FREE EXERCISE AND FUNDING

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In a series of cases culminating in Carson v. Makin, *the Supreme Court has held that the Free Exercise Clause prohibits states from excluding religious schools from funding programs solely because of their religious exercise. Yet so far, the Court has failed to explain how that approach follows from early understandings of free exercise. And what's more, critics have recently suggested that no such historical evidence exists.*

This Article suggests that the historical record is both more interesting and more complicated than either side has so far acknowledged. Far from being "barren" of free exercise arguments, evidence from the Founding period onward contains numerous examples of religious groups arguing that exclusionary school funding violated their right to free exercise—an argument that sometimes prevailed, especially early on. Considering that history provides a new vantage point for evaluating Carson *and related cases. But even more, appreciating the complexities this evidence presents may also provide some important insights about the usefulness and limits of appeals to history in this area, whatever one's constitutional methodology.*

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INTRODUCTION

When it comes to funding and the free exercise of religion, the Supreme Court's caselaw has settled into a new paradigm. But important questions remain about how to assess it.

In *Carson v. Makin*, the Supreme Court held that where a state chooses to subsidize private education, "it cannot disqualify some private schools solely because they are religious."[1] And, *Carson* added, this same principle applies not just to exclusions of religious schools as a class, but also to exclusions based on a school's *use* of funds for something religious while teaching math, reading, or other subjects.[2] Such exclusions don't depend on an identity-based classification. But they still "operate[] to identify and exclude otherwise eligible schools on the basis of their religious exercise" in a way the Constitution forbids.[3]

Carson represents the latest chapter in the Court's longstanding struggle to reconcile two competing principles. More than half a century ago, in *Everson v. Board of Education*, the Supreme Court said that under the Establishment Clause, "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions."[4] Yet in nearly the same breath, the Court noted that, under the Free Exercise Clause, states "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[5] The tension between those two principles has defined the Court's funding jurisprudence ever since.[6]

Carson sounds in *Everson*'s second principle—the idea that a state cannot exclude recipients from public benefits on account of their faith.[7] But it does not reject *Everson*'s no-aid principle. Instead, it seeks

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1 Carson v. Makin, 142 S. Ct. 1987, 1997 (2022) (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020)).

2 *See id.* at 2001.

3 *Id.* at 2002.

4 Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

5 *Id.* (emphasis omitted).

6 For one insightful account of this tension, see Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133, 137–42 (2017). As Professor Laycock explains, nearly any benefit provided on neutral terms could be construed as "support" for religion when received by a religious entity. *Id.* at 138. But nearly any benefit can also qualify as "public welfare legislation," such that denying it based on a recipient's religious practice would be an affront to free exercise. *Id.*

7 *See Carson*, 142 S. Ct. at 1996 (quoting *Everson*, 330 U.S. at 16); *see also* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020); Laycock, *supra* note 6, at 142 (noting a similar reliance in a predecessor case, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017)).

to bring the two principles into harmony, in a way that the Court's *Lemon*-era precedents arguably failed to do.[8]

Under *Carson*, including religious entities in funding programs is not unconstitutional "support" for religion. It is support for a public good, offered to a variety of recipients based on neutral, non-religious criteria.[9] But denying funding on account of religion is not similarly neutral. It is a *penalty* on religious practice, forcing citizens to choose between adherence to their faith and receiving a government benefit. *Carson* reconciles *Everson*'s principles by maximizing government's freedom to fund social welfare and minimizing its ability to selectively exclude religion.

Yet there is also a puzzle lurking here. In a variety of other areas, especially the Establishment Clause, the Supreme Court has said the Constitution must be interpreted primarily by reference to Founding-era "historical practices and understandings."[10] But as critics have pointed out, in *Carson* and related free exercise cases, history has played a minimal role at best.[11] How should we think about that reticence and the relationship between history and funding under the Free Exercise Clause generally?

Recent developments have put the issue front and center. In *Oklahoma Statewide Charter School Board v. Drummond*, the Supreme Court deadlocked on whether a state violated the Free Exercise Clause by refusing to include a religious school in the state's publicly funded

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8 During the *Lemon* era, the Court dramatically expanded *Everson*'s no-aid principle while minimizing or ignoring the non-discrimination principle. The results were incoherent on multiple levels. For some sampling in the caselaw, see, for example, *Wallace v. Jaffree*, 472 U.S. 38, 110–11 (1985) (Rehnquist, J., dissenting) (noting that, under *Lemon*, a state could "lend to parochial school children geography textbooks that contain maps," but could not "lend maps . . . for use in geography class" and discussing similar nonsensical results, *id.* at 110 (footnote omitted)). For scholarly discussion of these and similar problems, see Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 164–65 (2004); and Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. 111, 112–14 (2020).

9 *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002) (upholding a school voucher program because aid was provided on a religion-neutral basis—there, based on the "true private choice" of families); *Carson*, 142 S Ct. at 1997 (noting that "a neutral benefit program . . . does not offend the Establishment Clause").

10 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2414 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

11 *See, e.g.*, Alexander Tsesis, Essay, *The Establishment of Religion in Schools*, 76 STAN. L. REV. 1725, 1748 (2024) (observing that "history played a de minimis role in *Carson* and *Espinoza*"); Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763, 1789 (2023) (criticizing *Carson* and related cases for reaching their results "without any originalist analysis of either Religion Clause").

charter school program.[12] But during the litigation, a group of historians and legal scholars advanced a broader set of claims. According to them, when nineteenth-century actors began arguing against funding for church-run schools in favor of so-called "nonsectarian" schools, supporters of church-run schools "never challenged this practice under the free-exercise clauses . . . in state constitutions."[13] Based on this claim, these scholars argued further that "denial of funding was thought to be consistent with constitutional free-exercise principles even by religious school leaders themselves," and thus, outside the scope of the Free Exercise Clause today.[14]

This Article contends that the historical record is both more interesting and more complicated than either the Court or its critics have suggested. More specifically, it contends that—far from lacking such arguments—the historical record from the Founding period onward is replete with examples of religious groups arguing that selective school funding and similar policies violated their right to free exercise. This evidence strongly suggests that, on this early understanding, free exercise and disestablishment were symmetrical. Just as government could not provide funding solely to support religion, neither could it deny funding based on religion or its exercise. As one early source put it, such a denial was "at variance with the liberal spirit of our constitution, which recognizes no distinction in religious worship."[15] And early on, at least, those arguments seem to have prevailed.

Understanding early arguments over free exercise and funding is essential for a Court that claims to be focused on history. But even more, attending to this historical evidence provides a window into the ways that Protestant-Catholic conflict and the push for common schools altered the earliest understandings of free exercise and disestablishment, with effects that continue to haunt all sides of the modern debate.

Reasonable minds can differ as to the importance of history for answering contemporary questions. But at a minimum, appreciating the full range of evidence provides a new vantage point for assessing

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12 Okla. Statewide Charter Sch. Bd. v. Drummond, 145 S. Ct. 1381, 1382 (2025) (mem.).

13 Brief of Historians and Legal Scholars as Amici Curiae in Support of Respondent at 10, *Drummond*, 145 S. Ct. 1381 (Nos. 24-394 & 24-396).

14 *Id.* at 17. A recently published article by two of these scholars makes the same basic claims. Aaron Tang & Ethan Hutt, *"Original History" and the Free Exercise Case for Religious Charter Schools*, 103 WASH. U. L. REV. 639, 666–67 (2026) (arguing that the historical record is "barren" of evidence that denominational schools "advanced any argument that [the] denial of access to equal funding violated the right to free exercise").

15 The Mem'l of Trs. of the Congregation of Sheerith Isr. Convened, Petition to Legislature from K.K.S.I. on Religion and the Free Schools (Jan. 10, 1813), *reprinted in* 27 PUBL'NS AM. JEWISH HIST. SOC'Y 92, 95 (1920).

Carson and related cases—a vantage point that, so far, neither supporters nor detractors have adequately considered. And in the process, appreciating the complexity of the evidence may also illumine the usefulness and limits of appeals to history in this area generally.

Historical approaches to the Constitution begin from the premise that, whatever else has changed, constitutional rights offer no less protection today than they did when they were ratified. But in the funding context, operationalizing that claim might best be seen as flowing not just from history, but also from an analogy: The Constitution prohibits targeting religious practices for fines or punishment, and giving meaning to that rule today requires treating denials of funding in a similar way. When it comes to free exercise and funding, then, both the relevance of history and its possible limits are fully on display.

This Article is organized as follows. Part I briefly summarizes some relevant historical background—evidence surrounding disestablishment and funding for religious schools in the Founding era. Having done so, Part II investigates what the historical record might tell us about free exercise and questions of funding. This Part begins by exploring some of the earliest debates over free exercise and government subsidies—arguments that have never been cited or discussed by the Supreme Court. Having done so, it goes on to chart the continuation of those arguments into the nineteenth century and the way that Protestant-Catholic conflict distorted earlier constitutional understandings. Finally, in Part III, the Article offers some brief reflections on both the benefits and limits of appeals to history in this context.

I. THE DISESTABLISHMENT BACKGROUND

For roughly two decades in the twentieth century, the Supreme Court insisted that the Establishment Clause required denying most forms of aid to religious schools.[16] And to support that claim, the Court and individual Justices have relied on appeals to Founding-era history, especially quotes from figures like Thomas Jefferson and James Madison.[17] Thus, an examination of the historic backdrop of disestablishment provides the essential starting place for thinking about the relationship between funding and the Religion Clauses.

16 Laycock, *supra* note 6, at 139–40 (noting that the no-aid approach "dominated from 1971 to 1985" and discussing evolution in the doctrine).

17 *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760–61 (1973) (appealing to Jefferson and Madison); Lemon v. Kurtzman, 403 U.S. 602, 633–34 (1971) (Douglas, J., concurring) (similar), *abrogated by*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); Meek v. Pittenger, 421 U.S. 349, 382 n.4 (1975) (Brennan, J., concurring in part and dissenting in part) (similar), *overruled by*, Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion); Everson v. Bd. of Educ., 330 U.S. 1, 28–42 (1947) (Rutledge, J., dissenting) (similar).

To appreciate the issue's importance, consider just one recent opinion. In a precursor case to *Carson*, Justice Sotomayor argued in dissent that Founding-era history demonstrated that the Establishment Clause forbade including religious schools in a program providing funds for safer playground surfaces.[18] Justice Sotomayor did not deny that the program was available to religious and non-religious schools alike, or that it employed neutral criteria. On her view, however, the fact that the school "use[d] . . . its playground, in conjunction with its religious mission" made including religious schools indistinguishable from laws "exacting payment for . . . religion" that the Founders had condemned.[19]

Justice Sotomayor's dissent in *Trinity Lutheran Church of Columbia, Inc. v. Comer* reflects a popular understanding of Founding-era history, tracing all the way back to Justice Rutledge's dissent in *Everson*. But as I have explored at length in prior work, the available Founding-era evidence suggests a much different picture. Far from condemning the inclusion of religious schools in funding programs, both the practice and the reasoning of Founding-era Americans strongly suggest that providing funds to religious entities in support of goods like education was not understood as a form of religious establishment.[20]

Start with evidence from practice. Beginning after 1776 and extending into the decade following the adoption of the Establishment Clause, many states rejected church taxes as inconsistent with religious freedom.[21] Yet during the same period, virtually every state and the federal government provided support for religious schools of all kinds.[22] Nor was that support limited to places like Massachusetts that retained some form of religious establishment. On the contrary, even in places like Virginia, Maryland, and Pennsylvania where citizens had roundly rejected church taxes, funding for religious schools flourished, seemingly as a matter of course.[23] What's more, even the most vehement objectors to church taxes, like Baptists and Quakers, sought and often received funding for their schools.[24]

Taken in isolation, this evidence does not prove beyond all doubt that the strident no-aid reading is mistaken. But at a minimum, it casts

18 Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 481–86 (2017) (Sotomayor, J., dissenting).

19 *Id.* at 473, 482.

20 For a more extended discussion of these issues, see Storslee, *supra* note 8, at 120–82.

21 *Id.* at 150–63. For another account covering a wider swath of history, see Richard J. Gabel, Public Funds for Church and Private Schools (1937) (Ph.D. dissertation, Catholic University of America) (on file with the Hesburgh Libraries, University of Notre Dame).

22 Storslee, *supra* note 8, at 150–69.

23 *Id.* at 130–35 (Virginia); *id.* at 152–55 (Maryland); *id.* at 162 (Pennsylvania).

24 *Id.* at 147–50 (canvassing this practice).

significant doubt on the idea that early Americans viewed funding for education as a form of religious establishment just because a school might also use the funds for something religious. And indeed, a similar conclusion follows from the nature of Founding-era objections to church taxes.

Proponents of a broad no-aid rule have sometimes suggested that Founding-era supporters of religious liberty categorically objected to paying for disagreeable religion.[25] But a closer look at the evidence suggests a different conclusion. Rather than vague objections about supporting religion, Founding-era proponents of religious liberty tended to lodge a much more specific claim—namely, that church taxes amounted to a coerced tithe, a "sacrifice" or "homage" to God that government had no right to command. That objection clearly ruled out religious assessments—exactions of money, taken by force, solely to support the religious function of churches. But by all indications, it did not apply to programs using taxes for other purposes like education, even if a recipient's activities might also include religion.

To understand the point, consider one prominent example of this thinking, sometimes misinterpreted by contemporary readers. Following the American revolution, pro-establishment forces in Virginia proposed a general assessment—a tax to fund minister salaries and worship, but one that would also allow citizens to direct their money to the church of their choice, or to education.[26] In his *Memorial and Remonstrance Against Religious Assessments*, James Madison famously objected to the proposal, arguing that "the same authority which can force a citizen to contribute three pence . . . for the support of any one establishment, may force him to conform to any other establishment."[27]

Supporters of a strict no-aid theory have read Madison as arguing that citizens cannot be forced to contribute even one penny that will subsidize religion they oppose.[28] But the facts make that reading hard

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25 *See, e.g.*, HOWARD GILLMAN & ERWIN CHEMERINSKY, THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE 64 (2020); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 417 (2002) ("[T]he Framers broadly agreed that coercively requiring dissenters to contribute funds to religious purposes with which they disagreed constituted a violation of conscience." (emphasis omitted)).

26 A Bill Establishing a Provision for Teachers of the Christian Religion (1784), *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1, 72–74 (1947) (Rutledge, J., dissenting) (contained in the supplemental appendix to Justice Rutledge's dissent).

27 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).

28 *See, e.g.*, Hein v. Freedom from Religion Found., 551 U.S. 587, 638 (2007) (Souter, J., dissenting) (arguing that Madison's statement indicates that conscience is violated by "the expenditure of an identifiable three pence . . . for the support of a religious cause"); *Everson*, 330 U.S. at 40–41 (Rutledge, J., dissenting) (citing Madison's statement to support

to sustain. After all, the general assessment proposal that Madison was fighting against did not actually require citizens to fund someone else's religion. Instead, it would have allowed each citizen the option of contributing money to his own church, or alternatively to education.[29] Indeed, one point in *favor* of the general assessment was that it would not have forced anyone to support a repressive state church.[30] It is hard to believe Madison's argument could have missed the mark so widely.

A more likely reading begins in a different place. Earlier in his *Memorial*, Madison had argued that the general assessment mandated a coerced religious sacrifice—an act of "homage" to God.[31] The subsequent argument about three pence drew this point to its logical conclusion: If the government could command even a trivial religious sacrifice, so could it demand any other. And to drive the point home, Madison's mention of "three pence" alluded to another little tax that stood as a symbol of tyranny—the tax of three pence per pound on tea that had occasioned the Boston Tea Party.[32]

Read in context, Madison's discussion of "three pence" was not an argument about "pennies for religion." Much more likely, it was an argument about coerced tithes. Money provided for the exclusive support of worship had always been viewed as a religious sacrifice, an act of "homage" to God. But, Madison contended, the government lacked the power to require such religious observances—no matter how trivial

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the view that the First Amendment "forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises").

29 A Bill Establishing a Provision for Teachers of the Christian Religion (1784), *reprinted in Everson*, 330 U.S. at 72, 73–74 (Rutledge, J., dissenting). As Professor Carl Esbeck has explained, the bill's reference to "seminaries" was a reference to "schools of general education." Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 GEO. J.L. & PUB. POL'Y 51, 79 n.121 (2009).

30 Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227, 242 (2004) (noting that supporters of the general assessment "did all they could to make it nonpreferential as among Christian denominations" and even provided that "non-Christians and conscientious objectors . . . could decline to designate a church and thereby send their clergy tax to a fund for schools").

31 MADISON, *supra* note 27, at 56 ("It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him [i.e., to God]. . . . We maintain therefore that in matters of Religion, no mans [sic] right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.").

32 *See, e.g.*, BENJAMIN L. CARP, DEFIANCE OF THE PATRIOTS: THE BOSTON TEA PARTY & THE MAKING OF AMERICA 20 (2010) (noting that under the Tea Act of 1773, Parliament "continue[d] to collect the three-penny duty on every pound of imported tea," and by doing so, "reaffirmed Parliament's right to tax the colonists without their consent, a point that more and more Americans were refusing to concede").

they appeared. And indeed, arguments made by other supporters of religious liberty in this period confirm the same point.[33]

This alternate reading of Madison's *Memorial* has an important practical upshot. Most significantly, it offers a plausible explanation as to why, even after Thomas Jefferson's Bill for Religious Freedom ended church taxes in Virginia, the state went on to fund a variety of religious schools, seemingly without comment or controversy.[34] By all appearances, Madison's argument about coerced worship clearly applied to programs coercing payments exclusively to support religious worship—payments that had always been considered tithes or sacrifices to God. But very likely, that objection did not apply to programs that funded education, even if recipients might also use some of those funds for religion.[35]

On this Founding-era understanding, providing funds to support a public good like education was well within the government's power. Requiring religious sacrifices exclusively to support worship and ministers was not. And indeed, that same basic explanation makes sense of the near-ubiquitous practice of funding religious schools in this period, even in states that had roundly rejected church taxes.

The Court has articulated its modern Establishment Clause rules by focusing on the concept of neutrality between religious and secular entities—categories that Founding-era Americans did not possess. But the Founding-era evidence surrounding disestablishment and religious schools arguably points toward a similar set of conclusions, albeit indirectly. On the predominant Founding-era understanding, where a funding program served a public good and did not treat religion as an

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33 For instance, roughly a decade before Madison's *Memorial*, the well-known Baptist minister Isaac Backus objected to Massachusetts' church-tax scheme by drawing the same analogy to the tea tax:

> That which has made the greatest noise, is a tax of three pence a pound upon tea . . . . All America are alarmed at the [British] tea tax; though, if they please, they can avoid it by not buying the tea; but we have no such liberty. . . . [W]e are determined not to pay [the church tax] . . . because we dare not render that homage to any earthly power, which I and many of my brethren are fully convinced belongs only to God.

Isaac Backus, Address to the Honorable Congress of the Massachusetts Province (Nov. 22, 1774), *in* ALVAH HOVEY, A MEMOIR OF THE LIFE AND TIMES OF THE REV. ISSAC BACKUS, A.M. 215, 220–21 (Boston, Gould & Lincoln 1859). Likewise, John Leland objected to paying the salary of federal chaplains because "[t]his money they receive for religious services," even though the tax was "a trifle, far less than the three pence on a pound of tea." John Leland, An Elective Judiciary (July 4, 1805), *in* THE WRITINGS OF THE LATE ELDER JOHN LELAND 283, 293 (New York, G.W. Wood 1845). For additional discussion of this point, see Storslee, *supra* note 8, at 126–27.

34 *See* Storslee, *supra* note 8, at 129–36 (canvassing this evidence).

35 *Id.* at 157–69 (documenting evidence involving other states and the federal government that suggests a similar conclusion).

independent basis for funding, it was not equivalent to a coerced tithe, and thus, not an establishment of religion. The Court's modern Establishment Clause jurisprudence does not speak in those terms. But where modern programs provide neutral support for things like education, they cohere to that principle by default.

II. FREE EXERCISE AND FUNDING

The history of disestablishment discussed above is an essential starting place for thinking about questions of funding under the Religion Clauses. But it is also only half the story. After all, in cases like *Carson*, the Court has concluded not just that including religious schools in neutral funding programs is *permissible* under the Establishment Clause, but also that it is *required* as a matter of free exercise, at least where government has chosen to fund other kinds of private education.[36] And it is that latter claim that has been the subject of some criticism by those skeptical of the Court's jurisprudence.

Part of the criticism has been about consistency. In numerous opinions, the Court has stressed that the Establishment Clause should be interpreted principally by way of "historical practices and understandings" drawn from the Founding era.[37] Yet in *Carson* and cases leading up to it, the Court has offered little historical support for its conclusion that the Free Exercise Clause forbids states from refusing to fund religious schools based on their religious status or activity.[38] But, as noted above, some scholars have gone even further, contending that during the Founding period and into the nineteenth century, church-run schools "never asserted a free-exercise right to public funding," effectively undermining any historical case for *Carson*'s free exercise theory.[39]

This Part suggests that the historical record is both more interesting and more complicated than either side has acknowledged. Far

36 *See* Carson v. Makin, 142 S. Ct. 1987, 1996–97 (2022).

37 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2414 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (quoting *Town of Greece*, 572 U.S. at 576).

38 In *Espinoza v. Montana Department of Revenue*, the Court briefly noted that funding for denominational education was commonplace in the years surrounding the Founding and into the early nineteenth century. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2258 (2020). That observation was accurate; if anything, it understated the pervasiveness of the practice. But it does not speak directly to whether funding some schools but not others violates the Free Exercise Clause.

39 Brief of Historians and Legal Scholars, *supra* note 13, at 5; Tang & Hutt, *supra* note 14, at 647 (noting that during the nineteenth century, refusals to fund denominational schools while funding others "occurred . . . in highly visible settings," but insisting that "no one we are aware of argued that the governmental practice was inconsistent with then-extant free exercise principles").

from lacking free exercise objections like these, the nineteenth-century record contains numerous examples of religious groups arguing that exclusionary school funding violated their right to free exercise. And early on at least, those arguments prevailed. This evidence does not "prove" the Court's decisions in *Carson* and similar cases are correct; here as elsewhere, relating history to modern circumstances is more complicated than that. But at minimum, it offers a new way to assess the Court's jurisprudence, unburdened by the Protestant-Catholic conflict that came to alter (and in my view, distort) earlier Founding-era understandings.

This Part begins by canvasing early historical evidence surrounding free exercise and funding—evidence that has never been discussed or otherwise analyzed by the Supreme Court. Having done so, it goes on to relate that evidence to developments later in the nineteenth century, when proponents of common schools reshaped arguments about disestablishment to counter free exercise objections. Finally, it considers a selection of additional evidence relevant to the question, including instances in which arguments over free exercise and government benefits took some alternative forms.

A. Early Evidence

By all accounts, the earliest and most notable episode involving free exercise and funding occurred in New York. As early as 1795, the legislature had provided funds to support schools, seemingly without regard to their religious persuasion.[40] In 1801, it followed up by enacting a law directing the mayor of New York City to disperse available funds equally to schools run by Baptists, Presbyterians, Episcopalians, and others.[41] Later, the legislature extended that benefit to the city's religious minorities—a school run by the city's Catholics, as well as one operated by the Shearith Israel Congregation, the country's oldest Jewish synagogue.[42] But not everyone was satisfied with that arrangement.

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40 *See* An Act for the Encouragement of Schools, ch. 75, 1795 N.Y. Laws 626, 626.

41 *See* An Act Directing Certain Monies to be Applied to the Use of Free Schools in the City of New York, ch. 189, 1801 N.Y. Laws 552, 552.

42 *See* An Act Respecting the Free School of St. Peter's Church in the City of New York, ch. 63, 1806 N.Y. Laws 393, 393 (providing funds for a school supported by St. Peter's Church); An Act for the Payment of Certain Officers of Government, and for Other Purposes, ch. 246, § XLIII, 1811 N.Y. Laws 329, 333–34 (providing support for the school run by Shearith Israel). Later, when St. Patrick's Church opened a school in 1817, it too would receive state funds. Charles J. Mahoney, The Relation of the State to Religious Education in Early New York: 1633–1825, at 118 (1941) (Ph.D. dissertation, Catholic University of America) (on file with the Hesburgh Libraries, University of Notre Dame). Between 1805 and 1824, with financial assistance from the state, the two Catholic schools provided elementary education to 10,632 children in New York City. *Id.*

Since 1805, the New York Free School Society had operated schools alongside the city's denominational schools.[43] Started by a group of philanthropists—many of whom were Quakers—the Society aimed to provide for "the education of such poor children as do not belong to or are not provided for by any religious society."[44] But these were not secular schools. Instead, as the Society explained in an address to the public, its schools aimed to "inculcate the sublime truths of religion and morality contained in the Holy Scriptures," but "without observing the peculiar forms of any religious Society."[45] And in the ensuing years, the legislature provided numerous grants to the Free School Society alongside local denominational schools.[46] When the state began revising its laws supporting education, however, the Society sought the upper hand.

In February 1812, the Society began a campaign to discontinue state financial support for denominational schools. Submitting a petition to the New York legislature, the Society argued for exclusive control of education funds in New York City.[47] The legislature postponed decision on the issue until the following year, allowing denominational schools to contest the Society's proposed policy.[48] And here, a

43 A. EMERSON PALMER, THE NEW YORK PUBLIC SCHOOL: BEING A HISTORY OF FREE EDUCATION IN THE CITY OF NEW YORK 16 (1905).

44 *Id.* at 130; *see id.* at 35 (noting Quaker influence within the early Free School Society); *see also* The Memorial of the Subscribers, Citizens of New York, to the Representatives of the People of the State of New York (Feb. 25, 1805), *reprinted in* WILLIAM OLAND BOURNE, HISTORY OF THE PUBLIC SCHOOL SOCIETY OF THE CITY OF NEW YORK 3, 3 (New York, William Wood & Co. 1870) (quoting a memorial to the legislature submitted by the Free School Society).

45 Address of the Trustees of the "Society for Establishing a Free School in the City of New York, for the Education of Such Poor Children as Do Not Belong to, or Are Not Provided for by, Any Religious Society" (May 18, 1805), *reprinted in* BOURNE, *supra* note 44, at 6, 7. As Palmer reports, "From the beginning it was the daily practice to read passages from the Bible in the [Society's] schools," though ostensibly without providing "direct religious instruction." PALMER, *supra* note 43, at 35. That project coincided with Quaker hostility to "sectarian" education, as well as the beliefs of Deists and some liberal Protestants of the time. *See* Mahoney, *supra* note 42, at 123 (explaining the religious background of the Free School Society's approach); *see also* THOMAS BOESE, PUBLIC EDUCATION IN THE CITY OF NEW YORK: ITS HISTORY, CONDITION, AND STATISTICS 73 n.1 (New York, Harper & Bros. 1869) (noting that "[t]o the last of its existence, the 'Quaker' element was very influential, almost controlling" in the Society). The Free School Society relied on the Lancasterian model of education, which employed fewer teachers and used student monitors to help facilitate instruction. *See* CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860, at 40–41 (1983) (describing the Lancasterian model). The model's founder, Joseph Lancaster, was a well-known English Quaker. *See* BOESE, *supra*, at 73 n.1.

46 *See* Mahoney, *supra* note 42, at 120–21.

47 *See id.* at 131–32 (recounting the petition); J. OF THE SENATE OF THE STATE OF N.Y., 35th Sess., at 108 (1812) (documenting presentation of the petition).

48 *See* Mahoney, *supra* note 42, at 132.

particularly notable memorial came from the congregation Shearith Israel, the city's only Jewish synagogue.

Shearith Israel's memorial began by noting the Free School Society's "highly laudable" work in providing education to children unaffiliated with the city's various religious societies.[49] And accordingly, Shearith Israel suggested that the Society was "justly entitled to a share of the interest of the School Fund, in common with other Charity Schools in this city."[50] But contrary to the Society's more aggressive claims, the congregation could "see no claim [the Society] can have to the exclusive patronage of the state bounty."[51]

Shearith Israel's memorial first explained that the Society's monopolistic proposal flouted sound policy. The members of the legislature were "the guardians of the poor children of this state," and thus had an obligation to distribute funds to every school engaged in "rescuing from ignorance . . . so many thousands of the rising generation."[52] But that was not all. Besides being "impolitic," Shearith Israel also insisted that the Society's proposal posed a further problem—it was "at variance with the liberal spirit of our constitution, which recognizes no distinction in religious worship."[53]

Shearith Israel did not elaborate on this constitutional objection. But its meaning follows naturally enough from context. Among other provisions, New York's 1777 constitution had guaranteed "the free exercise and enjoyment of religious profession and worship, without discrimination or preference."[54] Yet at least arguably, the Society's proposal would have violated that provision, by withholding funding to denominational schools while granting it to the Society's schools, including their "nonsectarian" religious instruction. By insisting that the Society's exclusionary proposal violated "the liberal spirit of our constitution," Shearith Israel was almost surely suggesting the proposal ran

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49 The Mem'l of Trs. of the Congregation of Sheerith Isr., *supra* note 15, at 92, 93.

50 *Id.*

51 *Id.*

52 *Id.* Moreover, Shearith Israel continued, the Society's approach was "exceptionable on the score of religious instruction." *Id.* at 93. Here, the objection might have been in part a reference to the Christian overlay that accompanied the Society's in-school religious exercises. But it was also an expression of Shearith Israel's concern that, under the Society's supposedly nonsectarian approach, "children are likely to grow up unacquainted with the principles of any religion," especially when unassisted by parents or a corresponding religious community. *Id.* at 94.

53 *Id.* at 95.

54 N.Y. CONST. of 1777, art. XXXVIII ("[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall for ever hereafter be allowed within this state to all mankind: *Provided*, that the liberty of conscience hereby granted shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.").

contrary to the state's free exercise clause—distributing funds to some schools but not others based in part on a "distinction in religious worship."[55]

Nor did this argument emerge out of the blue. Instead, it shared much in common with arguments put forward by the city's Catholics just a few years earlier, albeit in a different context.

In 1806, Catholics submitted a memorial protesting the state's test oath, which required renouncing allegiance to every foreign monarch or potentate "in all matters ecclesiastical as well as civil" as a condition for holding office.[56] Although the language may have been considered neutral by some, it had the clear effect of forcing Catholics either to perjure themselves or renounce their allegiance to the pope in order to serve in government.[57] The Catholic memorial protested that outcome in constitutional terms that Shearith Israel would echo nearly verbatim just a few years later. According to the memorial, the test oath violated the "liberal principle" of the state's free exercise clause by operating as an "oppressive disqualification[] on the score of religion."[58] Shearith Israel's memorial offered a parallel, nearly verbatim free exercise argument, now in the context of school funds.

There is no way to know for sure how influential Shearith Israel's constitutional argument may have been. But there is also no doubt the argument was one part of the picture that turned the tide, at least in this period. Having considered the memorials, the New York Assembly passed a bill rejecting the Free School Society's proposal, directing

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55 The Mem'l of Trs. of the Congregation of Sheerith Isr., *supra* note 15, at 95. Professors Tang and Hutt acknowledge that on its face, this episode runs counter to the thesis that religious groups did not object to exclusionary funding on free exercise grounds, but dismiss Shearith Israel's memorial as a "*policy argument* for the legislature to be more ecumenical in doling out funds." Tang & Hutt, *supra* note 14, at 666 n.130. But they do not grapple with the close ties between Shearith Israel's argument and the language of the state's free exercise guarantee or the similar, close-in-time constitutional objection to the state's test oath. *See supra* notes 49–53; *infra* notes 56–58. Nor do they consider that looking for "lawsuits" raising unconstitutional conditions arguments in this period is anachronistic. For more on the latter point, *see infra* notes 157–60 and accompanying text.

56 An Act Concerning Oaths, ch. 113, 1801 N.Y. Laws 258, 258. The oath had been drawn from the text of the 1777 Constitution. See N.Y. CONST. of 1777, art. XLII. For the text of the Catholic memorial, see Petition of the Catholics of New York in 1806 Against a Religious Test for Office (Jan. 6, 1806), *reprinted in* 11 AM. CATH. HIST. RSCHS. 182 (1894).

57 *See* JOHN WEBB PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 123 (1967) ("Because of their ecclesiastical loyalties to the pope, no Catholic could subscribe to this oath without either committing perjury or apostasy.").

58 Petition of the Catholics of New York, *supra* note 56, at 182–83 (referencing the "38th section of the Constitution of this state" guaranteeing "religious profession or worship, soever without discrimination or preference," and claiming the oath was in "direct contradiction to this liberal principle," *id.* at 182).

instead that school funds in New York City would be distributed equally among both the Free School Society and the city's denominational schools on a per capita basis.[59] The Senate agreed, rejecting a last-ditch effort to resurrect the Society's position in the process.[60] And in the final version of the law, the legislature went even further—mandating funds not only for *existing* denominational schools in the city, but also for other denominational schools that might be established in the future.[61]

To my knowledge, this controversy represents the earliest effort anywhere in the country to deny funding to church- and synagogue-run schools in favor of other private schools. And again, we cannot know for certain what role Shearith Israel's constitutional argument ultimately played in the outcome. But even the bare existence of the argument is significant. At a minimum, it suggests that, far from viewing selective funding as "consistent with constitutional free-exercise principles,"[62] at least some (and likely many) supporters of denominational schools in this period believed something closer to the opposite. Indeed, actors like Shearith Israel actively resisted such funding proposals *precisely because* they thought them inconsistent with free exercise, and prevailed. And what's more, although Shearith Israel's memorial may have been the first full-throated argument linking free exercise to exclusions from government support, its appeal to constitutional principle shares a general similarity with at least one other early episode.

Since 1727, Catholic nuns in the Ursuline Order had operated a convent in the city of New Orleans, which eventually included a free

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59 *See* Mahoney, *supra* note 42, at 132; *see also* J. OF THE SENATE OF THE STATE OF N.Y., 35th Sess., at 49 (1812) (documenting presentation of the joint resolution offering the bill to the senate).

60 *See* Mahoney, *supra* note 42, at 132–33; J. OF THE SENATE OF THE STATE OF N.Y., 36th Sess., at 197 (1813). A proposed amendment by one of the Society's supporters would have named the Free School Society as the sole beneficiary of the funds. The senator suggested the amendment was intended to ensure "all children, in said city and county, may forever hereafter, without any religious or political discrimination, receive and enjoy the blessings of education." *Id.* The fact that the legislature rejected this proposal indicates it may have concluded the constitutional protection for free exercise required dispersing funds equally to schools of all kinds rather than denying funding to schools educating only children affiliated with the school's chosen faith.

61 *See* Act of Mar. 12, 1813, ch. 52, § IV, 1813 N.Y. Laws 53, 54–55 (providing funds for "the trustees of the free school society in the said city of New-York, and the trustees or treasurers of the Orphan's Assylum [sic] society, the society of the Economical school in the city of New-York, the African free school, and of such incorporated religious societies in said city as now support or hereafter shall establish charity schools within the said city, who may apply for the same").

62 Brief of Historians and Legal Scholars, *supra* note 13, at 17.

school for poor children.[63] The school served large numbers of girls, including both free and slave girls of color, and likely played a role in the city's unusually high female literacy rates in this period.[64] But when the United States acquired New Orleans through the Louisiana Purchase in 1803, the status of the school and its property became uncertain. In particular, the Ursuline nuns seemed to have worried that, as a result of the Purchase, their land may have passed to the United States or would be subject to confiscation by the newly authoritative federal government.[65]

Those fears were understandable. Since the convent's founding in 1726 by the permission of Louis XV of France, it had been under state control.[66] Indeed, just a few weeks before the Louisiana Purchase, the prefect of the French colonial government had characterized the nuns as "coadjutors of the Government" who could continue use of the property by way of France's governmental "decree[]."[67] On this understanding, title to the property arguably lay with the United States, having passed from one sovereign to another after the Purchase.[68] But

63 *See* Kevin Pybas, *Disestablishment in the Louisiana and Missouri Territories*, *in* DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776–1833, at 273, 280 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019).

64 *See* EMILY CLARK, MASTERLESS MISTRESSES: THE NEW ORLEANS URSULINES AND THE DEVELOPMENT OF A NEW WORLD SOCIETY, 1727–1834, at 113–17 (2007) (suggesting that "the Ursuline school was likely responsible for the impressive literacy of New Orleans women in the early 1760s" and noting that the school educated at least two free girls of color before 1801). The nuns also operated a hospital and, by 1803, held title to roughly 1,000 acres of land which they rented to generate revenue for the convent and its philanthropic activities. *See* Pybas, *supra* note 63, at 280.

65 According to at least one newspaper, after the completion of the Louisiana Purchase, "it was publicly announced in New Orleans that the American government would not permit the Ursulines to receive novices, and at the death of the last survivor, the convent would become the property of the State." JANE FRANCES HEANEY, A CENTURY OF PIONEERING: A HISTORY OF THE URSULINE NUNS IN NEW ORLEANS (1727–1827), at 219 (1993) (quoting an article from the Paris newspaper *l'Univers*). Professor Heaney has expressed doubt about the accuracy of the newspaper's report, but it may have stoked fear among the sisters nonetheless. *Id.*

66 *See* Michael D. Breidenbach, *Religious Tests, Loyalty Oaths, and the Ecclesiastical Context of the First Amendment*, *in* THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS LIBERTY 166, 187–88 (Michael D. Breidenbach & Owen Anderson eds., 2020). France ceded Louisiana to Spain in 1762, though later resumed control of the territory through the Treaty of San Ildefonso before ceding it to the United States. *See* Pybas, *supra* note 63, at 276–80. As Professor Heaney explains, Spain's ownership of the nuns' property had been the subject of some dispute, but the parties "failed to reach any agreement prior to the retrocession of the colony to France, and the question was still not settled at the time of the Louisiana Purchase." HEANEY, *supra* note 65, at 257.

67 Heloise Hulse Cruzat, *The Ursulines of Louisiana*, 2 LA. HIST. Q. 5, 19 n.10 (1919).

68 *See* De la Croix v. Chamberlain, 25 U.S. (12 Wheat.) 599, 601 (1827) (observing that, as to property subject to "inchoate rights" in territories acquired from Spain and France after the Louisiana Purchase, "legal title remained in the United States, until, by

the nuns may have believed they possessed at least an *imperfect* claim to the property—a "right to request" that the United States confirm their possessory rights or transfer the property to them, if only as an exercise of "judgment" rather than obligation.[69] On this view, the nuns held some presumptive property rights as to the convent and school, subject to federal discretion.

In November 1803, the nuns wrote to John Carroll, America's first Catholic bishop, who promptly passed along their concerns to James Madison, then Secretary of State.[70] Madison responded by assuring Carroll that the current President, Thomas Jefferson, fully supported "the public benefit" of the nun's school—a sentiment that applied "to those of all religious persuasions."[71] Before receiving Madison's reply, however, the nuns appealed directly to President Jefferson.[72]

Jefferson's response was notable. He first assured the nuns that "the principles of the constitution" provided a sure guarantee that the nuns' property would be "preserved to you . . . inviolate."[73] Moreover, Jefferson continued, the same constitutional principles ensured that "your institution will be permitted to govern itself according to [its] own voluntary rules, without interference from the civil authority."[74] He then observed that "whatever diversity of shade may appear in the religious opinions of our fellow citizens," the nuns' charitable

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some act of confirmation, it was passed, or relinquished to the claimants"). For discussion of the status of such property and the legal ambiguities surrounding it in the territory context, see Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277, 313–20 (2022); Caleb Nelson, *Did I Get Public Rights Wrong?*, 112 VA. L. REV. 661, 681–87 (2026) .

69 3 E. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 7 (Charles G. Fenwick trans., William S. Hein & Co. 1995) (1758) (explaining that whereas "[*p*]*erfect rights* . . . carr[ied] with them the right of compelling the fulfillment of the corresponding obligations," "*imperfect rights*" provided only a "right to request," while the holder retained an obligation that "depend[ed] upon . . . judgment" and "the right of deciding what are his obligations according to the law of conscience"); *De la Croix*, 25 U.S. (12 Wheat.) at 601 (observing that holders of inchoate rights to property in the territories had a right to "confirm such inchoate rights or concessions" with the governing authority).

70 *See* 2 PETER GUILDAY, THE LIFE AND TIMES OF JOHN CARROLL 482 (1922).

71 *Id.*

72 *See* Letter from the Ursuline Nuns of New Orleans to President Thomas Jefferson (Apr. 23, 1804), *in* 43 THE PAPERS OF THOMAS JEFFERSON 297, 297 (James P. McClure et al. eds., 2017). Based on the original sources, it appears that William Claiborne, the first governor of the Territory of Orleans, delivered the letter to Jefferson in June 1804. *See* Letter from William C.C. Claiborne to President Thomas Jefferson (June 15, 1804), *in* THE PAPERS OF THOMAS JEFFERSON, *supra*, at 592, 592–93 (enclosing the nuns' communication).

73 Letter from President Thomas Jefferson to the Ursuline Nuns of New Orleans (July 13, 1804), *in* 44 THE PAPERS OF THOMAS JEFFERSON, *supra* note 72, at 78, 78 (2019).

74 *Id.* at 78–79.

endeavors "cannot fail to ensure . . . the patronage of the government it is under."[75]

Jefferson did not explain how the "principles of the constitution" guaranteed the nuns a right to what likely amounted to a land grant from the federal government. But his suggestion that those same constitutional principles also guaranteed that the school could "govern itself according to [its] own voluntary rules, without interference from the civil authority" suggests Jefferson likely had the federal Free Exercise Clause in mind.[76]

On this view, Jefferson's insistence that the administration "[could] not fail to ensure [the nuns' school] the patronage of the government" reflected more than pure beneficence. Rather, it flowed from a constitutional obligation to treat the nuns' presumptive rights evenhandedly, without regard to the "diversity of shade [that] may appear in the religious opinions of our fellow citizens." Obviously, there is no way to know for certain what Jefferson intended his letter to mean. But here as in Shearith Israel's case, it is plausible that Jefferson believed that free exercise principles forbade denying the nuns a form of in-kind aid to which they were otherwise entitled, at least where doing so was based on religion or religious exercise.

By all indications, selective funding in the early republic seems to have been relatively rare. But that fact makes the examples of Shearith Israel and the Ursuline nuns all the more striking. In the period surrounding the Founding, when the government funded almost nothing in the private sector, funding for religious schools was ubiquitous even in the states firmly committed to disestablishment. Yet when proposals arose to exclude some schools based on their religious activities, the constitutional objection sounding in free exercise immediately appeared. Here as in other contexts, practice among Founding-era Americans and their contemporary explanations for it provide insight into constitutional norms as they perceived them.

Moreover, episodes like those involving Shearith Israel and the Ursuline nuns suggest a symmetrical understanding of disestablishment and free exercise in this period. On the disestablishment side, government had no power to extract funds from citizens solely to finance religion *qua* religion. But as a matter of free exercise, neither could it *deny* subsidies or other forms of government assistance to support public goods based on religion or its exercise. Such

75 *Id.* at 79.

76 *Id.* at 78–79. Of course, Jefferson's remark may not have been *limited* to the Free Exercise Clause. The idea that government is forbidden from intruding on the internal affairs of religious bodies also has historical roots in the Establishment Clause. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 183–85 (2012) (describing incidents involving James Madison).

discrimination, as Shearith Israel had put it, violated the "spirit of our constitution" because it was based on a "distinction in religious worship."[77]

The modern Supreme Court has sometimes suggested that the Free Exercise and Establishment Clauses are "frequently in tension."[78] But as the history above suggests, that view is probably a modern invention, not a historical inheritance. On the earliest understanding, free exercise and disestablishment weren't conflicting; they were complementary. Just as the government could not provide funds where the sole reason for doing so was religion, neither could it deny support for things like education where the reason for doing so rested on religion or its exercise. And together, that unified understanding meant that, as Jefferson noted, all citizens enjoyed "the patronage of government," whatever the "diversity of shade may appear in . . . [their] religious opinions."

B. Continuity and Discontinuity in the Nineteenth Century

To my knowledge, the examples involving Shearith Israel and the Ursuline nuns are the most notable early episodes raising issues surrounding free exercise and selective government aid in the years immediately surrounding the adoption of the Religion Clauses. But as support for the common school movement and anti-Catholic fervor increased, arguments over selective funding became more common, and more controversial.

In this period as in Shearith Israel's case, religious minorities continued to raise free exercise objections. But as the nineteenth century wore on, supporters of so-called "nonsectarian" education subordinated those objections to a novel understanding of church-state separation. And to understand that basic development, the evidence from New York again provides the best starting place.

Following Shearith Israel's victory in 1813, New York continued funding denominational schools in New York City alongside schools run by the Free School Society for roughly a decade.[79] In 1824, however, the situation changed. Following a controversy over a Baptist church's use of funds to pay for buildings and not just teacher salaries, the Society insisted that the legislature should require that denominational schools receiving funds "confine their activities to the poor of their own congregations, and not to extend them to a wider field of

77 The Mem'l of Trs. of the Congregation of Sheerith Isr., *supra* note 15, at 95.

78 Locke v. Davey, 540 U.S. 712, 718 (2004).

79 *See* PRATT, *supra* note 57, at 167.

benevolence."[80] Transparently, the request was part of the Society's desire to stave off competition.[81] Rather than resolve the issue, however, the legislature passed a bill providing city officials complete discretion in administering the school funds, which they promptly used to deny funds to all the city's denominational schools.[82] But the matter was far from settled.

In the years following the Council's decision, Catholic migration transformed New York City.[83] And partly for this reason, in 1840, New York's governor William Seward issued a message indicating an openness to revisiting the school issue.[84] Accordingly, Catholics soon picked up where Shearith Israel left off in arguing against selective funding. And here too, many of their arguments focused squarely on free exercise, in ways directly reminiscent of Shearith Israel's early memorial.

Consider just a few examples. Responding to Seward's invitation, Catholic communities in New York passed a resolution demanding an equal share of "the bounty of this State for education" to "carry out the principles of the Constitution, which secures equal civil and religious rights to all."[85] Likewise, in a petition submitted a few weeks later, they repeated those same arguments.

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80 Mahoney, *supra* note 42, at 146 (emphasis omitted) (quoting the Free School Society's memorial). For a discussion of the controversy surrounding Bethel Baptist Church, see PRATT, *supra* note 57, at 166–67.

81 *See, e.g.*, PRATT, *supra* note 57, at 166–67 (noting the "economic motive" for the Society's proposal, given that "[i]f children were won away from [the Society's] schools by the church schools, which is what the Bethel Church was trying to accomplish, the society's share of the school fund . . . would be diminished").

82 *See Friday, (Evening) April 29*, N.Y. SPECTATOR, May 3, 1825, at 1; PALMER, *supra* note 43, at 56 (noting that the result of the debate was "the enactment of an ordinance providing that the Common School Fund should not be distributed to any religious societies, but only to the Free School Society, the Mechanics' Society, the Orphan Asylum Society, and the trustees of the African Free Schools").

83 *See* PRATT, *supra* note 57, at 168–69.

84 In an annual message in 1840, Seward expressed concern that "children of foreigners, found in great numbers in our populous cities . . . are too often deprived of the advantages of our system of public education, in consequence of prejudices arising from difference of language or religion." *See* Annual Message of Governor Seward (1840), *as reprinted in* BOURNE, *supra* note 44, at 179, 179. Consequently, Seward recommended "the establishment of schools, in which [foreign children] may be instructed by teachers speaking the same language with themselves, and professing the same faith." *Id.* According to Mahoney, the governor's message was occasioned at least in part by a desire that "upwards of thirty thousand children, whose parents objected to Protestant non-sectarian education in the free schools, might be brought under [some] instruction." Mahoney, *supra* note 42, at 201.

85 Resolutions (July 27, 1840), *reprinted in* BOURNE, *supra* note 44, at 187, 188. Catholics had submitted an initial request for funds in February 1840. BOURNE, *supra* note 44, at 179.

The petition began by noting that "[t]he rights of conscience in this country are held by both the Constitution and universal consent, to be sacred and inviolable," and that they intended to "claim the benefit of this principle, in regard to the public education of their children."[86] Later on, the petition made the same point, insisting that "[t]he contest is between the *guaranteed* rights, civil and religious, of the citizen on the one hand, and the pretensions of the Public School Society on the other," and thus urged officials to provide "a just proportion of the public funds" for denominational schools too.[87]

Supporters of common schools in New York responded to these arguments with two principal assertions. First, they claimed a right to exclusive funding based on the theory that their schools taught only religion that was "general and scriptural," not "sectarian."[88] Yet as Catholic petitioners pointed out, the claim of nonsectarianism was hollow.[89] Even apart from openly anti-Catholic sentiment (of which there was plenty),[90] the "nonsectarian" approach rested on the distinctly

86 Petition of the Catholics of New York to the Honorable the Board of Aldermen of the City of New York (Sep. 21, 1840), *reprinted in* BOURNE, *supra* note 44, at 189, 189. During this period, Shearith Israel also renewed its request for school funding. *See* BOURNE, *supra* note 44, at 722 (noting a request accompanying the initial Catholic petition from "the Hebrew congregation in Crosby street"). Based on some passing remarks from Bishop John Hughes, the leader of the Catholic delegation, Professor Vincent Lannie has speculated that despite all appearances, Shearith Israel's petition in fact "opposed any division of the school fund among denominational schools." VINCENT P. LANNIE, PUBLIC MONEY AND PAROCHIAL EDUCATION 33 (1968) (citing 1 COMPLETE WORKS OF THE MOST REV. JOHN HUGHES, D.D., ARCHBISHOP OF NEW YORK 88–89 (, Lawrence Kehoe ed., 2d ed., New York, Am. News Co. 1865)). But on my reading, Bishop Hughes's remarks indicated a frustration with the way Shearith Israel had entered the new debate, not a belief that their petition was a rear-guard action against funding. *See, e.g.*, Stephan F. Brumberg, *The Education of Jewish, Protestant, and Catholic Children in Mid-Nineteenth-Century New York City*, 61 AM. JEWISH ARCHIVES J. 11, 13 & n.11 (2009) ("Bishop Hughes was not happy that the Jews and Scotch Presbyterians joined his suit, believing it was opportunistic on their part and fearing that it would raise concerns regarding a rush of requests from other denominations for a share of school funds."). Many other commentators seem to agree. *See* LANNIE, *supra*, at 34 n.14 (collecting sources); DIANE RAVITCH, THE GREAT SCHOOL WARS: A HISTORY OF THE NEW YORK CITY PUBLIC SCHOOLS 53 (1974) (noting Jewish support for the Catholic position).

87 Petition of the Catholics of New York to the Honorable the Board of Aldermen of the City of New York, *supra* note 86, at 193–94. In 1826, the Free School Society received a new charter from the legislature, under which it was renamed as The Public School Society of New York. *See* PALMER, *supra* note 43, at 63.

88 Petition of the Catholics of New York to the Honorable the Board of Aldermen of the City of New York, *supra* note 86, at 191; *see also* BOURNE, *supra* note 44, at 108 (excerpting the relevant portion of the Society's report referenced in the Catholic petition).

89 Petition of the Catholics of New York to the Honorable the Board of Aldermen of the City of New York, *supra* note 86, at 191.

90 According to one supporter, for instance, instruction in the Society's schools was "calculated to break the superstitious spell of saints, confessing to the priest, relics, absolution, penance, and give [children] notions of God himself, in His Word and works," without

Protestant assumption that students ought to read the Protestant version of the Bible and "judge for themselves," rather than be guided by church tradition or alternate versions of the scriptures (Catholic as well as Jewish).[91] In the eyes of Catholics and other religious minorities, the situation was neither "just, or equal, or *constitutional*."[92]

But supporters of common schools also offered another theory. Besides arguments about nonsectarian worship, they also began to suggest that providing funds to denominational schools was incompatible with the "entire separation between Church and State" that underlay "our political compact."[93] In New York, the Free School Society first advanced this argument in 1824, suggesting that providing funds to denominational schools threatened "the sacred principle of our constitution, that church and state shall not be united."[94] And by 1840, the argument was a commonplace feature of the debate.[95] According to this view, allowing funding for denominational schools was "at variance with the letter and spirit of our chartered rights . . . that the community should be taxed to support an establishment in which sectarian

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"holy water, and dead men's bones, and prayers measured out by chains of beads." Report of the Secretary of State Briefly Examined (May 20, 1841), *reprinted in* BOURNE, *supra* note 44, at 482, 486. During this period, Catholics also complained that the Society's schools used numerous textbooks that were "blatantly Protestant in sympathy and . . . were openly disrespectful of Catholicism." RAY ALLEN BILLINGTON, THE PROTESTANT CRUSADE 1800–1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM 144 (1938) (describing one textbook including a fanciful dialogue in which famous Quaker William Penn remarked: "A Papist talk of reason! Go to the Inquisition and tell them of reason and the great laws of nature," *id.* at 144–45).

91 Letter from John Power, Vicar-General of the Diocese of New York, to the Editor of the New York Freeman's Journal (July 9, 1840), *reprinted in* BOURNE, *supra* note 44, at 328, 328–29; NAOMI W. COHEN, JEWS IN CHRISTIAN AMERICA: THE PURSUIT OF RELIGIOUS EQUALITY 79–80 (1992) (noting the plight of Jews in this period resulting from selective funding).

92 Address of the Roman Catholics to Their Fellow-Citizens of the City and State of New York (Aug. 10, 1840), *reprinted in* BOURNE, *supra* note 44, at 331, 337 (emphasis added); *see also id.* at 336 (observing that "we are denied our portion of the school fund, simply because we at the same time endeavor to train [our children] up in principles of virtue and religion," and asking "is this state of things . . . worthy of our just and glorious Constitution?"). For similar objections from other religious minorities, see BRUCE J. DIERENFIELD, THE BATTLE OVER SCHOOL PRAYER: HOW *ENGEL V. VITALE* CHANGED AMERICA 29 (2007).

93 Reply of the Trustees of the Public School Society to the Address of the Roman Catholics (Aug. 27, 1840), *reprinted in* BOURNE, *supra* note 44, at 338, 344.

94 PRATT, *supra* note 57, at 167 (quoting *School Fund Controversy—No. II*, ALBANY ARGUS, Nov. 9, 1824, at 3); *see also* Mahoney, *supra* note 42, at 149–50 (discussing an 1824 memorial by the Society that "questioned for the first time the constitutionality of including religious institutions as the agent of Common School education," *id.* at 149).

95 *See, e.g.*, Reply of the Trustees of the Public School Society, *supra* note 93, at 338, 344.

dogmas are inculcated, whether that establishment be a school or a church."[96]

By all appearances, the Society's claims in New York that funding denominational schools amounted to a forbidden religious establishment were the first of their kind anywhere in the country.[97] But even in 1824, the argument was notable for its originality. Proponents of common schools suggested that "to pay teachers of sectarian schools . . . is the same thing, in effect, as to pay the clergymen of the congregations," since both might promote "sectarian purposes."[98] Yet as already noted, earlier practice across the country did not accord with that view.[99] Indeed, prior to 1824, even the Free School Society itself never so much as hinted that funding denominational schools would be unconstitutional.[100]

Unlike Founding-era religious assessments, the school fund did not involve taxation solely to fund religious worship in a way comparable to a coerced tithe. Instead, it provided funds for "the gratuitous instruction of the poor"—a form of "public patronage" that Catholics had argued could not be granted to some private schools but denied to others based on their "care in religious instruction."[101] The Society's

96 Remonstrance of the Trustees of the Public School Society (Feb. 29, 1840), *reprinted in* BOURNE, *supra* note 44, at 180, 180.

97 Other commentators seem to agree. For examples of this conclusion from scholars with very different views on the implications of this history, see PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 219–25 (2002) (observing that "[t]he idea of separation of church and state first attracted widespread support and even national attention in 1840, when Protestants and Catholics in New York City quarreled over public school funds," *id.* at 219–20, and tracing the concept's application to schools to the 1824 controversy); STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE 45–54 (2012) (similar).

98 REPORT OF THE LAW COMMITTEE OF THE COMMON COUNCIL (1825), *reprinted in* BOURNE, *supra* note 44, at app. A, at 715, 718.

99 *See supra* notes 21–25 and accompanying text (discussing support for church-run schools in various states across the country, even as those states rejected religious establishment and church taxes).

100 *See* Letter from John Power to the Editor of the New York Freeman's Journal, *supra* note 91, at 330 ("It is said that the State cannot lend itself to the support of sectarian principles. But recollect, sir, that this objection is urged by those [i.e., the Public School Society] whose conduct is truly sectarian, as far as regards the management of the public schools. This, I think, I have abundantly proved. When the common school fund was created, it was not considered unconstitutional to extend it to the charity schools in connection with the incorporated religious societies in this city . . . .")

101 *School Fund Controversy*, ALBANY DAILY ADVERTISER, Nov. 10, 1824, at 3 ("Let the legislature extend equal patronage to all, and make no favorable distinction of one sect above another, and what christian, or what enlightened citizen, will say that any association of respectable men, successfully prosecuting the gratuitous instruction of the poor, are unfit objects of public patronage, because to the faithful imparting of the ordinary branches, they add care in religious instruction?").

argument about church-state separation and school funding had little foothold in text or history.[102] But whatever its weaknesses, the argument allowed proponents of "nonsectarian" schools to do something they had so far failed to do—respond to their opponents' free exercise arguments with newly minted claims to constitutional authority.

To appreciate this dynamic, consider just a few examples. In April 1840, officials in New York prepared a report responding to an early request from Catholics and others to receive a portion of the school funds.[103] The report acknowledged that the state's free exercise clause forbade government from "creating any distinctions between citizens on account of religious faith."[104] And the report acknowledged that, under this provision, Catholics had claimed they were "entitled to participate" in the school fund alongside the Public School Society.[105] But according to officials, novel theories about church-state separation made that solution impossible: "If the doctrines of all the religious denominations in the State were taught in the slightest degree at the expense of the people . . . there would still be a legal religious establishment . . . ."[106] Rather than a complement to free exercise, the Society reimagined disestablishment as a sword to vanquish it.

Supporters of common schools in New York replicated the same strategy just a few months later. Acknowledging that Catholics sought their share of school funds by "urging their rights of conscience"—again, presumably a reference to their free exercise arguments—

102 As Mahoney notes, the only extant *legal* basis for the Society's argument was a provision of the New York constitution that forbade "any minister of the gospel from holding any civil or military office"—a provision that did not apply, since the trustees of the denominational schools (like those of the Free School Society) were "officers of private agencies." Mahoney, *supra* note 42, at 199; *see also* HAMBURGER, *supra* note 97, at 221 ("Although no one claimed that the New York constitution, let alone its religious liberty clauses, actually required this 'policy' against a connection [between church and state], the Common Council's Law Committee perceived such a policy underlying the state's constitution and, on this ground, recommended that the Council deny funds to Catholic schools."); GREEN, *supra* note 97, at 45 (The no-funding rule "initially reflected practical considerations . . . . Foremost, public school officials opposed dividing school funds as a way to secure the financial stability of the nascent common schools.").

103 BD. OF ASSISTANT ALDERMEN, REPORT OF THE COMMITTEE ON ARTS AND SCIENCES AND SCHOOLS (1840), *reprinted in* BOURNE, *supra* note 44, at app. B, at 722, 722.

104 *Id.* at 728.

105 *Id.* at 730–31. This report issued several months before Catholics published the additional petitions described above that unfolded their free exercise arguments in detail. But there is little doubt that the Committee was already aware of the Catholic community's basic contentions. *See, e.g.*, RAVITCH, *supra* note 86, at 41–42 (documenting Catholic arguments as early as February 1840 that denominational schools were entitled to public support to prevent "forcing the professors of any religion to act against their conscience," *id.* at 41, presumably by being forced to send their children to the Society's schools in order to receive the benefits of the school fund).

106 BD. OF ASSISTANT ALDERMEN, *supra* note 103, at 731.

defenders of the Public School Society simply changed the subject.[107] Any claim by Catholics or other religious minorities to an equal share of school funds on free exercise grounds was condemned by a simple axiom: "Religious establishments must not be supported by general taxation."[108]

Here as in earlier years, the fact that the Society's own schools included Protestant religious instruction and worship was of no moment. However plausible the minorities' free exercise objections sounded, providing funds equally was an affront to "fellow-citizens [who] would think their own rights of conscience violated in being taxed for the support of Catholic schools."[109] That argument glossed over the religious nature of the Society's own "nonsectarian" schools. But given the overwhelming interest in common schools and the Protestant desire for religious instruction there, the success of the argument was probably a foregone conclusion in this period, whatever its merit or shortcomings.

The controversy in New York illustrates the profound role that Protestant-Catholic conflict played in reshaping earlier constitutional understandings. Ideas of free exercise and disestablishment were once in harmony. But as the controversy in New York illustrates, the fight over common schools and Protestant hegemony eventually put them at odds. And even more, the earliest free exercise arguments eventually faded from view, overtaken by a novel theory of non-establishment that authorized exactly what its proponents had hoped—exclusive funding for schools that taught the basic religious commitments of a Protestant Christian majority.

C. A Sampling of Additional Nineteenth-Century Evidence

The nineteenth-century evidence from New York illuminates how Protestant-Catholic conflict altered the earliest understandings of free exercise and disestablishment. But it is also important to note the connections between this evidence and historical developments elsewhere. Here again, a complete survey is beyond what can be accomplished here. But as evidence from several other jurisdictions indicates, the basic understanding of free exercise articulated by Shearith Israel and endorsed by Catholic petitioners in New York persisted in debates over schools and funding well into the nineteenth century.

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107 *See, e.g.*, Reply of the Trustees of the Public School Society, *supra* note 93, at 338, 343; *see also id.* at 341 (noting Roman Catholic claims that the refusal of funds on a discriminatory basis was "thought to affect the Roman Catholics in their 'civil and religious rights'").

108 *Id.* at 339.

109 *Id.* at 343.

One interesting example comes from Michigan. In 1827, the legislature of the Michigan territory provided each township the option of hiring a schoolmaster and imposing a local tax to support schools.[110] Yet the system remained largely inert until 1842, when Detroit enacted a law providing for a system of tax-supported local schools.[111] Similar to the situation in New York, these schools received exclusive state funding while engaging in so-called "nonsectarian" Bible reading and prayer.[112] And accordingly, the situation eventually led Catholics in Detroit to object to the exclusionary funding regime, again on free exercise grounds.

Beginning their memorial to the legislature, the Catholic petitioners complained that exclusive funding for so-called nonsectarian schools "impos[ed] . . . taxes for the support of schools, which . . . we cannot allow our children to attend," despite the fact that "the Constitution guarantees liberty of conscience to every citizen of our State."[113] Viewing the situation as "self-evidently a violation of liberty of conscience," the memorial argued in favor of granting funds to all qualified teachers on a per-pupil basis, allowing parents to obtain funds for Catholic-oriented schools too.[114]

Legislative committees rejected the Catholic proposal. Here as in New York, however, the reasons for that conclusion were suspect.

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110 MARY ROSALITA, EDUCATION IN DETROIT PRIOR TO 1850, at 205–14 (1928) (quoting and summarizing the 1827 law).

111 *See, e.g.*, *id.* at 232 (quoting a state official in 1832 observing that state laws providing for common schools "have not been carried into effect . . . as to realize the benefits which their enactment was designed to impart").

112 DANIEL PUTNAM, THE DEVELOPMENT OF PRIMARY AND SECONDARY PUBLIC EDUCATION IN MICHIGAN 213–15 (1904). Although direction by the local board allowed the teacher to choose between "either Catholic or Protestant" versions of the Bible, *id.* at 215, because teachers were ultimately subject to the control of political majorities, it seems that instruction in these schools was invariably of the Protestant, "nonsectarian" variety. *See id.* at 211–12 (surveying the various flavors of "nonsectarian" religion taught in these schools).

113 Memorial to the Legislature Relative to a Division of the School Fund, *in* FRANCIS W. SHEARMAN, ANNUAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION app., at 190, 190 (Lansing, Geo. W. Peck 1853). The memorial can also be found in ELLWOOD P. CUBBERLEY, READINGS IN THE HISTORY OF EDUCATION 576 (1920).

114 Memorial to the Legislature, *supra* note 113, at 190, 190–91. The memorial requested that "each person teaching any public school in the State should be entitled to draw from the public school fund." *Id.* at 191. But as contemporary sources explain, the proposed bill accompanying the memorial amounted to a funding proposal for both government and private schools based on parental choice. *See* Report of the Majority of the Committee on Education, *in* SHEARMAN, *supra* note 113, at app., at 193, 194 (noting that "[t]he bill under consideration proposes to divert from the primary school fund, an equal amount in every school district, to any person having the requisite qualifications, who shall teach therein for three months, any school wherein is taught the English languages, whether private, select, or academical, placing all schools in regard to the primary school fund, upon an equal footing with primary schools").

According to the winning faction, Catholics had "no just cause of complaint," since political majorities maintained ultimate control over the teachers "requiring secular instruction," notwithstanding the curriculum of Protestant prayer and Bible reading actually present in most schools.[115] The report also argued that the Catholic proposal would "open[] the door" to violating an anti-establishment provision in the state constitution, but stopped short of claiming it actually did so.[116]

These weaknesses were not lost on contemporaries. As a report for the legislative minority pointed out, the state constitution explicitly forbade "diminish[ing] . . . the civil or political rights, privileges and capacities of any person, on account of . . . religion."[117] Yet, the report continued, "[t]o offer the petitioners their common enjoyment of [the school fund], one of their civil rights, only on conditions so utterly abhorrent to every sense of religious duty, is worse than to deny it altogether."[118]

As other commentators have noted, arguments like those pressed by Catholics in Detroit were common during this period.[119] But such arguments were not limited to Catholics. On the contrary, government officials of differing religious persuasions sometimes raised similar free exercise arguments too, with varying degrees of success.

One interesting example occurred in New Jersey. Beginning in 1831, the state provided money to support a burgeoning public school system.[120] In doing so, however, the legislature allowed church schools to participate under certain conditions. Specifically, Section 12 of an 1838 law allowed a pro rata distribution to existing schools under the

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115 Report of Committee on the Supplementary Bill to the Primary School Law, *in* SHEARMAN, *supra* note 113, at app., at 191, 192.

116 *Id.* at 193. Here, the committee cited a provision of the Michigan Constitution stating, "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, [T]heological or [R]eligious [S]eminary, nor shall property belonging to the [S]tate be appropriated for any such purpose." *Id.* (quoting MICH. CONST. of 1850, art. 4, § 40) (quote corrected). But as the minority report pointed out, the argument that this provision forbade funding Catholic-oriented schools was difficult to square with the *existing* system, in which common-school teachers taught religious minorities to "despise the precepts and instruction of their parents, and the ministers of religion." Report of the Minority of the Committee on Education, *in* SHEARMAN, *supra* note 113, at app., at 195, 200. Directing funds to teachers of any faith "would be no more sectarian than are the existing [common] schools . . . and they could not become prosolyting [sic] seminaries." *Id.*

117 Report of the Minority of the Committee on Education, *supra* note 116, at 199 (quoting MICH. CONST. of 1850, art. 4, § 41).

118 *Id.*

119 *See* CUBBERLEY, *supra* note 113, at 576 (noting that the Catholic petition in Detroit was "typical of petitions of the time to Legislatures in other States"); *see also supra* notes 47–61 and accompanying text (discussing petitions in New York).

120 Gabel, *supra* note 21, at 373.

care of "any religious society . . . whose church discipline provide[d] for the establishment of schools and the appointment of trustees."[121] However, confusion soon ensued about the law's scope.

In 1847, New Jersey's first Superintendent of Schools, T.F. King, explained that he believed this provision only applied to Quaker schools, since they were the only denomination that provided for schools and the appointment of trustees as a matter of official "church discipline."[122] But more interesting is what followed. Having noted that the statute might authorize funding only for Quaker schools, King went on to suggest the distinction was not merely wrong, but unconstitutional.

King first observed that "[a]ll have equal rights—all are called upon to contribute . . . to the taxes which support the government and schools—and why should not all enjoy equal privileges?"[123] He continued: "[W]e are a people of many sects and much diversity of opinion; and who shall say this is the true sect, that the right opinion? None. The constitution of our country gives freedom to all religious worship—the constitution of our state guarantees it . . . ."[124] Accordingly, King urged the legislature to clarify the provision, or alternatively, to "frame the law that all should have equal rights and privileges."[125]

As Shearith Israel had done in New York, so King asserted in New Jersey—providing funds to some schools but not others based on a recipient's religion or worship violated constitutional guarantees of free exercise.

Nor is it convincing to dismiss King's argument as solely an appeal to policy.[126] King did not merely claim that the Quaker-exclusive reading of Section 12 was unjust. Rather, he claimed that it trampled the "freedom to all religious worship" guaranteed by both "the

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121 LUCIUS Q.C. ELMER, A DIGEST OF THE LAWS OF NEW JERSEY 502 (Bridgeton, James N. Newell, 1838).

122 ANNUAL REPORT OF THE STATE SUPERINTENDENT OF PUBLIC SCHOOLS OF NEW JERSEY, FOR THE YEAR 1847, at 24 (Trenton, Sherman & Harron, 1848) [hereinafter ANNUAL REPORT OF 1847].

123 *Id.*

124 *Id.* at 24–25.

125 *Id.* at 24. In 1851, King offered the same solution. *See* ANNUAL REPORT OF THE STATE SUPERINTENDENT OF PUBLIC SCHOOLS OF NEW JERSEY, FOR THE YEAR 1851, at 8–9 (Trenton, Morris R. Hamilton, 1852) [hereinafter ANNUAL REPORT OF 1851] (suggesting that officials might extend Section 12 to "schools of all denominations; they all have equal rights, let them all have equal privileges"). By 1851, however, King also added that the legislature might resolve the difficulty by "repeal[ing] the section entirely," perhaps reflecting growing support for common schools at the expense of denominational ones. *Id.* at 8. But it is not surprising that King, a supporter of common-school education, may not have readily perceived that funding only common schools conducting pan-Protestant religious exercises burdened the religious rights of Catholics and other religious minorities.

126 *Cf.* Tang & Hutt, *supra* note 14, at 671.

constitution of our country" and "the constitution of our state"—the latter an explicit reference to New Jersey's protections for free exercise.[127] Likewise, although King suggested that, at a minimum, the legislature should clarify whether it intended the law only to fund Quaker schools, that was not an admission that a such a scheme would be constitutional. On the contrary, as his reports suggest, King offered that course of action to put full responsibility on the legislature and absolve members of his office from "charges of favoring one sect at the expense of another."[128]

In 1866, the legislature in New Jersey resolved the tension by repealing Section 12 altogether, though not without controversy.[129] But in other jurisdictions, arguments like King's achieved more success. In 1832, for example, officials in Georgetown provided funds for a Catholic school for indigent boys alongside an existing pan-Protestant school.[130] And consistent with King's arguments (and Shearith Israel before him), officials in Georgetown appealed to the conviction that government ought not "exclud[e] [citizens] from a just participation of any investment of the public funds in consequence of a peculiarity of religious faith."[131] It is unclear whether these officials invoked the Constitution explicitly when reaching that conclusion. But by all indications, officials in Georgetown provided the Catholic school a proportion of funds roughly corresponding to the number of children enrolled there compared to the existing Lancasterian school.[132]

Controversies over unequal school funding probably represented the most common source of conflict over free exercise and government benefits in the mid-nineteenth century. But it is worth noting that, as with the Ursuline nuns, free exercise arguments were not always limited to monetary benefits. Instead, they sometimes extended to other forms of government aid. And here, the most important later evidence comes from Philadelphia.

In 1831, Pennsylvania established a school fund, and Philadelphia followed up by establishing a system of government-funded common

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127 N.J. CONST. of 1844, art. I, §§ 3–4 (declaring that "no person shall be denied the enjoyment of any civil right merely on account of his religious principles" and that all were protected in "worshipping Almighty God in a manner agreeable to the dictates of his own conscience").

128 ANNUAL REPORT OF 1847, *supra* note 122, at 24; *see also* ANNUAL REPORT OF 1851, *supra* note 125, at 8 (making this same argument).

129 THOMAS WOODY, QUAKER EDUCATION IN THE COLONY AND STATE OF NEW JERSEY 361 (1923); *see also id.* at 367 (noting controversy surrounding the legislature's decision).

130 WILLIAM W. WARNER, AT PEACE WITH ALL THEIR NEIGHBORS: CATHOLICS AND CATHOLICISM IN THE NATIONAL CAPITAL 1787–1860, at 76–77 (1994).

131 *Id.* at 77.

132 *See* Storslee, *supra* note 8, at 166 & n.322 (providing evidence as to the possible relative enrollment in the two schools).

schools in 1834.[133] That same year, the city's Board of Comptrollers for the Public Schools passed a series of resolutions allowing the reading of the Protestant King James Bible "without note or comment," while forbidding formal religious exercises or lessons.[134] In 1838, the state legislature required the use of the Protestant Bible as a textbook.[135]

This policy was deeply concerning to Catholics, who feared that it effectively required Catholic children undergo Protestant religious instruction.[136] They also contended that, despite formal limitations, teachers in many schools still required Catholic children and other religious minorities to engage in Protestant devotion and worship.[137]

Supporters of common schools rejected these concerns. As they saw things, there were no laws compelling attendance, so free public education was a gratuitous benefit. If Catholics and other religious minorities did not approve, that was their problem.[138] From the perspective of the city's Catholics, of course, that response was far from satisfactory. But rather than protesting exclusionary *funding*, Catholics in

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133 Vincent P. Lannie & Bernard C. Diethorn, *For the Honor and Glory of God: The Philadelphia Bible Riots of 1840*, 8 HIST. EDUC. Q. 44, 47 (1968).

134 Amanda Beyer-Purvis, *The Philadelphia Bible Riots of 1844: Contest Over the Rights of Citizens*, 83 PA. HIST.: J. MID-ATL. STUD. 366, 376, 375–76 (2016) (emphasis omitted) (quoting TWENTY-SIXTH ANNUAL REPORT OF THE CONTROLLERS OF THE PUBLIC SCHOOLS OF THE CITY AND COUNTY OF PHILADELPHIA 7 (Philadelphia, Bd. of Controllers 1844).

135 Lannie & Diethorn, *supra* note 133, at 48.

136 Sentinel, *Common Schools*, 6 CATH. HERALD 117 (1838) ("If the Bible be used, will religious instruction contract no sectarian hue? The teacher interrogates—the child answers. Who can determine the questions that may be put, and the art with which sectarian views may be insinuated into the unsuspecting minds of children?"). Catholics objected to the idea that the Bible ought to be read "without note or comment" unaided by authority or church tradition. They also regarded the King James Bible as a faulty translation, and one that failed to include the full panoply of divinely inspired books. For some good modern explanations of these objections, *see, e.g.*, Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 505–06 (2003); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause,* 100 MICH. L. REV. 279, 300 (2001).

137 *Letter of Bishop Kenrick*, 11 CATH. HERALD 23 (1843) (noting that "[t]he consciences of Catholics are also embarrassed by the mode of opening and closing the School exercises, which I understand is by the singing of some hymn, or by prayer"); *Proceedings in the Board of Controllers of the Public Schools in Relation to the Use of "the Bible in Public Schools,"* 12 CATH. HERALD 95 (1844) (complaining that, despite formal limitations on the practices, the "singing of religious hymns has been introduced [into public schools], and other religious exercises, wherein Catholics cannot conscientiously concur").

138 *See, e.g.*, Lannie & Diethorn, *supra* note 133, at 59 (quoting the January 21, 1843 edition of the *Presbyterian* as saying: "Protestants founded these schools, and they have always been in a majority; why then should the minority who have come in afterwards for the benefits of these schools, regard the most vital principle entering into their constitution as an infringement of their rights? Were the Roman Catholics forced to send their children to these schools, their complaints would be well grounded; but there is no compulsion; they act in the full knowledge of the facts, and should not therefore complain.").

Philadelphia argued that Protestant Bible reading in public schools forced them to choose between their right to free exercise and the in-kind benefits associated with public schooling itself.

One set of arguments involved teachers. Following the legislature's policy requiring Bible reading, Catholics serving as teachers in Philadelphia public schools were threatened or sometimes terminated for refusing to read the Protestant Bible to students.[139] Catholics protested on constitutional grounds. "Catholics have the same rights as other citizens: they should be equally eligible to offices in the public institutions, and their conscientious scruples should be equally respected."[140] Accordingly, imposing such requirements was not just impolitic, but also "opposed to the liberal spirit of our Constitution . . . that a condition should be prescribed by any body of men . . . which would preclude conscientious Catholics from accepting such office [as a teacher]."[141]

But their constitutional arguments were not limited to employment. Catholics in Philadelphia also protested on behalf of Catholic children and parents, who were beholden to local public schools based on financial need. And here too, they focused on the material benefits provided by the public school system itself—benefits the state could not condition on the surrender of free exercise rights.

In a series of editorials spanning the conflict, the local Catholic bishop Francis Kenrick laid out the arguments. Writing under the pseudonym "Sentinel," Kenrick began by emphasizing the burden that use of the Protestant King James Bible in public schools placed on religious liberty.[142] He noted, moreover, that although Catholics were not

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139 *Id.* at 54. As with participation by students, supporters of the schools' policy argued that such dismissals were justified since teaching was a gratuitous benefit. A Catholic was "not forced to become a Teacher but in accepting the office she was forced by a sense of honour to observe its requisitions and in the event of refusing she did but purchase for herself the dismissal." Truth, Letter to the Editor, *To the Editor of the Catholic Herald*, 10 CATH. HERALD 132 (1842).

140 *School Teachers*, 11 CATH. HERALD 21 (1843).

141 *Id.* Nor was this the only place where Catholics lodged this argument. The following year, the *Catholic Herald* published a lengthy editorial noting that, under the extant regulations, Catholic teachers had been dismissed or denied promotions for refusing to read the Protestant Bible. "How [this injustice] can be persevered in whilst the rights of conscience are declared inviolate by the Constitution, it is difficult to conceive." *The Public Schools*, 12 CATH. HERALD 76 (1844). The editorial continued by arguing the situation was impermissible—school laws were "based on the Constitution, which recognizes no religious distinctions, but gives equal rights to all." *Id.*

142 Sentinel, *Public Schools*, 9 CATH. HERALD 371 (1841) ("Of what avail is it that there shall be no penalty for following the dictates of conscience in the worship of God, if sectarian stratagem shall succeed in bringing the young mind into captivity?"); Lannie & Diethorn, *supra* note 133, at 49 (identifying "Sentinel" as a likely pseudonym used by

coerced to attend school, financial realities placed a significant burden on parents who wished to protect their children's religious rights while providing an education.[143] And to remedy that inequality, Kenrick suggested that officials allow Catholic children "the liberty of using the Catholic version" in the city's schools too.[144] According to Kenrick:

> They [Catholics] only desire to enjoy the benefit of the Constitution of the State of Pennsylvania, which guarantees the rights of conscience, and precludes any preference of sectarian modes of worship. . . . They desire that the Public Schools be preserved from all sectarian influence, and that education be conducted in a way that may enable citizens equally to share in its benefits, without any violence being offered to their religious convictions.[145]

On this view, free exercise required that citizens enjoy the benefit of public education itself on equal terms with others, unencumbered by distinctions based on worship or other requirements that did "violence . . . to their religious convictions."[146]

Kenrick probably knew that allowing Catholic religious exercises alongside Protestant ones was an untenable solution in the long run. As he and others recognized even in this period, conducting devotional Bible reading or prayer in public schools would inevitably oppress religious minorities, no matter how attractive it might seem in

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Kenrick); LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL 1825–1925, at 77 (1987) (same).

143 Sentinel, *Education*, 7 CATH. HERALD 90 (1839) (noting that "[i]n the case of the public schools, the poor are most exposed" by Protestant religious exercises, since these parents "must forego the education of their children if they do not avail themselves of that which is provided from the public funds").

144 Francis Patrick Kenrick, *To the Citizens of Philadelphia, and the Public Generally*, 12 CATH. HERALD 84 (1844).

145 *Id.* Kenrick's reference to the state constitution was almost surely a reference to Article IX, which guaranteed "a natural and indefeasible right to worship Almighty God, according to the dictates of . . . conscience[]," and included a related ban on legal "preference . . . to any religious establishments or modes of worship." *See* PA. CONST. of 1838, art. IX, § III. A petition supported by some forty-nine Catholic laymen from Philadelphia repeated Kenrick's constitutional protest one week later. *Proceedings in the Board of Controllers of the Public Schools in Relation to the Use of "the Bible in Public Schools," supra* note 137 (arguing that the situation in the public schools was "contrary to the Constitution of the State of Pennsylvania" insofar as it "controlled and interfered with the rights of conscience" and entailed "preference . . . given, under the school laws, to sectarian religious establishments and modes of worship").

146 Kenrick, *supra* note 144. For a modern-day echo of the latter contention, see Mahmoud v. Taylor, 145 S. Ct. 2332, 2359 (2025) (holding that "[p]ublic education is a public benefit, and the government cannot 'condition' its 'availability' on parents' willingness to accept a burden on their religious exercise" (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 462 (2017)).

the abstract.[147] But Kenrick's argument is significant, not least because of its affinity with Jefferson's position regarding the Ursuline nuns just a few decades before. Whether the issue involved monetary support or an in-kind subsidy, free exercise protections required government to enable citizens "equally to share in its benefits," on terms that avoided "violence . . . to their religious convictions." When it came to free exercise, it was impositions on conscience and impermissible discrimination that mattered, not the nature of the benefit at issue.

These arguments yielded a halfway compromise in Philadelphia, at least at first. In 1843 and again in 1844, public school officials clarified that dissenting children could be excused from Bible reading or worship in public schools on request of their parents.[148] Yet they also forbade use of the Catholic Bible and ensured the continuation of Protestant religious exercises.[149] That result left Catholic complaints mostly unheeded, and "petty persecution of the Catholic pupils" persisted.[150] But even this compromise failed to satisfy to the Protestant majority and ultimately sparked a series of riots, killing as many as forty-five people.[151] Once again, Protestant-Catholic conflict overshadowed claims to free exercise, despite the commonality between those claims and the earliest Founding-era understandings.

As the evidence from Philadelphia suggests, arguments over school funding obtained an explosive character in nineteenth-century America. And undoubtedly, that dynamic had an impact on the nature of the debate going forward in jurisdictions across the country. As

147 Sentinel, *supra* note 143 (observing that allowing devotional Bible reading in schools subjected students to the "arts of proselyting teachers," and arguing instead for "no religious exercise or instruction whatever"); Sentinel, *supra* note 136 (suggesting that because the teaching of devotional religion in public schools "endangers the integrity of faith, and gives an undue bias to the minds of the pupils," it followed that "[h]owever unnatural it may be to separate Religion from education, it becomes necessary . . . in order to guard inviolate the rights of conscience"). Other sources also noted this problem. For example, an article in the *Catholic Herald* observed that although distributing public funds on a per-student basis would "leave education unrestricted and free," that solution was unlikely. *Public Schools*, 11 CATH. HERALD 76 (1843). Accordingly, the article hinted that the most likely result would have to be "the entire separation of Religion from public education, as the only just system for schools in which the children of all denominations mingle together." *Id.*

148 Lannie & Diethorn, *supra* note 133, at 57–58 (quoting the 1843 resolutions); JORGENSON, *supra* note 142, at 78–80 (noting later reaffirmations of the resolutions).

149 Lannie & Diethorn, *supra* note 133, at 58; JORGENSON, *supra* note 142, at 80.

150 A Catholic Layman, Letter to the Editor, *Petty Persecution of the Catholic Students in the Public Schools*, 12 CATH. HERALD 115 (1844).

151 JORGENSON, *supra* note 142, at 79–83; Lannie & Diethorn, *supra* note 133, at 83–85, 85 n.93. For a bracing account of the riots, see Mary Ann Meyers, *The Children's Crusade: Philadelphia Catholics and the Public Schools, 1840–1844*, 75 RECS. AM. CATH. HIST. SOC'Y 103, 122–27 (1964).

immigration and anti-Catholic sentiment grew, the idea that non-establishment prohibited funding for denominational schools "developed gradually and unevenly at the local level during the nineteenth century."[152] And despite constitutional objections from religious minorities like those outlined above, that situation eventually became the norm.

It is impossible to know how denominational schools in every jurisdiction responded to those developments. In many cases like those described above, they raised constitutional objections. In some instances, they may have simply chosen to remain silent rather than endure the ire of their neighbors. But as the evidence above indicates, that is likely not because religious objectors in this period viewed such policies as consistent with free exercise. Then as now, being a religious minority is a fraught position. But then as now, it is in those instances where the protections for free exercise are probably needed most.

III. ON THE USE AND LIMITS OF HISTORY

The intersection of religion and government support has long been an area of deep contestation. And nineteenth-century history surrounding free exercise and funding is no exception. In this final Part, I want to offer some reflections on what this historical evidence might tell us—about free exercise, but also about the perils and limits of historical argument in this area.

Start with some basic observations about the historical record. As previously observed, the Court has developed its doctrine in *Carson* and related cases without much reference to history. That absence has encouraged some scholars to conclude that nineteenth-century history is devoid of evidence linking free exercise and funding. But at a minimum, the evidence above suggests that the issue is much more complicated.

In the years immediately surrounding the adoption of the Religion Clauses, actors like Shearith Israel and the Ursuline nuns prevailed in contexts involving government subsidies of various kinds, based in part on constitutional arguments about free exercise. And Catholics and other religious minorities continued to deploy similar arguments well into the nineteenth century. This understanding suggested that free exercise and disestablishment were symmetrical:

152 *See* KAESTLE, *supra* note 45, at 167, 166–67; JORGENSON, *supra* note 142, at 69 ("In state after state during the [eighteen] fifties, with Know-Nothing leaders in the forefront of the battles, state school officers and Protestant denominational bodies were able to obtain legislation denying public funds to non-public schools and requiring Bible reading in the public schools. There was no mistaking the motivation behind these campaigns; the leaders openly and boastfully made anti-Catholicism the dominant theme of their attacks.").

Government should neither grant nor deny funding based on religion or its exercise. And as the episodes involving Shearith Israel and the Ursuline nuns indicate, that argument seems to have prevailed, especially early on. But as the nineteenth century progressed, proponents of "nonsectarian" schools subordinated that understanding to a novel theory of church-state separation.

During the *Lemon* era, the Court projected this later nineteenth century view back on to the Founding era.[153] But the historical evidence does not support that conclusion. The idea that bans on religious establishment demanded denying funds to denominational schools was not a Founding-era conviction. It was a nineteenth-century innovation, created in part to justify funding only "nonsectarian" Protestant schools. That new arrangement had only a tentative connection to Founding-era understanding. But by the time cases like *Everson* and *Lemon* arose, many of the Justices could not imagine things had ever been any different.

Carson swung the pendulum the other direction, in a way that points back to the earliest conceptions of free exercise and disestablishment. On this view, denying otherwise-available funding based on a recipient's religious practice is not a policy choice the state is free to make. Rather, it is a penalty on the free exercise of religion. And in so concluding, *Carson* might well be seen as giving voice to early understandings of free exercise articulated by Shearith Israel and others, now in a different context.

Here, though, a word of caution is in order. Nineteenth-century funding controversies did not involve discrimination between secular versus religious private schools. Instead, as the conflict involving Shearith Israel indicates, they involved funding *some* religious schools but not others, based on a "distinction in religious worship."[154] Moreover, although actors like Shearith Israel and the Ursuline nuns seem to have prevailed early in the century, arguments for equal school funding increasingly fell on deaf ears, as sprawling arguments about church-state separation and anti-Catholic feeling proliferated. Assessing how all of that should inform legal judgments today is a complicated enterprise.

Even with those caveats, however, it seems clear that the history outlined above provides a new perspective from which to judge the Court's more recent free exercise decisions. In the early years of the republic, the historical understanding of disestablishment and free exercise arguably worked together. Just as government was forbidden from providing funds solely to support religious worship as a matter of

153 *See supra* note 8 and accompanying text.

154 The Mem'l of Trs. of the Congregation of Sheerith Isr., *supra* note 15, at 95.

non-establishment, so it was forbidden from *refusing* funds for goods like education solely because of a recipient's religious practice as a matter of free exercise. By all indications, that was the principle endorsed by Shearith Israel and others in the years immediately surrounding the adoption of the Religion Clauses. And that principle would seem to apply just as readily to modern programs that deny funding only to religious private schools while extending it to secular ones. Although not discriminatory *among* religions, such denials still penalize religious schools based on a "distinction in religious worship," discouraging free exercise in the process.[155]

Moreover, although supporters of "nonsectarian" schools rejected these free exercise arguments later in the nineteenth century, the grounds on which they did so were highly suspect. As a legal matter, these decisions had little grounding in history or prior practice. And just as significantly, the debates took place in contexts where religious discrimination and Protestant hegemony were rampant—so rampant, in fact, that supporters of "nonsectarian" schools could not fathom how others could reasonably object to their modes of religious instruction.[156] Again, none of this "proves" that *Carson* or similar cases are correct. But at minimum, it suggests that the Court's recent decisions in this area might best be seen as a modern echo of earlier controversies—now in a different frame, unencumbered by Protestant-Catholic conflict.

As I see it, this nineteenth-century evidence provides at least some degree of support for the Court's decisions in *Carson* and related cases. But even acknowledging that point, it is also worth reflecting more generally on the limits of what this sort of history can offer.

Start with a peril to be avoided. As we have seen, contrary to some recent arguments, history contains numerous examples of actors in earlier eras objecting to selective funding with arguments sounding in free exercise. In raising these objections in *Drummond*, however, scholars arguing in favor of this position stated their position not only as a claim about substance, but also as a claim about court cases: Because no one in the nineteenth century chose to "litigate" funding denials as free exercise challenges in court, such denials must have been thought constitutional and are thus off-limits today.[157]

So far as I am aware, supporters of denominational schools in the nineteenth century did not bring lawsuits challenging discriminatory

155 *Id.*

156 *See* Laycock, *supra* note 6, at 145 ("The claim that funding religious schools is or should be unconstitutional did not emerge until long after the Founding, and in response to intense Protestant-Catholic conflict.").

157 Brief of Historians and Legal Scholars, *supra* note 13, at 14–17; Tang & Hutt, *supra* note 14, at 666.

school funding on constitutional grounds. But as the evidence above strongly suggests, that is not because they thought such actions were consistent with free exercise. Rather, it is almost surely because nineteenth-century courts did not consider programs that conditioned funding on a surrender of individual constitutional rights as within their power to correct.

During the early nineteenth century, religious minorities regularly defended their free exercise rights in court when traditional coercion was a stake, and courts sometimes vindicated those rights.[158] Religious institutions also sometimes sued to argue they had been denied funding on grounds unauthorized by a specific law.[159] But as many scholars have noted, the idea that courts could strike down requirements that forced recipients to relinquish their constitutional rights in order to receive funding or other government benefits did not arise until much later. And the idea that those protections extended to individual freedoms like free speech and free exercise came even later than that.[160]

Challenging a denial of funding on free exercise grounds depends on a theory of unconstitutional conditions. But until the twentieth century, no such theory was recognized or generally available. When challenging a funding denial based on free exercise in the nineteenth century, then, appealing to legislatures or the public was the natural (and likely the *only*) option.

All of this has a simple upshot. People can reasonably disagree about the significance of historical arguments over free exercise and funding for resolving modern controversies. But claiming that

158 *See, e.g.*, People v. Philips (N.Y. Ct. Gen. Sess. June 14, 1813) (protecting a Catholic priest from being forced to testify under pain of penalty about a supplicant's confession), *reprinted in* WILLIAM SAMPSON, CATHOLIC QUESTION IN AMERICA 5 (New York, Edward Gillespy 1813); Commonwealth v. Cooke, 7 AM. L. REG. 417, 418–19, 426 (Mass. Police Ct. 1859) (suing a teacher for assault for beating a Catholic child for refusing to recite the Protestant Ten Commandments). For an insightful discussion of early judicial free exercise decisions that illustrate this pattern, see Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55 (2020).

159 *See, e.g.*, People *ex rel.* the Roman Cath. Orphan Asylum Soc'y v. Bd. of Educ., 13 Barb. 400 (N.Y. Gen. Term 1851) (challenging a denial of funds to a Roman Catholic orphanage on statutory grounds); St. Patrick's Orphan Asylum v. Bd. of Educ., 34 How. Pr. 227 (N.Y. Gen. Term 1867).

160 *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416 (1989) (noting the origins of the unconstitutional conditions doctrine in the late nineteenth century and its refashioning to protect individual constitutional rights in the twentieth century); Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 S.D. L. REV. 337, 339 (1989) (similar); Richard A. Epstein, *The Supreme Court 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 73–102 (1988) (similar); Sherbert v. Verner, 374 U.S. 398, 404–06 (1963) (announcing application of the unconstitutional conditions doctrine to free exercise claims).

nineteenth-century people thought exclusionary funding was constitutional because they didn't bring free exercise lawsuits rests on an anachronism. It's like concluding nineteenth-century people didn't care about travel because they used carriages rather than jet planes.

What's more, even outside the funding context, discounting evidence about constitutional meaning merely because it does not appear in "lawsuits" proves far too much. In the years immediately surrounding the adoption of the Constitution, many of the most important constitutional debates took place largely in Congress or the public press, not in court—think about the famous Decision of 1789 or the Federalist Papers. Likewise, nearly all the important state-level victories ending religious establishments were waged and won in newspapers and legislative halls, not in courtrooms and complaints.[161] Closing one's eyes to historical evidence about the Constitution's meaning simply because it does not appear in the form of lawsuits artificially limits our understanding, whether the issue is funding or not.

That said, though, maybe there's a deeper objection lurking here. Saying that early courts did not generally entertain constitutional lawsuits over funding and individual rights is a statement about prior legal doctrine. But maybe it is also just another way of saying that originalism or other historical approaches do not allow such claims either. If courts did not enforce limits on government's ability to leverage benefits to defeat individual rights in the past, why should courts enforce those limits today?

This is the most plausible version of the argument about a lack of nineteenth-century lawsuits. But in my view, it also misses some important nuance, whatever one's constitutional methodology. More specifically, it overlooks the fact that, even under historical or originalist approaches, policing exclusionary is not a deviation from original understanding. Instead, it is a faithful means of applying the Constitution's historic meaning to new contexts.

To appreciate this point, consider a well-known dissent authored by Justice Scalia in a past case about religion and funding, *Locke v. Davey*.[162] There, Justice Scalia noted (with a logic equally applicable to other First Amendment rights), "When the State makes a public benefit generally available, that benefit becomes part of the baseline against

161 Arguments seeking to minimize historical evidence regarding the scope of the Establishment Clause sometimes make a similar "only-lawsuits-count" move. *See, e.g.*, Stephanie H. Barclay, *Tension Between Constitutional Meaning and Constitutional Construction*, 47 HARV. J.L. & PUB. POL'Y 613, 624 (2024) (dismissing Founding-era arguments that even church-attendance laws with opt-outs were impermissible because such arguments did not appear in lawsuits seeking "judicial enforcement").

162 Locke v. Davey, 540 U.S. 712 (2004).

which burdens on religion are measured."[163] And, Justice Scalia continued, in a world like ours where government largesse is extremely powerful, it follows that "when the State withholds [a] benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause *no less than* if it had imposed a special tax."[164]

Here, the claim is one of analogy, not history. But that does not mean the claim lacks historical grounding. In the Founding era, proponents of religious freedom successfully argued that government lacked the power to impose penalties based on religion, like licenses to preach or discriminatory taxes. Indeed, even modern interpreters who disagree about the historic meaning of free exercise agree on at least this much.[165]

Justice Scalia's argument relates this history to a new, modern context—and one unimaginable to the Founding generation. At the Founding, government funding for activities in the private sector was both sparing and rare. Yet as Justice Scalia's comment suggests, in the modern welfare state, the plethora of state benefits and their importance ensures that withholding them is often comparable to earlier, traditional penalties in their power to influence behavior.[166] And in those circumstances, treating the denial of a benefit as placing "the same kind of burden upon the free exercise of religion" as a fine on religious practice makes sense.[167] It ensures that, in a world of widened government influence, the Constitution still limits government's

163 *Id.* at 726 (Scalia, J., dissenting).

164 *Id.* at 726–27 (emphasis added).

165 *Compare, e.g.*, Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historic Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (arguing that on the Founding-era understanding, the right of free exercise embodied only a freedom from discrimination or penalty on the basis of religion, not a freestanding liberty), *and* VINCENT PHILIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING 231 (2022) (arguing that, as originally understood, the Free Exercise Clause only prohibited "regulating, punishing, prohibiting, or mandating religious beliefs or exercises *on account of* their religious character or *for* religious reasons"), *with* Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 820–21 (1998) (suggesting that the original meaning of the Free Exercise Clause extended beyond non-discrimination to protect religious exercise from "unnecessary government interference," *id.* at 820), *and* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1438–40 (1990) (similar).

166 Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 490 (2012) (noting that "government by contract" is the "most serious adjacent danger" to traditional laws that directly restrain freedom, because it effectively forces individuals to "sell their rights for government benefits").

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

ability to punish or discourage religious practice today no less than it did at the Founding.[168]

Nor is this idea foreign to the law. In *West Virginia State Board of Education v. Barnette*, Justice Jackson famously insisted that the role of the judiciary is to "translat[e] the majestic generalities of the Bill of Rights . . . into concrete restraints on officials dealing with the problems of the twentieth century."[169] In my view, Justice Jackson's mention of "majestic generalities" probably exaggerates the indeterminacy of constitutional guarantees. But the point about applying historic meaning to new circumstances rings just as true today as it did in 1943, both as a normative claim and as a description of what judges actually do. And on this point, at least, a variety of modern originalist theories point toward a similar idea.

On one theory, applying the Constitution's fixed meaning to new contexts is an exercise in "constitutional construction," which aims to implement a Clause's original function in a world of altered circumstance.[170] On another theory, interpreting the Constitution in a way that accounts for modern developments is a faithful means of applying the drafters' original choice to frame a provision as a principle or standard inviting future elaboration rather than a rigid rule.[171] Under still another formulation, things like the unconstitutional conditions doctrine function as "implementing rules" that bridge the gap between original meaning and judicial enforcement, preserving the Constitution's protections under modern conditions.[172]

Theories like these differ in their particulars. But one need not choose between them or any other theory of constitutional interpretation to see their applicability to debates over free exercise and funding.

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168 *See* Thomas C. Berg & Douglas Laycock, Essay, Espinoza*, Government Funding, and Religious Choice*, 35 J.L. & RELIGION 361, 378 (2020) ("Protection from religiously burdensome funding conditions is essential to religious liberty in the modern state. Governments spend enormous amounts of money; they would have extraordinary power to buy up constitutional rights if they were allowed to withhold government contracts or social-welfare benefits from those who persist in exercising their religion.").

169 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943). For a modern theory focused on the concept of "translation," see LAWRENCE LESSIG, FIDELITY AND CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION (2019).

170 Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018).

171 JACK M. BALKIN, LIVING ORIGINALISM 26–31 (2011). For another recent discussion of the theory underlying the modern unconstitutional conditions doctrine and its connection to nineteenth century doctrines like duress, see Ryan C. Williams, *Unconstitutional Conditions and the Constitutional Text*, 172 U. PA. L. REV. 747, 765–72 (2024).

172 Lawrence B. Solum, Essay, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1281 (2019). For an illuminating discussion of the concept of implementing doctrines and issues surrounding them, see RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001).

The Free Exercise Clause supplies a historic principle, and the task is to give that principle force in circumstances the Founding generation arguably could not have envisioned or fully foreseen.

As the history recounted above makes plain, refusals to fund based on religion or its exercise have always placed significant burdens on religious minorities. But even without that history, it would still be the case that in the modern welfare state, policing selective funding involving religion is probably a faithful means of applying the Constitution's historic meaning to new contexts. Under a historical approach, the Constitution sets floors of protection that do not change, even if circumstances do.[173] The application of free exercise principles to social welfare programs may amount to just another example of that same basic conviction, now in a world where subsidies and not just punishments set the order of the day.

CONCLUSION

People understandably disagree about the implications of history or its importance as a source of constitutional interpretation. But regardless, any historical argument over free exercise and funding should grapple with the full range of nineteenth-century evidence, and the complexities such evidence presents. Far from being barren of free exercise objections, the nineteenth-century record contains numerous examples of religious groups arguing that exclusionary school funding violated their right to free exercise. Both supporters and opponents of the Court's recent funding cases have overlooked that evidence. But reflecting on it is the next step in thinking about protections for free exercise today.

173 *See, e.g.*, United States v. Rahimi, 144 S. Ct. 1889, 1908 (2024) (Gorsuch, J., concurring) ("Developments in the world may change, facts on the ground may evolve, and new laws may invite new challenges, but the Constitution the people adopted remains [the] enduring guide." (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131–32 (2022))); Michael W. McConnell, Lecture, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1762–63 (2015) ("[T]he Constitution contains a small but important set of principles to which this nation agreed to be bound. The job of the Court is to enforce those principles . . . . Judges should not ask which way the winds of popular opinion are blowing, but what the Constitution *means*.").