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[193] Thus, in Madison's view, "establishment" referred to the legal enforcement of religion by law.[194] In a later draft of the Clauses, the reconciliation committee inserted the word "national" before religion in response to federalism concerns. Commenting on this revision, Madison again focused on coercion, stating that the reason for the clauses was "that the people feared one sect might obtain a pre-eminence, or two combined together, and establish a religion, to which they would c*ompel others to conform*."[195] Madison was not alone in the belief that establishment centered on coercion, not enacting a high and impregnable wall between church and state: "the Framers generally agreed with Madison and thought that religious establishments involved the legal coercion of religion."[196]

In sum, Madison's Memorial and Remonstrance does not support the Oklahoma Supreme Court's no-aid reading of the Establishment Clause. First, Madison opposed a system of compelled financial support for clergy, not a neutral program where public funds follow private choice. Second, the Virginia Assessment gave preferential aid to certain churches, while St. Isidore operates within a generally available funding program with no religious preference. Third, Madison's own writings show that he viewed establishment as coercion, not the voluntary participation of religious schools in public programs. Since no one is forced to attend St. Isidore and the school merely provides parents with another educational option, the Remonstrance does not support the Oklahoma Supreme Court's no-aid view.

2. The Blaine Amendments

The exclusion of religious groups from government programs has sometimes been justified by looking to state Blaine Amendments, which prohibit the government from funding "sectarian" education.[197] Yet that argument ignores the relevant sociopolitical context and the fact that state Blaine Amendments were passed precisely *because* the Establishment Clause was not believed to exclude religious schools.

The Blaine Amendments were created in the 1870s as a reaction to the rising Catholic population in America. By the 1850s, a wave of immigration catapulted Catholicism from relative obscurity to America's largest Christian denomination. As Catholics grew in political power, "[p]rotestants sought to entrench their former dominance in constitutions and statutes" by banning "sectarian" schools.[198] In pursuit of that objective, Maine Senator James G. Blaine proposed a federal constitutional amendment forbidding aid to "sectarian" schools.

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[192] Muñoz, *supra* note 47, at 247; *see also* CHAPMAN & MCCONNELL, *supra* note 108, at 37.
[193] Muñoz, *supra* note 47, at 245 (quoting 1 ANNALS OF CONG. 758).
[194] *See* CHAPMAN & MCCONNELL, *supra* note 108, at 37.
[195] 1 ANNALS OF CONG. 758–59 (1789) (emphasis added).
[196] Muñoz, *supra* note 47, at 248; *see also* CHAPMAN & MCCONNELL, *supra* note 108, at 2119.
[197] *Espinoza*, 591 U.S.at 482.
[198] Jeffries & Ryan, *supra* note 113, at 304.

While the federal constitutional amendment failed, more than thirty states adopted Blaine Amendments, many (like Oklahoma) as a condition of statehood. As the Supreme Court has explained, "it was an open secret that 'sectarian' was code for 'Catholic.'"[199] Because these no-aid provisions were "born of bigotry" and "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general," the Supreme Court has held that their history does not inform the Court's interpretation of the Establishment Clause.[200]

In St. Isidore's case, the Oklahoma Supreme Court sought to defend the Oklahoma Constitution's religious exclusions by speculating that the Framers of the Oklahoma Constitution were not motivated by religious bigotry.[201] To be sure, Congress required Oklahoma to include a Blaine Amendment in its Constitution as a condition of admission to statehood. Yet even if the Framers of Oklahoma's Constitution did not harbor religious prejudices, the Blaine Amendments do not support a no-aid view of the Establishment Clause for two additional reasons. First, the historical record reveals that supporters of the state and federal Blaine Amendments did not seek to eliminate religion in public schools, but to entrench "nonsectarian" practices—namely, Protestant prayer and Bible reading.[202] The Blaine Amendments debate, in other words, was not about *secularizing* public schools, but keeping the "right kind" of religion in those schools.[203] That Blaine Amendments were "born of bigotry" and exclusively targeted Catholicism shows that those Amendments writ large were not based on Establishment Clause concerns regarding public funding for religious schools.

Second, imperatively, the Blaine Amendment debate confirms that the Reconstruction Congress did not believe the Establishment Clause forbade religious education. The fact that the Blaine Amendments' supporters thought them necessary to exclude Catholic schools from receiving federal funding shows that Congress did not believe that the Establishment Clause did that work. Something more was needed to keep religious doctrine out of public schools. The debate over the federal Blaine Amendment thus shows that many of the same Members of Congress that framed the Fourteenth Amendment thought an *additional* amendment was necessary to restrict the government funding of religious schools.

D. Drummond*'s reading of the Establishment Clause does not comport with the long history and tradition of funding religious education.*

The Oklahoma Supreme Court's holding that "a religious public charter school violates the Establishment Clause" would have been news to the generations that ratified the First and Fourteenth Amendments.[204] As this essay has shown, from the nation's Founding until the late 1800s, every level of American government funded religious education, whether that religiosity

[199] *Espinoza*, 591 U.S. at 482.

[200] *Id*.

[201] *See* Drummond *ex rel.* State v. Okla. Statewide Virtual Charter Sch. Bd., 558 P.3d 1, 8 (2024) (asserting that Article 2, Section 5 is not a "Blaine Amendment," and that arguments to the contrary "completely ignore[] the intent of the [state] founders," who merely "sought to ensure . . . religious freedom" and "recognized the necessity of a complete separation of church and state" (first quoting Prescott v. Okla. Capitol Pres. Comm'n, 2015 OK 54, ¶ 24, 373 P.3d 1032, 1052 (Gurich, J., concurring in denial of reh'g), then quoting *Prescott*, 2015 OK 54, ¶ 6, 373 P.3d 1032, 1038 (majority opinion))).

[202] CHAPMAN & MCCONNELL, *supra* note 108, at 125.

[203] *See id.* at 126–27 ("At the heart of the debate was disagreement over the difference between 'religion' and 'sectarianism.' Supporters of the amendment believed that children 'can be taught religion without being taught the particular tenets or creed of some denominations.'").

[204] *Drummond*, 558 P.3d at 14.

was found in a school's affiliation, curriculum, or both.[205] This history included not only the Founding-era and beyond public funding of private religious education but also funding of early public schools around the time of the Fourteenth Amendment which were so pervasively religious that historians described them as "Protestant religious establishment."[206] There simply is "no historically sound understanding of the Establishment Clause that begins to make it necessary for government to be hostile to religion"—but that is exactly the understanding the Oklahoma Supreme Court relied on in *Drummond*.[207]

Whether one looks to 1791 or 1868, there is "contemporaneous and weighty evidence" that the public funding of religious education does not violate the Establishment Clause.[208] In addition to long-standing state funding of religious education, the federal government long funded religious education in spite of the Establishment Clause. Indeed, the First Congress funded expressly religious education several times. The re-enactment of the Northwest Ordinance, its explicit linking of education and religion, and its funding of religious schools in federal enclaves cannot be squared with the Oklahoma Supreme Court's no-aid view of the Establishment Clause. Nor can the government-missionary partnerships that spanned the eighteenth and nineteenth centuries and in which "Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations."[209] And the same Congress that framed the Fourteenth Amendment created the Freedmen's Bureau, which partnered with primarily religious organizations to educate newly freed African American children.[210] This long-standing history establishes that Oklahoma's exclusion of religious charter schools "promotes stricter separation of church and state than the Federal Constitution requires."[211] St. Isidore cannot be excluded from running a charter school consistent with history.

In sum, the Oklahoma Supreme Court's reading of the Establishment Clause in *Drummond* does not "accord with history" or "faithfully reflect the understanding of the Founding Fathers."[212] Instead, history definitively shows that every level of government funded religious education from the Founding through the turn of the nineteenth century.

IV. CONSISTENT WITH THE ORIGINAL UNDERSTANDING OF THE ESTABLISHMENT CLAUSE, RECENT SUPREME COURT PRECEDENT FORBIDS EXCLUDING RELIGIOUS GROUPS FROM EDUCATIONAL PROGRAMS.

The Oklahoma Supreme Court justified excluding St. Isidore from a generally available program based on its conclusion that the Religion Clauses are in inherent tension and that "compliance with the Establishment Clause" served as a "compelling governmental interest" and justified a Free Exercise violation.[213] But the Supreme Court has recently and repeatedly held that an "interest in separating church and state *more* fiercely than the Federal Constitution . . . cannot

[205] Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 480 (2020).

[206] JAMES W. FRASER, BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN A MULTICULTURAL AMERICA 35, 41 (1999).

[207] Kennedy v. Bremerton School District, 597 U.S. 507, 541 (2022).

[208] *See* Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888) (showing the Court has traditionally looked to such historical context clues to guide its interpretations); Marsh v. Chambers, 463 U.S. 783, 790–91 (1983) (same).

[209] Wallace v. Jaffree, 472 U.S. 38, 103 (1985) (Rehnquist, J., dissenting).

[210] *See Espinoza*, 591 U.S. at 481.

[211] Carson *ex rel.* O.C. v. Makin, 596 U.S. 767, 781 (2022).

[212] *Kennedy*, 597 U.S. at 536 (cleaned up).

[213] Drummond *ex rel.* State v. Okla. Statewide Virtual Charter Sch. Bd., 558 P.3d 1, 15 (2024).

qualify as compelling in the face of the infringement of free exercise."[214] This means that the only way that the Oklahoma Attorney General can win in his lawsuit against St. Isidore is to show that St. Isidore itself violates the Establishment Clause. This he cannot do for two reasons.

First, as shown above, the no-aid absolutism of the Oklahoma Supreme Court's *Drummond* decision cannot be squared with history and tradition. History is conclusive that the federal government has long funded religious education—notwithstanding the Establishment Clause. Further, that history has given rise to two lines of Supreme Court precedent holding that the Establishment Clause is not violated when religious groups are included in generally applicable grant programs, especially where money flows to them as a result of private choice.

After its deviation from the original meaning of the Establishment Clause in the mid-twentieth century, the Supreme Court has course corrected, returning to a historically faithful view of the Establishment Clause as working in tandem with the Free Exercise Clause to protect religious liberty. Taking the early American educational context as its historical guide, the Supreme Court has held three times in recent years that the Establishment Clause is not violated by the inclusion of religious groups in generally available educational programs. *Drummond's* contrary holding rests on "a principle that is inconsistent with our Nation's long tradition of allowing religious adherents to participate on equal terms in neutral government programs."[215]

A. An antiestablishment interest does not justify excluding religious organizations from an otherwise generally available benefit.

In *Drummond*, the Oklahoma Supreme Court opined that "[t]he Establishment Clause prohibits government spending in direct support of any religious activities or institutions."[216] The Court reached this erroneous conclusion by relying on older cases that invoked the concept of a "tension" between the Religion Clauses.[217] But those cases are vestiges of a "'bygone era' when this Court took a more freewheeling approach to interpreting legal texts."[218]

The Oklahoma Supreme Court's argument attempts to raise the *Lemon* test from the grave. That test no longer "compel[s] the government to purge from the public sphere" anything that might be viewed as an endorsement of religion.[219] Rather, "the Establishment Clause must be interpreted by reference to historical practices and understandings."[220] As this essay has demonstrated, the history of government funding of religious education shows that St. Isidore does not raise legitimate establishment concerns.

Consistent with this history, a recent trio of Supreme Court cases have made clear that "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause."[221]

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[214] *Carson*, 596 U.S. at 781 (emphasis added) (quoting *Espinoza*, 591 U.S. at 484–85); *see also* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 466 (2017).

[215] Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 852–53 (1995) (Thomas, J., concurring).

[216] *Drummond*, 558 P.3d at 13.

[217] *Id.* (citing Locke v. Davey, 540 U.S. 712, 718 (2004) for the "play in the joints" between the Establishment Clause and Free Exercise Clause).

[218] Shurtleff v. City of Bos., 596 U.S. 243, 276 (2022) (Gorsuch, J., concurring) (citations omitted).

[219] *Kennedy*, 597 U.S. at 535 (citing Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in judgment)).

[220] *Id.* at 510 (citations omitted).

[221] *Carson*, 596 U.S. at 781.

And even more specifically, the Court has held "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs."[222]

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Supreme Court invalidated a Missouri program that offered playground resurfacing grants to qualifying nonprofit organizations—but not religious ones.[223] The Supreme Court held that the Free Exercise Clause did not permit a state to "expressly discriminate[ ] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."[224] The Court dispensed with the State's antiestablishment interest in a few sentences, holding that "religious establishment concerns" did not "qualify as compelling" because any 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."[225]

Similarly, in *Espinoza v. Montana*, the Supreme Court held that the State of Montana could not exclude private religious schools from its tuition scholarship program. The application of Montana's Blaine Amendment to "bar religious schools from public benefits solely because of the religious character of the schools" violated the Free Exercise Clause.[226] As the *Espinoza* Court explained, the Supreme Court has "repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs."[227] Were the rule to the contrary, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair."[228]

In *Carson ex rel. O.C. v. Makin*, Maine attempted to circumvent the Court's recent Free Exercise jurisprudence by excluding religious schools based on their religious use of funds rather than their religious status. The Supreme Court rejected Maine's attempt to exclude only schools that sought to present "academic materials through the lens of . . . faith" and held that "use-based discrimination is [no] less offensive to the Free Exercise Clause" than status-based discrimination.[229]

In short, the Supreme Court's recent precedent is clear that "[a] State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise."[230] This means that "a government does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular persons, organizations, and speech in public programs, benefits, facilities . . . ."[231] Indeed, the Supreme Court has long "require[d] the

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[222] Mitchell v. Helms, 530 U.S. 793, 829 (2000) (plurality opinion).

[223] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 466 (2017).

[224] *Id.* at 462.

[225] *Id.* at 466 (quoting Widmar v. Vincent, 454 U.S. 263, 276 (1981)).

[226] *Espinoza*, 591 U.S. at 476.

[227] *Id.* (citing Locke v. Davey, 540 U.S. 712, 719 (2004) and Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 839 (1995)); *see also Trinity Lutheran*, 582 U.S. at 458 ("[T]his Court has repeatedly confirmed 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.'") (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

[228] *Widmar*, 454 U.S. at 274–75 (1981) (citing Roemer v. Bd. of Pub. Works of Maryland, 426 U.S. 736, 747 (1976)).

[229] Carson *ex rel.* O.C. v. Makin, 596 U.S. 767, 787 (2022).

[230] *Id.* at 781.

[231] Shurtleff v. City of Bos., 596 U.S. 243, 261 (2022) (Kavanaugh, J., concurring) (citing Zelman v. Simmons-Harris, 536 U.S. 639 (2002)).

state to be . . . neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[232]

In the instant case, it is undisputed that St. Isidore met the statutory criteria for a charter school. The Oklahoma City and Tulsa Dioceses use high-quality curriculum and have experience running brick-and-mortar schools with an extraordinary record of demonstrated academic success. And the school would potentially serve many of the state's economically disadvantaged students. That's why the Charter School Board approved St. Isidore. Yet the Oklahoma Supreme Court barred St. Isidore from operating a charter school solely because of its religious character.[233] *Drummond* treats religious persons and organizations as adversaries. Under *Trinity Lutheran*, *Espinoza*, and *Carson*, that violates the Free Exercise Clause, and under the Supreme Court's recent turn to history, it is not required by the Establishment Clause.

B. An antiestablishment interest does not justify excluding religious organizations where private choice directs a benefit.

St. Isidore also does not offend the Establishment Clause because public funds would only flow to the religious school through the independent choices of private benefit recipients.[234] As the Supreme Court held in *Locke v. Davey*, "the link between government funds and religious training is broken by the independent and private choice of recipients."[235]

Zelman v. Simmons-Harris demonstrates this principle. There, the Supreme Court rejected an Establishment Clause challenge to an Ohio Pilot Project Scholarship that, much like the program challenged here, gave additional choices to families who lived in underperforming school districts.[236] Because tuition aid followed the children, the Supreme Court held that the voucher program did not offend the Establishment Clause.[237] In reaching that conclusion, the Supreme Court focused on the fact that the Ohio funding program was "neutral in all respects toward religion . . . . [and] is part of Ohio's general and multifaceted undertaking to provide educational opportunities to children."[238]

Consistent with the original understanding of the term "establishment" set out above, the Supreme Court found that the relevant "Establishment Clause question" in *Zelman* was "whether Ohio is coercing parents into sending their children to religious schools."[239] That makes sense: government coercion of religious exercise is a hallmark of religious establishment the Framers sought to prohibit.[240] Government may not "make a religious observance compulsory," nor may it compel attendance at a religious school.[241] But where the "true private choice" of parents

[232] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

[233] Drummond *ex rel.* State v. Okla. Statewide Virtual Charter Sch. Bd., 558 P.3d 1, 15 (2024).

[234] *Carson*, 596 U.S. at 781; *see also Zelman*, 536 U.S. at 662–63 (holding that parents may "exercise genuine choice" among secular and religious options without offending the First Amendment).

[235] *Locke*, 540 U.S. at 719.

[236] *Zelman*, 536 U.S. at 669–70.

[237] *Id*.

[238] *Id.* at 653.

[239] *Id.* at 640–41.

[240] *See Kennedy*, 597 U.S. at 537 ("[C]oercion . . . was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."); 1 ANNALS OF CONG. 730–31 (1789) (Madison explaining that the First Amendment aimed to prevent sects from "establish[ing] a religion to which they would compel others to conform").

[241] Zorach v. Clauson, 343 U.S. 306, 314 (1952).

determines where both students and government funds go, the Establishment Clause is not offended.[242]

Oklahoma's charter school program is "a program of true private choice."[243] "It is neutral in all respects toward religion . . . . [and] is part of [Oklahoma's] general and multifaceted undertaking to provide educational opportunities to children."[244] No student is compelled to attend a charter school, much less St. Isidore. Far from coercing attendance, state law requires an interested family to apply and allows St. Isidore to cap its enrollment. It gives Oklahoma parents and students, especially disadvantaged families who may not otherwise be able to afford a private education, another alternative to the traditional public-school setting. And critically, that option may only be exercised through the "genuine and independent choices" of parents and students.[245] Under the per-capita funding formula, money is going to religious recipients as the result of private choice. As the Supreme Court has said, this choice means that there is no impermissible "establishment."

In short, the Supreme Court's recent cases have held that the Establishment Clause does not give a state the right to "treat religious persons, religious organizations, or religious speech as second-class."[246] To disqualify St. Isidore's high-quality application suggests a "hostility to religion" that would "undermine the very neutrality the Establishment Clause requires."[247] The Supreme Court has thrice held that an "interest in separating church and state more fiercely than the Federal Constitution . . . cannot qualify as compelling in the face of the infringement of free exercise."[248] It has repeatedly confirmed that an antiestablishment interest does not justify excluding religious organizations from an otherwise generally available benefit, especially when that benefit flows from private choice: "Nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs."[249]

CONCLUSION

The Oklahoma Supreme Court erred in holding that the Establishment Clause mandates the exclusion of religious schools. To the contrary, the same Congresses that enacted the First and Fourteenth Amendments regularly entrusted federal funds to religious organizations for the education of America's children. No one objected to this practice on the grounds that it violated the Establishment Clause.

Moreover, as the Supreme Court has recently clarified, the Establishment Clause and the Free Exercise Clause are not meant to be pitted against each other. There is no "inherent tension" between the two Clauses; the Framers intended the provisions to work in tandem to protect

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[242] *Zelman*, 536 U.S. at 649.

[243] *Id.* at 653.

[244] *Id.*

[245] *Id.* at 649.

[246] Shurtleff v. City of Bos., 596 U.S. 243, 261 (2022) (Kavanaugh, J., concurring)

[247] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 845–46 (1995); *see also* MCCONNELL, *supra* note 71, at 2131 (emphasizing the centrality of government control of religion in historical definitions of establishment).

[248] Carson *ex rel.* O.C. v. Makin, 596 U.S. 767, 781 (2022) (emphasis added) (quoting *Espinoza*, 591 U.S. at 484–85); *see also* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 466 (2017).

[249] Mitchell v. Helms, 530 U.S. 793, 829 (2000) (plurality opinion).

religious liberty. But in St. Isidore's case, the Oklahoma Supreme Court wrongly weighed the interests and declared the Establishment Clause the victor.

Further, recent Supreme Court precedent has made it clear that the Establishment Clause does not justify the exclusion of religious people from participation in generally available programs and benefits, especially where private parental choice determines where those benefits flow.

St. Isidore's submitted a qualifying charter school application. Standing in the way of its operating a charter school is the Oklahoma Supreme Court's faulty application of the Establishment Clause. The Establishment Clause does not impose a mandate to discriminate—rather, history and precedent demonstrate that the Clause does not bar private religious groups from participating in public programs.