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Introduction

On June 21, 2022, the U.S. Supreme Court ruled in *Carson v. Makin*[1] that Maine's school choice program violated the Free Exercise Clause by excluding religious schools.[2] Writing for the majority, Chief Justice Roberts explained, "the State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion."[3]

Less than a week later, the Court ruled in *Kennedy v. Bremerton School District*[4] that a high school football coach did not offend the Establishment Clause when he kneeled in prayer at midfield after games.[5] In an opinion by Justice Gorsuch, the Court explained that the coach's "private religious exercise did not come close to crossing any line . . . separating protected private expression from impermissible government coercion."[6]

These two cases—expanding the reach of the Free Exercise Clause and narrowing the scope of the Establishment Clause—make it unclear as to whether it is possible for a state to constitutionally exclude religious schools from its charter school program. If not, the Washington Charter School Act would be left in a tight spot: (1) continue to exclude religious schools and be declared unconstitutional under the First Amendment, or (2) include religious schools and be declared unconstitutional under the Washington State Constitution.[7] For the thousands of

[1] Carson as next friend of O. C. v. Makin, 596 U.S. 767 (2022).
[2] *Id.* at 1998; *see* U.S. Const. amend. I ("Congress shall make no law . . . prohibiting the free exercise thereof.").
[3] *Id.*
[4] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).
[5] *Id.* at 543-44; *see* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion.")
[6] *Id.* at 537.
[7] WASH. CONST. art. IX, § 4, "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

teachers and children who attend charter schools across the state of Washington each year, the stakes are especially high.[8]

This Note argues that the unique structure of Washington's Charter School Act— fully integrating charter schools into its public school system—is constitutional under the latest First Amendment tests. Part I provides the history of education in America and the origins of separating church and state in schools. Part II describes the development of the Establishment and Free Exercise Clauses from the mid-twentieth century until the most recent religion cases in 2022, *Carson* and *Kennedy.* Part III provides the history of education in Washington and the far stricter application of Washington's establishment clauses. Finally, Part IV analyzes the constitutionality of Washington's Charter School Act under the modern First Amendment framework, concluding that the Act's provision to exclude religious schools does not violate the Free Exercise Clause, and a requirement to include religious schools would instead violate the Establishment Clause.

I) The Origin of Education in America

A) Colonial period: 1620-1780

Schools have existed in the North American colonies since almost the beginning of European settlement.[9] However, colonial schools were quite different than the modern, tax-supported public schools today.[10] School attendance was not mandatory. Parents had the primary

[8] In 2023-24, 18 charter public schools were operating in Washington, serving more than 5,000 students statewide. *Demographics*, WASH. STATE CHARTER SCH. ASS'N., https://wacharters.org/demographics/#:~:text=In%202022%2D23%2C%20there%20were,serving%20more%204%2C800%20students%20statewide (last visited January 11, 2024).
[9] THE SCHOOL IN THE UNITED STATES 2 (James W. Fraser ed., 4th ed. 2019).
[10] *Id.*

responsibility for initiating and paying for their children's education.[11] And schools fully integrated religious instruction into all aspects of learning. Students learned to read and write using the Bible, and the most widely used textbook—the New England Primer—contained reading instruction alongside religious texts and prayers.[12]

Despite the colonial government's limited involvement with schools, colonial leaders recognized the benefits of an educated populace and passed legislation to ensure that parents would not neglect their children's learning.[13] In 1642, just 13 years after becoming a colony, the Massachusetts Legislature passed the first education-related law in the northern colonies, requiring that every head of household teach each child in that household, including apprentices or servants, to "read and understand the principles of religion and capital laws" or face a fine.[14] Five years later in 1647, the legislature famously passed the "Old Deluder Satan Act," a more comprehensive law that required towns with more than fifty households to appoint a teacher to instruct children to read and write.[15] Notably, both laws continued to place the responsibility of funding education on the family.

More than 100 years later—after the colonies unified—six states adopted a provision for education in their state constitutions.[16] Most used compulsory language--requiring that schools

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[11] Carl F. Kaestle, Pillars of the Republic: Common Schools and American Society, 1760-1860 3 (1983).
[12] *Id.* at 17. For example, to teach the alphabet, the New England Primer used short poems to teach letters: "Peter denies His Lord, and cries. Queen Esther comes in royal State. To save the Jews from dismal Fate. Rachel doth mourn For her first born. Samuel anoints Whom God appoints." The New England Primer (Boston: Printed by B. Green and J. Allen, 1777), https://collections.libraries.indiana.edu/lilly/exhibitions_legacy/NewEnglandPrimerWeb/page10.html.
[13] Kaestle, *supra* note 11, at 3.
[14] THE SCHOOL IN THE UNITED STATES, *supra* note 9, at 2. *But see*, Kaestle, *supra* note 11, at 3, "these laws were weakly enforced."
[15] *See id.* at 8. The act began by explicitly stating its purpose to thwart "ye old deluder, Satan" in his goal "to keepe men from the knowledge of ye Scriptures."
[16] John E. Haubenreich, *Education and the Constitution*, 87 PEABODY JOURNAL OF EDUCATION 436, 444-45 (2012),; *see* PA CONST. of 1776, § 44 ("A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices."); N.C. CONST. of 1776, § XLI (identical language as PA); GA CONST. of 1777, § LIV

"shall" be established by the legislature.[17] But New Hampshire's constitution, unlike the other five, did not delegate the responsibility for education to its state legislature. Rather, New Hampshire delegated education to a variety of organizations, declaring that "parishes, bodies, corporate, or religious societies shall . . . have the right of electing their own teachers." New Hampshire simply stipulated that "no person shall ever be compelled to pay towards the support of the schools of any sect or denomination."[18] Although these six states demonstrated strong support of education, the majority of the original thirteen original colonies did not include any provision for education in their state constitutions.[19]

The U.S. Constitution also did not include a provision to ensure, protect, or even encourage a right to education. Yet, the founders of the Nation did not leave education completely untouched. In 1785, Congress enacted the Land Ordinance of 1785, which set aside one section in every township in the Western Territory for the maintenance of public schools.[20] Two years later and just before the ratification of the U.S. Constitution, Congress adopted the Northwest Ordinance of 1787, which included a provision directing newly admitted states to

("Schools shall be erected in each county, and supported at the general expense of the State, as the legislature shall hereafter point out"); MASS. CONST. of 1780, ch. 5, § 2 (Wisdom and knowledge . . . being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures . . . to cherish the interests of literature and the sciences, . . . public schools, and grammar-schools in the towns."); N.H. CONST. of 1784, art. 6 ("[T]herefore, the several parishes, bodies, corporate, or religious societies shall at all times have the right of electing their own teachers, and of contracting with them for their support or maintenance, or both. But no person shall ever be compelled to pay towards the support of the schools of any sect or denomination.").

[17] *Id.*

[18] N.H. CONST. of 1784, art. 6.

[19] John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776-1900*, 42 THE AMERICAN JOURNAL OF LEGAL HISTORY 3 (1998).

[20] Land Ordinance of 1785, *reprinted in* 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 378, (John C. Fitzpatrick ed., 1933) "There shall be reserved the lot No. 16, of every township, for the maintenance of public schools within the said township."

forever encourage and support "schools and the means of education."[21] Thus, through these ordinances, states were required to both zone land for the building of schools and to encourage efforts to educate the citizens of their state.[22]

Notwithstanding these federal and state efforts to require states to provide for the education of its citizens, most states did little or nothing to establish a system of schools.[23] This was not due to lack of effort. Political leaders of the era, including Thomas Jefferson and Benjamin Rush, were frustrated by the uneven nature of schools and advocated vigorously for a state-sponsored and uniform system.[24] In 1779, Jefferson proposed three interconnected bills to the Virginia Legislature, including a bill to create a state-wide school system with free elementary schools and general oversight of a statewide curriculum.[25] Rush proposed similar measures in Pennsylvania, advocating for the "whole state [to be] tied together by one system of education."[26] However, these proposals failed to garner much support, and Jefferson attributed their defeat to the public's concerns over funding.[27]

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[21] THE SCHOOL IN THE UNITED STATES, *supra* note 9, at 19. (citing An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, art. III (1787) ("Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.")).

[22] Haubenreich, *supra* note 16, at 444.

[23] Haubenreich, *supra* note 16 at 445.

[24] THE SCHOOL IN THE UNITED STATES, *supra* note 9, at 17-20. In 1779, Thomas Jefferson presented the Virginia legislature with *A Bill for the More General Diffusion of Knowledge*, which proposed a state-wide school system. He hoped that a free schooling system available to all children would create a better-informed electorate and the best possible representative government.

[25] Kaestle, *supra* note 11 at 8-9. Jefferson argued his plan in 1779, again in the 1790s, and once again in 1817 but each time it failed. Virginia did not adopt a statewide school system until 1870. *Id.* at 9.

[26] *Id.* at 9.

[27] *Id.* One of Jefferson's supporters told him that "'neither the people nor the representatives would agree' to property taxes for a general system of common schools." *Id.*

B) 1780-1830: Church charity schools and the beginnings of state-wide public school systems

While children in rural communities attended relatively stable, community-supported schools, children in diverse urban areas were educated in a variety of different ways.[28] Families who resided in cities typically paid schoolmasters to send their children to independent "pay schools."[29] Other children received training while in apprenticeships or as domestic servants.[30] However, not all children had the opportunity or the means to be educated in these ways. In response, churches of various denominations established schools for financially disadvantaged children within their congregations.[31] Initially, only a relatively small number of children attended these church charity schools.[32] Yet, as poverty increased and apprenticeships declined, the number of church charity schools grew.[33]

Voluntary associations also stepped up to educate disadvantaged children who did not belong to a church charity school.[34] One such organization, the New York Free School Society, was started by the Quakers in 1805 and quickly garnered financial and political support from city leaders.[35] Gaining a reputation for excellence, the Free School Society consolidated most of the city's charity schools and became the dominant institution for financial assistance from the city and state.[36] In 1825, the Free Society renamed itself the Public School Society and invited all children, regardless of their economic status, to attend.[37] That same year, the city of New York

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[28] Kaestle, *supra* note 11, at 30.
[29] *Id*. at 30.
[30] *Id.* at 31.
[31] *Id.*
[32] *Id*. at 31-32. Churches in New York City offered only six such schools in 1796.
[33] *Id*. Philadelphia offered 12 church charity schools in 1810.
[34] *Id.* at 37.
[35] *Id*. at 40
[36] *Id*. at 57.
[37] *Id*. at 52.

stopped providing financial support to denominational church schools.[38] Similarly, across many big cities, a single unifying organization combined and controlled the city's charity schools, and thus received the bulk of public funds.[39]

Despite increased opportunities for all children to attend school, the quality and funding of schools continued to vary widely. [40] Predictably, children of wealthier parents went to school longer and had better access to good teachers and materials.[41] In 1837, Horace Mann became the Secretary of Education for the state of Massachusetts, the first of such an official in the United States.[42] To improve access to education, Mann proposed a new system which he called "common schools," entirely funded by tax dollars and free to all children.[43] He envisioned that common schools would teach a uniform body of knowledge, enforce set standards, and provide each student with an equal opportunity to gain an education.[44]

The movement towards a uniform, public school system was underway.

C) Crusade for the Common School 1830-1850: Debates over Religious Freedom

Not everyone was supportive of Mann's vision of a state-controlled and funded common school system. Many state leaders fundamentally disagreed that state and town governments had the duty to regulate schooling or that property taxes should be used to educate other people's

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[38] *Id*. at 57.
[39] *Id.* at 57-59. By 1836, charity schools in Philadelphia had been consolidated and received the bulk of public funds.
[40] Sheila Curran Bernard & Sarah Mondale, SCHOOL: THE STORY OF AMERICAN PUBLIC EDUCATION 27 (Sarah Mondale & Sarah B. Patton eds., Beacon Press (2001).
[41] *Id.*
[42] *Id.* at 25.
[43] *Id.* at 29-30 (Mann stated that common schools were to be "a free school system, it knows no distinction of rich and poor . . . it throws opens its doors and spreads the table of its bounty for all children of the state. . . . Education then, beyond all other devices of human origin, is the equalizer of the conditions of men, the great balance wheel of the social machinery.").
[44] *Id*.

children.[45] Church schools also united to oppose common schools, arguing that their taxes should not be used to fund what they viewed as primarily Protestant parochial schools.[46] Under the leadership of Catholic Bishop John Hughes, Catholic parishes united to petition the city of New York for a restored share of the public common school fund.[47] When Jews and Presbyterians also asked for financial support, the city leaders agreed to hold a debate, later called the "great school debates."[48] In front of a large crowd at City Hall, Hughes argued against representatives from the Public School Society for hours, repeatedly defending the church's position and arguing that Catholics should not be required to pay taxes for "the purpose of destroying their religion in the minds of . . . children."[49] Despite these protests, Hughes and the representatives from the other churches were unsuccessful in securing a portion of the common school funds for their schools.[50] Instead, they resigned themselves to "double taxation," paying taxes to support common schools while also contributing to their congregations for church-sponsored schools.[51]

Due to the efforts of Mann and other reformers, by the year 1870 a system of free, tax-supported schools had been established in practically every state in the Union.[52]

D) 1850-1890: The Origins of Education in Washington

Unlike the more populated areas in the East, there were only a few schools north of the Columbia River when Washington Territory was formed by the "Organic Act" on March 2,

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[45] Kaestle, *supra* note 11, at 148-49.
[46] Bernard & Mondale, *supra* note 40, at 33-36.
[47] THE SCHOOL IN THE UNITED STATES, *supra* note 9, at 36, 49-53.
[48] Bernard & Mondale, *supra* note 40, at 34. The great school debates were argued both in packed galleries in City Hall as well as in the press. *Id*. at 36; *see also* THE SCHOOL IN THE UNITED STATES, *supra* note 9, at 49 (calling the conflict between the Public School Society and Roman Catholics in the 1840s the "great school wars.").
[49] *Id*. at 33-36.
[50] THE SCHOOL IN THE UNITED STATES, *supra* note 9, at 36.
[51] *Id.*
[52] Gerald Lee Gutek, An Historical Introduction to American Education 60 (1970); *see* Fletcher Harper Swift, A History of Public Permanent Common School Funds in the United States, 1795-1905, 5 (1911).

1853.[53] As part of the Act, Congress granted Washington Territory with federal lands—in the form of two sections of each township, approximately one square mile each—to be "applied to common schools."[54] One year later, the Washington Territorial Legislature passed its first school law, providing that money accrued from the sale of federally granted land would be added to an irreducible school fund, the interest of which would be divided among all the school districts.[55] The Legislature also directed that property taxes and fines for breaches of territorial laws would also be to the fund.[56] Within just a few years, most populated areas had established schools.[57] However, most of these schools were still underfunded despite districts levying the maximum tax.[58] With an average of 38 students per teacher and 8% of public schools without a schoolhouse, Washington's rapidly growing school system still needed more money.[59]

On February 22, 1889, Congress passed the Enabling Act, admitting the states of Washington, Montana, North Dakota, and South Dakota to the United States.[60] As part of the Act, the federal government renewed the earlier Organic Act's land grant with added conditions,

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[53] Thomas William Bibb, History of Early Common School Education in Washington 1 (1929). *See* Act of Mar. 2, 1853, ch. 90, § 20. The Act provided in part, "That when the lands in said Territory shall be surveyed under the direction of the Government of the United States preparatory to bringing the same into market or otherwise disposing thereof, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said Territory."

[54] *See* Act of Mar. 2, 1853, ch. 90, § 20.

[55] Act of Apr. 12, 1854, ch. I, §§ 1-3, 1854 Wash. Terr. Laws 1, 319-20.

[56] *Id.*

[57] John Caldbick, *Washington's 'Barefoot School Boy Act' is Passed on March 14, 1895*, https://www.historylink.org/File/10003.

[58] L.K. Beale, *Charter Schools, Common Schools, and the Washington State Constitution*, WASH L. REV. 535, 543 (1997).

[59] U.S. CENSUS BUREAU, MISC. STATISTICS: TABLES 5-7, 1880 CENSUS: VOLUME 1, STATISTICS OF THE POPULATION OF THE UNITED STATES at 916-18 (1882), https://www2.census.gov/library/publications/decennial/1880/vol-01-population/1880_v1-22.pdf.; Caldbick, *supra* note 57 ("Of the 531 public schools counted in 1880, only 487 had their own buildings.").

[60] Act of Feb. 22, 1889, 25 Stat. 676 (1889); *see also* Caldbick, *supra* note 57 (Washington Territory first attempted to achieve statehood in November 1878` when the state passed a proposed constitution that required free public schools for all residents 5 to 21 years old. However, the population was not great enough to be admitted. After Washington's population nearly tripled during the next decade, the Territory voters ratified a new constitution on October 1, 1889.)

including a limitation on the state legislature's discretion to use and sell the land.[61] The Act also included a broad condition requiring the state to establish and maintain a system of public schools "open to all children" and "free from sectarian control."[62] Delegates to the Washington Constitutional Convention later incorporated these terms into the text of the state constitution.[63]

II) The Modern Separation between Church and State

A) 20th Century: Rise of the Establishment Clause

As states in the 19th century gradually took on a greater role in controlling and funding a system of common schools, they also gradually discontinued financial support to religious schools.[64] The relevance of the First Amendment to limiting state support of religious schools was asserted only after the U.S. Supreme Court decided *Everson v. Board of Education* in 1947.[65] From that time on, it was not just state constitutions that demanded schools be free from sectarian control, it was also the U.S. Constitution. In *Everson,* cited in nearly 90 Supreme Court cases, the Court explained:

> **Neither a state** nor the Federal Government can set up a church. . . . No tax in any amount, large or small, can be levied to support any religious activities or

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[61] Act of February 22, 1889, §§ 10-11, 25 Stat. 676, 679-80. "That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools." *See* John B. Arum, *Old-Growth Forests on State School Lands—Dedicated to Oblivion?—Private Trust Theory and the Public Trust*, 65 Wash. L. Rev. 151-52 (1990).

[62] Act of February 22, 1889, § 4, 25 Stat. 676, 676-77.

[63] WASH. CONST. art. 9, §§3-5, art. 16, §§ 1-5. It is the provisions of the state constitution rather than the Enabling Act that make these terms legally binding. *See* Coyle v. Smith, 221 U.S. 559 (1911) (holding that a condition in the enabling act dictating the location of the state's capital ceased to be a valid limitation of the state's power after its admission).

[64] States gradually discontinued financial support to religious schools for a variety of reasons. *See* Bernard and Mondale, *supra* note 40, at 33-35 (discontinuing funding to religious organizations because of a desire to provide universal education and prevalent anti-Catholic bias); Kaestle, *supra* note 11, at 57 (need to secure scarce state resources). Many states added no-aid provisions to their state constitutions in the 1840s and 50s. *See* WIS. CONST. art. I, § 18 (1848); IND. CONST. art. I, § 6 (1851); OHIO CONST. art. VI, § 2 (1851); MASS. CONST. amend. art. XVIII (1855), MINN. CONST. art. I, § 16 (1857); OR. CONST. art. I, § 5 (1857); KANS. CONST. art. VI, § 8 (1859).

[65] Everson v. Board of Ep. of Ewing Tp., 330 U.S. 1 (1947) (holding the 14th Amendment's Due Process Clause incorporated the 1st Amendment's Establishment Clause against the states).

> institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion . . . [T]the clause against establishment of religion . . . was intended to erect 'a wall of separation between Church and State.[66]

At the same time, the Court also instructed that the First Amendment does not require that the state be adversarial to religion.[67] Rather, it only required the "state to be neutral in its relations with groups of religious believers and non-believers."[68]

Ultimately, the Court concluded in a 5-4 opinion that the New Jersey statute funding student transportation to public and private schools did not violate the Establishment Clause. The Court determined that the State contributed no money or support to the schools.[69] Rather, the state simply provided "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[70] Despite vigorous disagreement over the holding, all nine justices agreed that government spending in direct support of religious education would have violated the Establishment Clause.[71] Additionally, all nine justices agreed that the Establishment Clause applied in force against the States.[72]

One year later, eight justices signed on to Justice Black's opinion in *Illinois ex rel. McCollum v. Board of Education*, reinforcing "that both religion and government can best work to achieve their lofty aims if each is left free from the other."[73] In *McCollum*, the Court examined a school program that permitted students to attend religion classes taught by outside religious

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[66] *Id.* at 15-16 (emphasis added).
[67] *Id.* at 18.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 16 ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."); *id.* at 42 (Rutledge, J. dissenting) ("[T]he only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through use of the taxing power to support religion."); *see, e.g.*, Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763, 1769 (2023).
[72] Lupu & Tuttle, *supra* note 71, at 1769-70.
[73] Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948)

teachers during regular school hours in public school classrooms. The Court held that integrating a program of religious instruction within a state's compulsory education system was unconstitutional as it "[fell] squarely under the ban of the First Amendment."[74] In a separate concurring opinion, Justice Frankfurter highlighted the unique role that education plays in American society: "In no activity of the State is it more vital to keep out divisive forces than in schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart."[75] Justice Frankfurter decisively declared, "Separation means separation, not something less."[76]

To aid courts in analyzing Establishment Clause violations, the U.S. Supreme Court in *Lemon v. Kurtzman* (1971), created a three-part test:

> First, the statute must have a secular, legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and finally, the statute must not foster "an excessive government entanglement with religion."[77]

This test, aptly called the *Lemon* test, would be used as the primary method of Establishment Clause analysis for the next 50 years. Over time, the Court later applied this test to also prohibit government actions that a "reasonable observer" would consider an "endorsement" of religion.[78] However, despite the Court's good intentions to bring clarity to Establishment

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[74] *Id*. at 210.
[75] *Id.* at 231.
[76] *Id.*
[77] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (internal quotations omitted) (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)).
[78] *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J. concurring) ("The proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion."); Doe ex rel. Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 850 (7th Cir. 2012) (viewing the endorsement test as a legitimate part of *Lemon's* second prong); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022) (recognizing that the *Lemon* test evolved to include the endorsement test).

Clause analysis, many justices maligned the *Lemon* test as confusing to apply with hard-to-predict results.[79] The test was completely overturned in *Kennedy v. Bremerton* (2022).[80]

B) Establishment Clause and School Choice

The U.S. Supreme Court first held that the Establishment Clause was not a total barrier to state funding of religious schools in *Zelman v. Simmons-Harris* (2002).[82] In *Zelman,* the city of Cleveland established a school voucher program where students could apply a voucher to attend a public or private school of their choice. The program benefitted religious schools the most, with ninety-six percent of students applying their vouchers towards religious schools.[83] The Supreme Court concluded, in an opinion by Chief Justice Rehnquist, that despite state funds reaching religious schools, the city's school choice program did not violate the Establishment Clause. [84] The Court explained that the city's voucher program was entirely neutral concerning religion because it did not coerce parents to support religious schools, but rather provided them with a genuine choice to choose whatever type of school their child wished to attend.[85] The Court held that a state program that permits government funds to reach religious institutions by way of individual choices does not offend the Establishment Clause.

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[79] *See* Lee v. Weisman, 505 U.S. 577, 644 (Scalia, J., dissenting) (calling the Lemon test irrelevant and a formulaic abstraction that conflicts with "our long-accepted constitutional traditions"); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (comparing the Court's use of the Lemon test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"); Van Orden v. Perry, 545 U.S. 677, 686 (2005) (in the plurality opinion, Chief Justice Rehnquist called the Lemon test "not useful"); Shurtleff v. City of Boston, 596 U.S. 243, 277 (2022) (Gorsuch, J. concurring) ("Lemon produced only chaos.").

[80] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 510 (2022) ("But—given the apparent 'shortcomings' associated with *Lemon*'s 'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause—this Court long ago abandoned *Lemon* and its endorsement test offshoot.") (quoting American Legion v. American Humanist Assn.,139 S. Ct. 2067, 2080 (2019) (plurality opinion)).

[82] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[83] *Id.* at 647.

[84] *Id.* at 644.

[85] *Id.* at 653.

This case went a long way towards affirming the constitutionality of school choice programs; however, it left unaddressed the question of whether excluding religious schools from a state's school choice program would violate the Free Exercise Clause.

C) Play in the Joints between the Free Exercise Clause and Establishment Clause

The question left opened in *Zelman* was answered just two years later, in *Locke v. Davey*,[86] where the Court held that at least in some circumstances, the Free Exercise Clause does **not** require a state to include both secular and religious schools in its state-funded program. The Washington State Legislature established the Promise Scholarship Program to assist talented students in low- and middle-income families with the cost of college tuition.[87] Joshua Davey was awarded a scholarship under the program but wished to pursue a double major in pastoral ministries and business at a private, church-affiliated college.[88] As Davey was not willing to certify that the funds would not be used to pursue a religious degree, he lost his scholarship.[89] The U.S. Supreme Court considered whether Washington, pursuant to its state constitutional mandate to prohibit even indirect funding of religious instruction, could deny such funding without violating the Free Exercise Clause.[90]

In an opinion by Chief Justice Rehnquist, the Supreme Court ruled 7-2 that the exclusion did not violate the Free Exercise Clause, concluding that this case fell in the "play in the joints" between what was permitted by the Establishment Clause but not required by the Free Exercise Clause."[91] In making this determination, the Court first held that the Promise Scholarship

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[86] Locke v. Davey, 540 U.S. 712, 719 (2004).
[87] *Id.* at 715.
[88] *Id.* at 717.
[89] *Id.* at 717.
[90] *Id.* at 719.
[91] *Id.* at 712, 19.

Program did not violate the Establishment Clause because, like in *Zelman,* "the link between government funds and religious training [was] broken by the independent and private choice of recipients."[92]

Thus, the Court held that there was no Free Exercise Clause violation. Looking to history, the Court noted that "early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars."[93] What's more, the Court highlighted that there was nothing in Washington's constitutional history—or the program's operation—that suggested any "animus toward religion." Instead, the Court noted the program went a "long way toward including religion in in its benefits."[94] As such, even though under the First Amendment, Washington could permissibly allow students to apply Promise Scholarships towards a degree in theology, the Free Exercise Clause did not force Washington to make that choice.

D) Free Exercise Violations

Since 2017, the Court has increasingly narrowed the decision in *Locke* and broadened the reach of the Free Exercise in a series of four cases—*Trinity Lutheran Church v. Comer,*[95] *Espinoza v. Montana Department of Revenue,*[96] *Carson v. Makin,* [97] and *Kenndy v Bremerton.*[98] The first three cases, neatly coined the TEC trilogy by law professors Ira C. Lupu and Robert W. Tuttle, [99] defined when states were constitutionally required under the First Amendment to include religious organizations in state programs. *Kennedy* continued to expand the protections

[92] *Id.* at 719 (citing *Zelman,* 536 U.S. at 652).
[93] *Id.* at 713.
[94] *Id.* at 723.
[95] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017).
[96] Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020).
[97] Carson as next friend of O.C. v. Makin, 596 U.S. 767 (2022).
[98] Kennedy v. Bremerton, 597 U.S. 507 (2022).
[99] Lupu and Tuttle, *supra* note 71, at 1763.

of the Free Exercise Clause while also defining a new test for interpreting the Establishment Clause. Thus, an understanding and application of these four cases is most critical in determining the fate of Washington's charter school program.

1. *Trinity Lutheran Church v. Comer*

In *Trinity Lutheran v. Comer,* the U.S. Supreme Court held that a state's antiestablishment interest did not qualify as compelling in the face of the clear infringement of free exercise.[100] The Missouri Department of Natural Resources offered a playground resurfacing grant to qualifying organizations. Trinity Lutheran Church applied for the grant but was denied under the Department's policy to deny grants to any applicants owned or controlled by a church.[101] The Court considered whether Missouri's program, which excluded religious organizations, violated the Free Exercise Clause.[102] The Court concluded yes.

In a 7-2 majority opinion, Chief Justice Roberts explained that the Free Exercise Clause not only "protect[s] religious observers against unequal treatment," it also subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status."[103] Under that stringent standard, the Court concluded that Missouri's antiestablishment interest to promote the separation of church and state did not qualify as compelling in "the face of the clear infringement on free exercise."[104] The Court held that the "exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand."[105]

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[100] *Trinity*, 582 U.S. at 466.
[101] *Id.* at 453-54.
[102] *Id.* at 454.
[103] *Id*. at 458 (internal quotations omitted) (quoting Church of Lukumi Bablu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)).
[104] *Id*. at 466.
[105] *Id*. at 467.

Although this case did not concern school choice, the ruling in *Trinity* appeared to answer the question left undecided after *Zelman*—a state's policy to exclude religious schools from a generally available program, would likely violate the Free Exercise Clause.

2. *Espinoza v. Montana Department of Revenue*

The next case, *Espinoza v. Montana Department of Revenue*, considered the constitutionality of a school choice program when it was in tension with a state constitution's stricter establishment clause.[106] The Montana Legislature enacted a scholarship program for students to attend a private school of their choice.[107] Shortly after the program was enacted, Montana's Department of Revenue added a provision prohibiting families from using scholarships at religious schools pursuant to the state constitution's no-aid provision.[108] Three mothers brought suit, claiming their children should be allowed to apply the scholarship funds at a private Christian school that otherwise met the criteria for accreditation under the program.[109]

In a 5-4 opinion, written by Chief Justice Roberts, the U.S. Supreme Court held that Montana's application of its no-aid provision violated the Free Exercise Clause.[110] The Court explained that Montana's actions triggered strict scrutiny, because like in *Trinity*, "[t]he provision plainly exclude[d] government aid solely because of religious status."[111] When

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[106] Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020).
[107] *Id.*
[108] *Id.* at 2252. MONT. CONST., Art. X, § 6(1). "The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination." This is similar to the Washington State Constitution's no-aid provision which states WASH. CONST. art. IX, § 4 "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."
[109] *Id.*
[110] *Id.* at 2262-63.
[111] *Id.* at 2255.

applying that "stringent standard,"[112] the Court held that Montana's anti-establishment interest to "separat[e] church and state 'more fiercely' than the Federal Constitution" did not qualify as compelling "in the face of the infringement of free exercise."[113] In making this ruling, the Court reasoned that although the historical record was complex, there was clearly no "historic and substantial tradition against aiding such schools comparable to the tradition against state-supported clergy invoked by *Locke."*[114]

This case stands as a reminder that in a conflict between the Free Exercise Clause and a state constitutional no-aid provision, the Supremacy Clause demands that courts should decide the case "'conformably to the [C]onstitution' of the United States."[115]

3. *Carson v. Makin*

The U.S. Supreme Court's decision in *Carson v. Makin* built on what the Court called the "unremarkable principles" outlined in *Trinity* and *Espinoza* to further prioritize an individual's right to free exercise over a state's interest in the separation of church and state.[116] The Maine Legislature created the tuition assistance program to ensure that Maine's children, living in rural school districts without secondary schools, had access to free public education.[117] Under the program, parents could send their children to a public or private school of their choice if approved by the Maine Department of Education.[118] The student's home school district would then direct payments to the chosen school up to a specified maximum rate.[119]

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[112] *Id.* at 2260 (quoting *Trinity*, 582 U.S. at 466).
[113] *Id.* (quoting *Trinity*, 582 U.S. at 466).
[114] *Id.* at 2259.
[115] *Id*. at 2262 (quoting Marbury v. Madison, 1 Cranch 137, 178 (1803).
[116] Carson as next friend of O.C. v. Makin, 596 U.S. 767, 780 (2022).
[117] *Id*. at 773.
[118] *Id*.
[119] *Id*. at 773-74.

To be approved, private schools had to be accredited by the New England Association of Schools and Colleges (NEASC) or separately approved by the Department.[120] In schools that were accredited by the NEASC, teachers did not need to be certified and Maine's curriculum requirements did not apply.[121] Additionally, the program imposed no geographic limitations and until 1981, parents could choose to send their children to any accredited religious school with very few restrictions.[122] However, in 1981, the Maine Legislature imposed a new requirement, prohibiting tuition payments to "nonsectarian" schools out of concern that the funding violated the Establishment Clause of the First Amendment.[123] The Department defined a "sectarian" school as "one that is associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith."[124]

In 2018, two Maine families who wanted to send their children to a religiously affiliated NEASC-accredited school challenged Maine's tuition aid program's "nonsectarian requirement" as an infringement on religion.[125] After both the district court and First Circuit upheld the program, the U.S. Supreme Court reversed, concluding in a 6-3 opinion written by Chief Justice Roberts that by barring tuition assistance payments to only religious schools that Maine violated the Free Exercise Clause.[126]

The Court first reiterated what constitutes a free exercise violation: "[W]e have repeatedly held that a State violates the Free Exercise Clause when it excludes religious

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[120] *Id*. at 774.
[121] *Id*.
[122] *Id*.
[123] *Id*. at 773-74.
[124] *Id*. at 775.
[125] *Id*. at 775-76.
[126] *Id*. at 789-90.

observers from otherwise available public benefits."[127] The Court then explored what exactly Maine offered as a public benefit. Maine argued that it offered the benefit of a "free public education" that it could permissibly require to be secular.[128] However, the Court disagreed, highlighting several important differences between the "free public education" that Maine thought it was offering and the actual public benefit that Maine offered its residents.

The Court reasoned that first, unlike Maine's public schools, private schools did not have to accept all students.[129] Second, unlike free public schools, the approved private schools in Maine's program could charge over and above the amount that Maine was willing to provide thereby requiring students to pay the difference.[130] Third, private schools did not have to adhere to the same public school curriculum or submit to statewide assessments or reporting requirements.[131] Finally, the Court added, that unlike traditional public schools, participating schools could be single-sex and did not have to hire certified teachers.[132] Due to these distinguishing differences, the Court declared that the public benefit Maine offered was not free public education, but rather was the benefit of "tuition assistance that parents [could] direct to the public or private schools of *their* choice."[133]

The Court also explicitly declared that the Free Exercise Clause not only forbids discrimination on the basis of religious status, but also the anticipated religious use of public benefits.[134] Recognizing that such an inquiry into religious use could pose a potential violation of its own, the Court explained that any attempt to scrutinize "whether and how a religious school

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[127] *Id*. at 778.
[128] *Id.* at 782.
[129] *Id.* at 783.
[130] *Id.*
[131] *Id.* at 784.
[132] *Id.*
[133] *Id*. at 785.
[134] *Id.* at 788-89.

pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism."[135]

The decision in *Carson* created constitutional questions about state laws that prohibit religious schools in other school choice programs, such as charter schools. In dissent, Justice Breyer asked, "What happens once 'may' becomes "must"? Does it mean that school districts that give vouchers for use at charter schools must pay equivalent funds to parents who wish to give their children a religious education?"[136] The Court left that question unanswered.

4. *Kennedy v. Bremerton School District*

Just days after the Court decided *Carson*, the Court released its opinion in *Kennedy v. Bremerton*, another important case interpreting the relationship between the Free Exercise Clause and Establishment Clause.[137] In *Kennedy*, the Court considered whether a school district violated the Free Exercise Clause when it fired a high school football coach for praying on the field after games. In a decision by Justice Gorsuch, the Court concluded yes, declaring that the Constitution "neither mandates nor tolerates that kind of discrimination."[138]

The Court explained that by forbidding Kennedy's prayer, it failed to act pursuant to a neutral and generally applicable rule, triggering strict scrutiny.[139] The burden then shifted to the school district to prove that its limitations on the coach's actions were narrowly tailored to serve a compelling government interest. Relying on the three-part *Lemon* test, the school district argued that its suspension of Kennedy was essential to avoid an Establishment Clause

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[135] *Id.* at 787.
[136] *Id.* at 795 (Breyer, J., dissenting)
[137] Kennedy v. Bremerton, 597 U.S. 507 (2022).
[138] *Id.* at 544.
[139] *Id.* at 525.

violation.[140] However, the Court responded that the school district and the Ninth Circuit were applying the wrong test, declaring unequivocally that *Lemon* and its progeny were overturned.[141]

In its place, the Court instructed that the "Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[142] The Court stated that when drawing a "line between the permissible and the impermissible," it must (1) "accord with history" and (2) "faithfully reflect the understanding of the Founding Fathers."[143] To demonstrate this approach, the Court provided three examples of Establishment Clause violations that are consistent with historically sensitive understandings. First, the government may not "make a religious observance compulsory."[144] Second, the government may not "coerce anyone to attend church."[145] And third, the government may not "force its citizens to engage in a formal religious exercise."[146]

In the specific area of education, the Court cited two additional examples of clear violations of the Establishment Clause: (1) permitting a clergy member to recite prayers as part of an official school graduation ceremony;[147] and (2) allowing a prayer to be broadcast over the public address system before each football game.[148] In both these cases, the Court noted that the school had in "every practical sense compelled attendance and participation in" a "religious exercise," violating the First Amendment.[149]

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[140] *Id*. at 532.
[141] *Id.* at 534.
[142] *Id.* at 535 (quoting Town of Greece v. Galloway, 576 U.S. 565, 576 (2014).
[143] *Id.* (quoting Town of Greece, 576 U.S. at 577) (internal quotations omitted).
[144] *Id.* at 537 (internal quotation omitted) (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).
[145] *Ibid.*
[146] *Id*. (internal quotation omitted) (quoting Lee v. Weisman 505 U.S. 577, 589 (1992).
[147] *Id*. at 541 (citing *Lee*, 505 U.S. at 580).
[148] *Id*. (citing Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 294 (2000)).
[149] *Id*. (internal quotations omitted) (quoting *Lee*, 505.U.S. at 580)).

In *Kennedy,* the Court held that a high school coach's prayer, recited at midfield after every football game, was not coercive because "[s]tudents were not required or expected to participate" and because the prayers "were not publicly broadcast or recited to a captive audience."[150] However, despite the Court's finding, this case and the Court's use of examples, demonstrate that at least in some circumstances, a separation of church and state in public schools is still required under the First Amendment.

III) Education in Washington

A) Application of the Washington Constitution Establishment Clauses in Education

Unlike the U.S. Supreme Court's interpretations of the Free Exercise Clause and the Establishment Clause, which have shifted significantly over time, the Washington Supreme Court has interpreted its own state constitution's establishment clauses much more consistently. Article IX, Section 4 of the Washington State Constitution declares that "[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." These words were not included without debate. A delegate had proposed an amendment to strike the phrase "or influence," however, the convention majority disagreed, and instead passed the provision as the committee presented it.[151]

In addition to Article IX, Section 4, the framers also included a general establishment clause in Article I, Section 11 which states that "no public money or property shall be appropriated for, or applied to, any religious worship, exercise or instruction or the support of any religious establishment." The Washington Supreme Court has consistently interpreted these

[150] *Id.* at 542.
[151] ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION 175 (2nd Ed. 2013).

two articles as providing a far greater separation of church and state than the Establishment Clause in the U.S. Constitution.[152]

As early as 1918, the Washington Supreme Court in *State ex rel. Dearle v. Frazier* emphasized its own state's constitutional mandate:

> The framers of the Constitution were not content to declare that our public schools should be kept free from sectarian control or influence; they went further and made it certain that their declaration should not be overcome by changing sentiments or opinions. They declared that "no public money or property shall ever be appropriated or applied to any religious worship, exercise or instruction," and in this respect our Constitution differs from any other that has been called to our attention.[153]

In *Dearle*, the Court struck down a resolution attempting to force a school board to give high school credits for Bible study done outside of school, even though no public money or property would be provided for instruction. The Court reasoned that because the law would allow religious instruction, provided by "sectarian agents," the course could not be made part of the public-school curriculum under the mandates of the Washington Constitution.[154]

Further, in *Visser v. Nooksack Valley Sch. Dist. No. 506, Whatcom Cnty,*[155] the Washington Supreme Court explicitly outlined the differences in the federal and state establishment clauses by directly rejecting the reasoning put forth in the U.S. Supreme Court case *Everson v. Bd. of Educ. of Ewing Tp*.[156] In *Everson*, the U.S. Supreme Court concluded that funds used to transport children to Catholic parochial schools did not violate the federal Establishment Clause as the State contributed no money or support to the schools.[157] The Court explained that New Jersey's legislation "[did] no more than provide a general program to help

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[152] *Id.* at 37.
[153] State ex rel. Dearle v. Frazier, 102 Wn. 369, 374, 173 P. 35 (1918)
[154] *Id.* at 378.
[155] Visser v. Nooksack Valley Sch. Dist. No. 506, Whatcom Cnty, 33 Wn.2d 699, 207 P.2d 198 (1949).
[156] Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1 (1947).
[157] *Id.* at 18.

parents get their children, regardless of their religion, safely and expeditiously to and from school.[158]

By contrast, just two years later the Washington Supreme Court in *Visser* reached a different conclusion on similar facts. In *Visser*, the Court considered the constitutionality of a statute requiring all children, attending public or private school, to be entitled to use the transportation facilities provided by the school district.[159] Expressly rejecting the *Everson* reasoning, the Court held that the use of public funds for transportation to private schools served to aid and build up the school itself and thus was unconstitutional under the state constitution.[160] The Court explained the reason for the different outcomes:

> While the degree of support necessary to constitute an establishment of religion under the First Amendment to the Federal constitution is foreclosed from consideration by reason of the decision in the *Everson* case . . . we are constrained to hold that the Washington constitution although based upon the same precepts, is a clear denial of the rights herein asserted by appellants.[161]

The differing requirements between the First Amendment's Establishment Clause and Washington's establishment clauses were displayed once again in *Witters v. State Comm'n for the Blind (Witters I)*.[162] In *Witters I*, the Washington Supreme Court considered whether a vocational assistance program, providing funds to a blind student studying for a career as a pastor violated the First Amendment's Establishment Clause. In a 7-2 opinion, the Court ruled yes, explaining that because the State's program "clearly had the primary effect of advancing religion," it was unconstitutional under the First Amendment.[163] The U.S. Supreme Court

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[158] *Id*. at 17.
[159] *Visse*r, 33 Wn.2d. at 708-09.
[160] *Id.* at 709.
[161] *Id*.
[162] Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986).
[163] Witters v. State, Comm'n for the Blind, 102 Wn.2d 624, 629, 689 P.2d 53 (1984), *rev'd sub nom*. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986). To determine the constitutionality of state aid under the Establishment Clause, the court applied the three-part *Lemon* test and determined that the provision did not meet the second prong. *Id*. at 627-28.

reversed, holding that Washington's program did not violate the federal Establishment Clause because Washington's program was generally available, and the public funds only reached religious institutions through the independent and private choices of aid recipients.[164]

On remand, the Washington Supreme Court heard the case for a second time, but this time considered whether the religious program was permissible under the state constitution.[165] Once again, the Court held that the program unconstitutional. The Court observed there was a "major difference" between the state and federal constitutions, and to apply federal establishment clause analysis to Article I, Section 11 of the state constitution would be inappropriate.[166] The Court reasoned that as the applicant was asking the State to pay for a religious course of study for a religious career, the program was clearly unconstitutional under the Washington Constitution.[167] The U.S. Supreme Court denied a writ of certiorari, leaving open the question of whether the Free Exercise Clause required Washington to extend the aid to the petitioner.[168]

B) Paramount Duty

The word paramount is only used one time in Washington's Constitution, and it is used to declare the importance of education. Article IX, Section 1 states, "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders." The Washington Supreme Court in *Seattle Sch. Dist. No. 1 of King Cty. v. State* explained the significance of the word "paramount."

> The singular use of the term 'paramount duty,' . . . is clear indication of the constitutional importance attached to the public education of the State's children.

[164] Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986).
[165] Witters v. Commission for the Blind, 112 Wn.2d 363, 771 P.2d 1119 (1989).
[166] *Id.* at 370.
[167] *Id.* at 369.
[168] Witters v. Washington Dept. of Services for the Blind, 493 U.S. 850 (1989).

> By imposing upon the State a Paramount duty . . . the constitution has created a 'duty' that is supreme, preeminent or dominant.[169]

Despite the constitutional mandate to prioritize public education, the state has had difficulties fulfilling its obligations. In *Seattle Sch. Dist.,* the Washington Supreme Court held that the State did not meet its affirmative constitutional duty to "make ample provision for the education of all (resident) children" when it relied on special excess levies for funding.[170] More than thirty years later, the Washington Supreme Court held once again in *McCleary v. State* that the state failed to meet its paramount duty by consistently underfunding three major areas: basic operational costs, student transportation, and staff salaries and benefits.*[171]* To ensure the state met its obligation, the Court in *McCleary* took the unusual step of retaining jurisdiction to monitor the state's progress.[172] As a result, the legislature passed several bills aimed at increasing education funding, and in 2018, the Washington Supreme Court declared that the State had finally complied with the Court's order.[173]

C) History and Structure of Washington Charter Schools

1. Initiative I-1240

In 2012, Washington voters approved Initiative I-1240, codified in chapter 28A.710 of the Revised Code of Washington ("RCW"), to create charter schools—defined as "public, common schools" that would be targeted towards improving academic outcomes for at-risk students through an innovative and flexible approach.[174] Like traditional public schools, charter schools would be required to provide a basic education as outlined in RCW 28A.150.210,

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[169] Seattle Sch. Dist. No. 1 of King Cnty. v. State, 90 Wn.2d 476, 511 P.2d 71 (1978).
[170] *Id.* at 524.
[171] McCleary v. State, 173 Wn.2d 477, 529, 533, 269 P.3d 227 (2012).
[172] *Id.* at 546.
[173] McCleary v. State, No. 84362-7, 2018 WL 11422996, at *2 (Wash. June 7, 2018).
[174] Former WASH. REV. CODE § 28A.710.020(1)(a) (2013); WASH. REV. CODE § 28A.710.040(3) (2013).

instruction in the essential academic learning requirements (EALRs), and a statewide student assessment.[175] Additionally, charter schools would be required to comply with nondiscrimination laws, be subject to financial examinations and audits by the state auditor, comply with the annual performance report, comply with the open public meetings act and the public records requirements, and be subject to the supervision of the superintendent of public instruction and the state board of education.[176]

Charter schools would be monitored by a new independent state agency—the Washington charter school commission.[177] The commission would consist of nine members: three appointed by the governor, three appointed by the senate, and three by the house of representatives.[178] The commission was meant to supervise charter schools in the same manner as a school district board of directors.[179]

As a "public, common school," funding for charter school would be apportioned out of the common school fund based on attendance, the same standard as traditional public schools.[180] Unlike traditional schools, however, charter schools would not be governed by locally elected school boards, but instead, would operate under a "charter school board," appointed or selected by application.[181]

To become a charter school, an applicant had to meet certain requirements. Relevant here, the applicant had to be a nonprofit organization as defined by the statute, and the nonprofit organization could not be sectarian or religious.[182] Further, no charter school could engage "in

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[175] WASH. REV. CODE § 28A.710.040(2)(b) (2013).
[176] WASH. REV. CODE § 28A.710.040(1)(a-i), (5)(2013).
[177] Former WASH. REV. CODE § 28A.710.070(1) (2013).
[178] Former WASH. REV. CODE § 28A.710.070(2) (2013).
[179] *Id.*
[180] Former WASH. REV. CODE § 28A.710.220.
[181] WASH. REV. CODE § 28A.710.020(3), .010(6) (2013).
[182] WASH. REV. CODE § 28A.710.010(1) (2013)

any sectarian practices in its educational program, admissions policies, employment policies, or operations."[183]

In September 2015, days before students began to attend the newly established charter schools, the Washington Supreme Court declared that the portions of I-1240 designating charter schools as common schools violated the state constitution.[184] The Court explained that because charter schools were not subject to control through locally elected school boards, they did not qualify as "common schools" within the meaning of Article IX.[185] Further, the Court concluded that because charter schools were not common schools, they could not be funded by the common school fund.[186] As the Court held the funding provision non-severable, the entire Act was declared unconstitutional.[187]

2. 2016 Charter School Act

In 2016, the Legislature enacted a revised Charter School Act meant to cure the prior initiative's constitutional defects. No longer were charter schools defined as "public, common schools," but rather were "charter public schools," "operat[ing] separately from the common school system as an alternative to traditional common schools."[188] And instead of being supported by the common school fund, charter schools were to be financed by the Washington Opportunity Pathways Account—funded by lottery revenue.[189] The Act also included a new assessment provision, requiring charter school boards to receive independent performance audits conducted at regular time intervals.[190]

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[183] WASH. REV. CODE § 28A.710.040 (2013).
[184] League of Women Voters of Wash. V. State, 184 Wn.2d 393, 413, 355 P.3d 1131 (2015).
[185] *Id*. at 405.
[186] *Id.* at 410.
[187] *Id*. at 412-13.
[188] WASH. REV. CODE § 28A.710.020 (2016).
[189] WASH. REV. CODE § 28A.710.270 (2016); WASH. REV. CODE § 28B.76.526 (2016).
[190] WASH. REV. CODE § 28A.710.030(2) (2016).

The Act also increased the number of board members on the charter school commission. Instead of just the nine appointed members, the board would consist of the superintendent of public instruction or representative, and the chair of the state board of education or representative.[191] The commission would reside within the office of the superintendent of public instruction rather than the governor's office.[192]

Within a year, a group of plaintiffs filed suit, seeking a declaratory judgment that the Act was unconstitutional. In *El Centro de la Raza v. State*, the Washington Supreme Court first considered whether under the Washington Constitution a "non-common school," such as a charter school, could be included in the state's public school system.[193] The Court held yes, stating that Article IX, Section 2 only required a "general and uniform system of public schools," and that it did not "restrict the legislature's ability to create non-common schools that provide a general education and are open to all students."[194]

The Court next considered whether the Charter School Act satisfied the "general and uniform" requirement. The Court once again held, yes, concluding that charter schools did not need to operate identically to common schools, but only that the Charter School Act operated "sufficiently similar" to the Basic Education Act.[195] The Court found that the local voter control requirement only applied to common schools and not the entire system of public schools.[196]

Additionally, the Court also considered whether the Act violated the state constitution by divesting the superintendent's supervisory power over charter schools by creating the

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[191] WASH. REV. CODE § 28A.710.070(3) (2016).
[192] WASH. REV. CODE § 28A.710.070(8) (2016).
[193] El Centro De La Raza v. State, 192 Wn.2d 103, 112-13 428 P.3d 1143 (2018).
[194] *Id.* at 114.
[195] *Id.* at 116-18; *see* WASH. CONST. art. IX, § 2 ("The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established."); RCW 28A.150.220 (outlining the minimum components for the instructional program of basic education).
[196] *Id*.

Washington State Charter School Commission.[197] The Court held no, reasoning that the superintendent supervises charter schools in the same manner as all other public schools, and that there was nothing in the Act that interfered with the superintendent's supervisory duty.

As such, the Court concluded that because the Charter School Act conformed to the public school requirements of the Basic Education Act, and complied with the superintendent's constitutional duties, charter schools, like common schools, were a constitutionally valid option under the Washington public school system.

3. Updates to the Act in 2023

In 2023, the Washington Legislature amended the Charter School Act to address concerns that charter schools were not fulfilling their charter school contracts at the great expense of students.[198] In response, the amended Act directed the Washington State Charter School Commission and if applicable, the authorizing school district, to hold charter school boards more accountable for "effective educational, operational, and financial oversight of charter public schools."[199] For example, a charter school authorizer was directed to take further steps to monitor a charter school's administration if the authorizer received a "pattern of well-founded complaints" or if the school persistently underperformed.[200] The legislature required charter schools boards to receive annual trainings to help them meet their important responsibilities.[201]

The legislature also required more oversight for the Commission by introducing a provision that instructs the State Board of Education to conduct a special review in cases where

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[197] *Id.* at 120; *see* WASH. CONST. art. III, § 22 provides, "The superintendent of public instruction shall have supervision over all matters pertaining to public schools, and shall perform such specific duties as may be prescribed by law."
[198] Laws of 2023, ch. 356 § 1(1-4); *see* notes to WASH. REV. CODE § 28A.710.030 (2023).
[199] WASH. REV. CODE § 28A.710.070(1)(c) (2023); WASH. REV. CODE § 28A.710.100 (2023).
[200] WASH. REV. CODE § 28A.710.180(2) (2023).
[201] WASH. REV. CODE § 28A.710.070(1)(h) (2023).

there are a high-percentage of charter school closures, well-founded complaints, or other objective reasons.[202] The Board is responsible to report its findings and recommendations to the governor, the superintendent, and the appropriate committees in the house and senate.[203] By implementing these changes, the legislature reinforced the principle that the State Board of Education is responsible for overseeing the performance and effectiveness of all charter schools.[204]

IV) Analysis

1) The Charter School Act does not violate the Free Exercise Clause.

Unlike the school choice programs in Maine and Montana, the unique structure of Washington's Charter School Act does not violate the Free Exercise Clause. In *Carson v. Makin,*[205] the U.S. Supreme Court emphasized that "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits."[206] When evaluating a state benefit program, the first step necessarily begins with analyzing and defining what the state is offering as a public benefit.

In *Carson*, Maine argued that through its tuition assistance program, the state was offering the public benefit of "a free public education."[207] The U.S. Supreme Court disagreed, explaining that Maine was **not** offering the benefit of free public education, but rather was offering "tuition at a public *or* private school, selected by the parent, with no suggestion that the

[202] WASH. REV. CODE § 28A.710.120 (2023).
[203] *Id.*
[204] *Id.*
[205] Carson as next friend of O.C. v. Makin, 596 U.S. 767 (2022).
[206] *Id.* at 778.
[207] *Id.* at 782. *See* summary of *Carson*, supra at 18-21.

'private school' must somehow provide a 'public' education."[208] The Court explained that schools participating in Maine's tuition assistance program did not resemble, nor provide a Maine public school education.[209] The Court described the major differences between private schools participating in Maine's program and Maine public schools. Private schools did not have to meet the State's curriculum requirements or administer state assessments. They did not have to accept all students. They could charge more money than what they received from the state. They did not have to hire state certified teachers nor meet statewide educational goals. In short, the Court determined that although these schools claimed to be a part of Maine's public education system, they did meet any of the same requirements of a Maine public school and thus, they were not public schools.[210] Rather, the Court concluded that the public benefit Maine offered was "tuition at a public *or* private school," and as such, the state could not constitutionally exclude only religious schools.[211]

If, after defining the public benefit, the Court determines that a state is barring religious organizations from receiving the generally available benefit, then the state will have to satisfy strict scrutiny.[212] To satisfy scrutiny, the state must show that its actions are narrowly tailored to achieve a compelling state interest.[213] Like a state's offered public benefit, however, the state's asserted compelling interest will similarly be scrutinized. In *Espinoza v. Montana Dep't. Of Revenue,* [214] the Montana Legislature sought to provide the public benefit of "parental and student choice in education" by enacting a scholarship program for students attending private

[208] *Id.* at 782-83.
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.* at 780.
[213] *Id.*
[214] Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020).

schools.[215] Montana argued that application of the state constitution's no-aid provision, excluding funding to religious schools, advanced the state's interest in "public education."[216] However, the Court reasoned that Montana's actions did not actually meet this state interest. The Court explained that Montana's interest in public education was "undermined" when it "divert[ed] government support to *any* private school, yet the no-aid provision bar[red] aid only to *religious* ones.[217] While the Court's analysis of Maine's offered public benefit and Montana's asserted public interest were different, the effect was the same, neither of the states' programs were truly providing a public education. As such, once the State provided a benefit to any private schools, the state could not disqualify some private schools solely because they were religious.[218]

As demonstrated by *Carson* and *Espinoza*, the Court's consideration of a state's public benefit and a state's asserted interest does not stop with a state's "reconceptualization of the public benefit" or "the presence or absence of magic words."[219] Rather, the Court will look to the "substance of free exercise protections," when applied to the details of a state's action.[220] Thus, Washington will have to show that its stated public benefit and declared state interest are closely aligned with the structure of the Washington Charter School Act to prove that the program is constitutional under the First Amendment.

The public benefit Washington is offering under the Charter School Act is "*public school* options" that serve as "alternative[s] to traditional common schools."[221] Opponents could argue that this sounds a lot like the school choice programs in Maine and Montana. However, unlike Maine and Montana, Washington does not claim to be providing a choice between public and

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[215] *Id.* at 2251.
[216] *Id.* at 2261.
[217] *Id.*
[218] *Id.*
[219] Carson as next friend of O.C. v. Makin, 596 U.S. 767, 785 (2022).
[220] *Id.*
[221] WASH. REV. CODE §28A.710.020(1)(b)(2016)(emphasis added).

private schools, but rather providing choice within the public school system. Under this description, if the State's claim is correct, it may permissibly require charter schools to be secular.[222]

Washington "charter public schools" do provide a public school education.[223] In *El Centro de la Raza*, the Washington State Supreme Court determined that its state constitution did not require non-common schools to be "indistinguishable from" or "identical to" common schools, but rather that they "satisf[ied] the general and uniform system of public schools."[224] The Court held that charter schools met the requirements of a constitutionally valid option in the "general and uniform system of public schools" because like the Basic Education Act, it provided "(1) uniform educational content, (2) teacher certification, (3) minimum instructional hour requirements, and (4) a 'statewide assessment system.'"[225]

Additionally, Washington charter schools are like traditional common schools in several important ways.[226] They are open to all children free of charge.[227] They provide statewide student assessments.[228] They are subject to performance improvement goals and must comply with screening and intervention requirements.[229] They employ certificated staff with limited exceptions.[230] And importantly, because they access substantially the same educational opportunities, students may seamlessly transfer from a charter school to a traditional school without substantial loss of credit.[231]

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[222] *See id.* at 785 ("Maine may provide a strictly secular education in its public schools").
[223] Throughout RCW 28A.710, charter schools are both referred to as "charter schools" as well as "charter public schools." *See generally* RCW 28A.710.150 and RCW 28A.710.040.
[224] El Centro De La Raza v. State, 192 Wn. 2d 103, 118, 428 P.3d 1143 (2018).
[225] *Id.*
[226] WASH. REV. CODE § 28A.710.040(2)(b) (2023).
[227] WASH. REV. CODE § 28A.720(1)(a) (2023).
[228] WASH. REV. CODE § 28A.710.040(2)(b) (2023).
[229] WASH. REV. CODE § 28A.710.040(2)(c), (h) (2023
[230] WASH. REV. CODE § 28A.710.040(2)(d) (2023).
[231] El Centro De La Raza v. State, 192 Wn.2d 103, 116, 428 P.3d 1143 (2018).

Further, charter schools are also fully monitored and supervised by the state. The state subjects charter schools to financial examinations and audits.[232] A state agency—the Washington Charter School Commission—supervises charter schools. [233] Charter schools comply with state laws including nondiscrimination laws, the Open Public Meetings Act, and public records requirements.[234] Moreover, the state board of education and ultimately the state legislature, are responsible for ensuring charter schools comply with their charters and meet the requirements of a basic education.[237] Thus, the nonprofit organizations who administer charter school education are integrated into the state public school system and are representatives of the state.

As evidenced by the unique structure of the Washington Charter School Act, Washington does not provide the same benefits as those provided by the state programs described in *Carson,*[238] *Espinoza,*[239] and *Zelman.*[240] Maine provided students with a stipend for tuition to be used at a public or private school.[241] Montana provided students with a scholarship to be applied at a public or private school.[242] Cleveland offered parents a voucher to be used at a public or private school.[243] Not so in Washington. Washington provided students with *choice*—within the public school system. Because Washington may permissibly require that choice to be secular, Washington's Charter School Act does not violate the Free Exercise Clause.[244]

However, the public right may be defined differently. For example, the Supreme Court framed the public benefit in Montana as subsidies given to private schools. As a result of this

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[232] WASH. REV. CODE § 28A.710.040(2)(f) (2023).
[233] WASH. REV. CODE § 28A.710.070 (2023).
[234] WASH. REV. CODE § 28A.710.040(2)(a), (i) (2023).
[237] *El Centro De La Raza,* 192 Wn.2d at 125.
[238] Carson as next friend of O.C. v. Makin, 596 U.S. 767 (2022).
[239] Espinoza v. Montana Dep' t of Revenue, 140 S. Ct. 2246 (2020).
[240] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
[241] *Carson,* 596 U.S. at 771-72.
[242] *Espinoza,* 140 S. Ct. at 2251.
[243] *Zelman,* 536 U.S. at 643-44.
[244] *See Carson.* 596 U.S. at 785 ("Maine may provide a strictly secular education in its public schools").

framing, the Court in *Espinoz* applied strict scrutiny because the state "bar[red] **religious schools** from public benefits solely because of the religious character of those schools."[245] Likewise, a person may argue that the public benefit Washington is offering is funds given to nonprofit organizations. They could then argue the program is unconstitutional because it bars religious nonprofits from participating. Yet, even in this framing, the Act is still valid because Washington can show that the Act is narrowly tailored to advancing a compelling government interest.

Washington has a compelling interest in ensuring that all of its citizens have an opportunity to receive a basic education. As stated in *Brown v. Bd. Of Ed*., education is "perhaps the most important function of state and local governments."[246] Washington also has a compelling interest in upholding the mandates of the Washington State Constitution, which states that no public money should be applied to any "religious worship, exercise, or instruction."[247] Washington's charter school law is different than the scholarship program in Montana. The Court in *Espinoza* concluded that Montana was simply "subsidiz[ing] a private education", and as such, it "cannot disqualify some private schools solely because they are religious." Washington is not subsidizing private education. It is incorporating nonprofit organizations into its public school system. If Washington allowed religious charter schools, the state would be forced to monitor and fund religious instruction. The state's antiestablishment interest in avoiding that entanglement is compelling. Washington's law is narrowly tailored to exclude only those charter schools that could not provide the equivalent of a secular public education. Thus, no matter how the benefit is defined or what level of scrutiny is applied, the law remains constitutional under the Free Exercise Clause.

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[245] Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2255 (2020) (emphasis added).
[246] Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483, 493, (1954), *supplemented sub nom.* Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955).
[247] WASH. CONST. art. I, § 11.

2) A judgment requiring Washington to include religious charter schools would violate the U.S. Constitution's and Washington State Constitution's establishment clauses.

A requirement to severe the Washington Charter School Act's nonsectarian provision would violate the Establishment Clause. To be sure, a state may hesitate to rely on the Establishment Clause after Justice Sotomayor's dissent in *Carson*, warning that current precedent is leading "to a place where separation of church and state becomes a constitutional violation."[248] However, the Court in *Kennedy v. Bremerton*,[249] plainly articulated a new test, instructing that the Establishment Clause must be interpreted by "reference to historical practices and understandings."[250] The Court explained that government may not, consistent with a historically sensitive understanding of the Establishment Clause, "make a religious observance compulsory,"[251] nor "force its citizens to engage in any religious exercise."[252] By applying this test, Washington can show that including formal religious exercise in a state-administered charter public system would be coercion, in violation of even the narrower application of the Establishment Clause. What's more, there is considerable historical evidence that the First Amendment prohibits state-control of religious institutions.

A) Historical traditions of antiestablishment.

Public education, as it exists now, did not exist when the Bill of Rights was ratified and nor did the Bill of Rights apply to the states. Thus, it is inherently difficult to proscribe the framer's intent regarding what would have been required under the First Amendment in public education. However, although the U.S. Supreme Court concluded in *Espinoza* that there was no

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[248] *Carson*, 596 U.S. at 810 (Sotomayor, J. dissenting).
[249] Kennedy v. Bremerton, 597 U.S. 507 (2022).
[250] *Id.* at 510 (internal quotations omitted) (quoting Town of Greece v. Galloway, 572 U.S. 575, 576 (2014)).
[251] *Id.* at 537 (internal quotation omitted) (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)); *see supra* at 21-22 for summary of *Kennedy*.
[252] *Id.* (internal quotation omitted) (quoting Lee v. Weisman 505 U.S. 577, 589 (1992)).

historic and substantial tradition against aiding private, religious schools, there is a historic and substantial tradition against aiding tax-supported, *state-controlled* religious institutions.[253]

For example, in 1784, Patrick Henry proposed a bill in Virginia to impose taxes for the support of "[t]eachers of the Christian Religion."[254] In response, James Madison, author of the Bill of Rights, wrote and presented a statement to the Virginia General Assembly vigorously opposing it.[255] Madison warned, "[W]ho 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 . . . in exclusion of all other Sects."[257] Due in large part to Madison's efforts, the general religious tax assessment was defeated.[258]

Another founding father, Thomas Jefferson, also fiercely opposed state-support of religion. In his Virginia Act for Establishing Religious Freedom, Jefferson wrote that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even . . . forcing him to support [a] teacher of his own religious persuasion, is depriving him of his own religious persuasion."[259] Both Jefferson's and Madison's writings provide support for the principle that a state should not directly control a religious institution.

Unlike schools at the time of the Founding, which were primarily religious and managed by local communities and families, the public school system today is government-controlled and

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[253] Espinoza v. Montana Dep' t of Revenue, 140 S. Ct. 2246, 2259 (2020).
[254] A Bill Establishing a Provision for Teachers of the Christian Religion (1784), *reprinted in* Everson v. Board of Ep. of Ewing Tp., 330 U.S. 1, 72 (1947) (supplemental appendix to dissent of Rutledge, J.)
[255] James Madison, *To the Honorable General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance*, reprinted in JAMES MADISON ON RELIGIOUS LIBERTY 55, 57 (Robert S. Alley ed., 1985).
[257] *Id.*
[258] *See* Joseph Loconte, *Faith and the Founding: The Influence of Religion on the Politics of James Madison*, 45 JOURNAL OF CHURCH AND STATE 669, 712 (2003).
[259] Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), *reprinted* in 2 THE PAPERS OF THOMAS JEFFERSON 545, 545 (Julian P. Boyd, Lyman H. Butterfield & Mina R. Bryan eds., 1950).

tax-supported. In Washington, education is the state's paramount duty. The state decides the curriculum, determines and allocates the budget, and sets the standards. The state superintendent and state board of education oversee the entire public education system and ensure that schools are adequately funded and meet the program of basic education.

Charter schools are fully integrated into that state-supported system. An independent state agency—the Washington Charter School Commission—administers, monitors, and enforces charter school contracts in the same manner as a school district board administers other schools.[260] The state superintendent and chair of the state board of education or their representatives are members of the Commission and are committed to "charter schooling as a strategy for strengthening public education."[261] Thus, requiring the Commission to inquire into whether and how a religious school pursues its educational mission is exactly the behavior that the Court in *Carson* warned would "raise serious concerns about state entanglement with religion and denominational favoritism."[262]

Public schools today are unlike the religious schools in colonial times that received state support and were controlled by families, churches, and communities. By 1790, only five of the original thirteen states included any provision for education in their state constitutions, and none had made any concerted effort to establish a statewide system of public schools.[263] It was not until Horace Mann in the 1830s that the push for a universal formal education become more of a possibility.[264] So, although it is true that there is no "historic and substantial" tradition against aiding religious schools at the time of the founding, the writings of Jefferson and Madison

[260] WASH. REV. CODE § 28A.710.070 (2023).
[261] WASH. REV. CODE § 28A.710.070(5) (2023).
[262] Carson as next friend of O.C. v. Makin, 596 U.S. 767, 787 (2022).
[263] *See* Eastman, *supra* note 19 at 42; Haubenreich, *supra* note 16 at 445.
[264] *See* Bernard & Mondale, *supra* note 40 at 25.

suggest that there is a clear "historic and substantial" tradition against aiding state-controlled and funded religious institutions. That same reasoning can be extended to state-controlled religious public schools.

B) Compelling attendance and participation in religious charter public schools violates the Establishment Clause.

A requirement to allow religious charter schools into Washington's public school system would have the coercive effect of requiring participation in religious activities. In *Kennedy v. Bremerton*,[265] the Court declared that "government may not, consistent with a historically sensitive understanding of the Establishment Clause, 'make a religious observance compulsory.'"[266] In the context of education, the Court provided two examples of violations: (1) permitting a clergy member to recite prayers as part of an official school graduation ceremony;[267] and (2) allowing a prayer to be broadcast over the public address system before each football game.[268] At the very least, these examples suggest that the scope of the Establishment Clause continues to safeguard the separation of church and state in schools.

Under the Washington Charter Act, charter schools are state-administered public schools. Charter schools are monitored by an independent state agency as well as the superintendent of public instruction and the state board of education. They must meet the same state educational standards and are required to comply with the same state nondiscrimination laws. Furthermore, they are fully funded by state money. As such, if the state were required to include religious

[265] Kennedy v. Bremerton, 597 U.S. 507 (2022).
[266] *Id.* at 537. (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).
[267] *Id.* at 541 (citing Lee v. Weisman 505 U.S. 577, 589 (1992)).
[268] *Id.* (citing Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 294 (2000)).

charter schools in its public school system, the state would not only be funding a blend of secular and religious education, it would also be administering it.[269]

In his concurring opinion in *Espinoza*, [270] Justice Thomas explained why he felt that the majority in *Locke* incorrectly interpreted the Establishment Clause: "The state neither coerced students to study devotional theology nor conscripted taxpayers into supporting any form of orthodoxy."[271] Opponents may argue that in Washington taxpayers do not directly support charter schools, because charter schools are funded by the lottery and not the common school fund. Opponents may also argue that religious organizations could potentially act as any other nonprofit organization and administer curriculum absent any instruction of religion. However, as the Court warned in *Carson* "[a]ny attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism."[272] To ensure compliance with the nonsectarian requirement, the state would have to probe charter schools' use of funds and curriculum. As such, the "nonsectarian" requirement in the Charter School Act is essential to violating the Establishment Clause.

C) If Washington is required to severe the nonsectarian requirement, the Act would unconstitutional under the state constitution.

If the Court declares that the Washington Charter School Act's provision to exclude religious schools violates the Free Exercise Clause, the State could not simply remove that provision and save the Act. Rather, including religious charter schools would clearly violate the

[269] *See id*.
[270] Espinoza v. Montana Dep' t of Revenue, 140 S. Ct. 2246 (2020).
[271] *Id.* at 2265 (Thomas, J., concurring).
[272] Carson as next friend of O.C. v. Makin, 596 U.S. 787 (2022).

state constitutional mandate that "[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."[273]

The Washington Supreme Court's application of the state's establishment clauses has been consistent. In *Dearle,* the Court held that a school district could not provide high school credit for Bible study done outside of school because under the state constitution, religious instruction could not be made part of the public school curriculum.[274] In *Visser,* the Court held that no money could be used to transport students to private schools as "[o]ur own state constitution provides that no public money or property shall be used in support of institutions wherein the tenets of a particular religion are taught."[275] The Court's interpretation of the state constitution's mandate is clear, no public money is to be used to support a school where the tenets of a particular religion are taught. As such, state-funded, religious charter schools would be deemed unconstitutional under the Washington state constitution. Thus, although it appears that a requirement to include religious public charter schools would be a violation of the federal Establishment Clause, if the Court required them under the Free Exercise Clause, all charter schools in Washington would lose funding from the state.

3) Education is a Duty of the State

Despite the complex history of religious schools in America, the responsibility for establishing educational policy and standards originated with, and has continually resided in, state governments. It was the framers of state constitutions that, one by one, enshrined the duty

[273] WASH. CONST. art. IX, § 4.
[274] State ex rel. Dearle v. Frazier, 102 Wn. 369, 378, 173 P. 35 (1918).
[275] Visser v. Nooksack Valley Sch. Dist. No. 506, Whatcom Cnty, 33 Wn.2d 699, 711, 207 P.2d 198 (1949).

to provide funding and control of education to their state legislatures.[276] The U.S. Supreme Court perhaps said it best in the landmark case, *Brown v. Board of Education*,

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[277]

Traditionally, states and local government have been afforded considerable discretion in operating public schools.[278] The complexity of financing and managing a statewide public school system suggests that there is just not one permissible way to accomplish this enormous and important task. Legislatures who are familiar with the local needs of its citizens "should be entitled to respect."[279] Washington voters passed an initiative for the creation of charter schools. Although later deemed unconstitutional, the state legislature heard the voters and rewrote the statute, fixing its errors and keeping the heart of what the voters intended. Washington citizens did not want more private school options nor stipends to be applied to any school of their choice. Rather, Washington citizens wanted more options within the framework and supervision of the public school system. The Washington State Legislature, familiar with the concerns of local school districts and parents, created charter schools within the general and uniform system of education. By doing so, the State neither violated the Free Exercise Clause nor the Establishment Clause.

Justice Brandeis identified one of the peculiar strengths of our dual system of government is that "a single courageous state may, if its citizens choose, serve as a laboratory, and try novel

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[276] *See* history of no-aid provisions in state constitutions, *supra* note 64.
[277] Brown v. Board of Education, 347 U.S. 483, 493 (1954).
[278] Edwards v. Aguillard, 482 U.S. 578, 583 (1987).
[279] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973).

social and economic experiments without risk to the rest of the country."[280] No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.[281] The citizens of Washington chose to structure its charter school program as part of the public school system. They could have structured it differently, but by integrating charter school into the public school system, the state may permissibly require that they be secular.

V) Conclusion

In conclusion, unlike the school choices programs in Maine and Montana, Washington's Charter School Act remains constitutional under the latest First Amendment tests. Washington may permissibly exclude religious charter schools and a requirement to do so would violate the Establishment Clause. Thus, "charter public schools" in Washington can continue to provide a diverse range of educational opportunities to the thousands of students who choose to enroll.

[280] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).
[281] *San Antonio Indep. Sch. Dist.*, 411 U.S. at 50.outloo