

**Upholding Religious Liberty: The Application of the Establishment and Free Exercise
Clauses in *Oklahoma Statewide Charter School Board v. Drummond***

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(Originalist Angles does not necessarily endorse the views expressed by authors in individual
articles.)

Charter schools have become the next legal battleground for defenders of religious liberty. In 2023, the Oklahoma Statewide Charter School Board approved the application and contract of St. Isidore of Seville Catholic Virtual School, allowing St. Isidore to become the first religious charter school in the country. Enforcing a nonsectarian requirement for charter schools in Oklahoma law, the Attorney General of Oklahoma sued to rescind the contract, leading the Charter School Board and St. Isidore to challenge the decision based on the Free Exercise Clause of the First Amendment.¹ On January 24th, 2025, the Supreme Court granted a writ of certiorari from the Charter School Board and is anticipated to make a decision that has wide-ranging implications on educational choice and religious liberty.² Considering the original public meaning and legal precedents of the Establishment and Free Exercise Clauses, the Supreme Court should rule in favor of the Oklahoma Statewide Charter School Board and affirm the right to establish religious charter schools.

¹ "Oklahoma Statewide Charter School Board v. Drummond," Oyez, Accessed February 2, 2025, <https://www.oyez.org/cases/2024/24-394>.

² Amy Howe, "Supreme Court will weigh in on effort to found nation's first religious charter school," *SCOTUSblog*, January 24, 2025, <https://www.scotusblog.com/2025/01/supreme-court-will-weigh-in-on-effort-to-found-nations-first-religious-charter-school/>.

First, the original public meaning of the Establishment Clause allows states to approve religious charter schools since the clause only covers direct government involvement and coercion in religious practices. In the case of St. Isidore, the school is neither directly controlled by the government nor coercive. To evaluate the scope of the Establishment Clause, we must examine the meaning of the phrase “an establishment of religion” as commonly understood in the era of the Framers. In the Framers’ era, the phrase “an establishment of religion” specifically referred to government-sponsored religions that compelled religious practice. The American revolutionaries rebelled against many British customs and traditions, namely the Church of England, a government sponsored and funded Church that enforced religious conformity. Hence, when writing the Establishment Clause, the Framers sought to prohibit the establishment of a national church and the enactment of any laws that would support a national religious standard.³ Despite having been incorporated to the states in *Everson v. Board of Education* (1947)—a controversial decision in and of itself—the Establishment Clause should still be evaluated by the same criteria of state control and coercion.

In the case of St. Isidore, the position of the Oklahoma Attorney General fails both tests. First, charter schools are independently operated, and therefore their actions cannot be construed as state action. In fact, St. Isidore has full control over its budget, policies, and curriculum, none of which are established by the Oklahoma state government.⁴ Education is also not a purely public function, since parents are ultimately responsible for education, and are free to choose from a

³ Carl H. Esbeck, "The Establishment Clause: Its Original Public Meaning and What We Can Learn From the Plain Text," The Federalist Society, last modified February 3, 2021, <https://fedsoc.org/fedsoc-review/the-establishment-clause-its-original-public-meaning-and-what-we-can-learn-from-the-plain-text>.

⁴ Manhattan Institute, *Brief of Amicus Curiae Supporting Petitioners, Oklahoma Statewide Charter School Board v. Drummond*, No. 24-394, 5, https://www.supremecourt.gov/DocketPDF/24/24-394/330825/20241031132201201_Drummond%20cert-stage.pdf.

wide range of private and homeschooling options.⁵ Hence, charter schools are functionally more similar to government-sponsored faith-based charities than a national church, and thus cannot be viewed as an arm of the state.

More importantly, the Establishment Clause, as originally understood, only forbids laws that enforce a religious standard by compelling a certain type of religious worship. In this case, the government is not compelling religious worship by establishing religious charter schools, since enrollment in a charter school is a choice, not a requirement. The lack of government coercion and involvement in *St. Isidore* demonstrates that the Establishment Clause does not prohibit religious charter schools.

This limited interpretation of the Establishment Clause is consistent with legal precedents. Over the past decades, the Supreme Court has repeatedly affirmed both the general importance of history and tradition in Establishment Clause jurisprudence and specifically the constitutionality of government funding of religious schools. In *Kennedy v. Bremerton School District* (2022), a case that dealt with a public-school prayer, for example, Justice Gorsuch's majority opinion emphasized that judges must consider "historical practices and understanding" when interpreting the Establishment clause.⁶ Employing a similarly originalist perspective, the court ruled in *Zelman v. Simmons-Harris* (2002) that Ohio's school voucher program, which applied to religious schools, did not violate the Establishment Clause.⁷ Compared to Ohio's school vouchers, this case involves charter schools funded directly by the government. However,

⁵ South Carolina et al., *Brief of Amici Curiae in Support of Petitioners, Oklahoma Statewide Charter School Board v. Drummond*, No. 24-394, 7, https://www.supremecourt.gov/DocketPDF/24/24-394/331502/20241108150316358_OK%20St.%20Isidore%20v.%20Drummond%20Cert%20Stage%20Amicus.pdf.

⁶ "Kennedy v. Bremerton School District," Oyez, Accessed February 3, 2025, <https://www.oyez.org/cases/2021/21-418>.

⁷ "Zelman v. Simmons-Harris," Oyez, Accessed February 3, 2025, <https://www.oyez.org/cases/2001/00-1751>.

the rationale that the religious schools were not state actors remains the same, so the precedent reinforces the argument that the Establishment Clause does not apply in the Oklahoma case.

Not only does the Establishment Clause allow religious charter schools, the Free Exercise Clause also prohibits the state from denying religious organizations the right to establish charter schools due to their sectarian affiliation. In this case, the Free Exercise requires Oklahoma to treat religious charter schools like St. Isidore equally with secular schools. To understand the original public meaning of the Free Exercise Clause, we must evaluate the history and tradition from which that constitutional protection originates. In the Framers' era, the right of the free exercise of religion comes from longstanding colonial protections against government repression and discrimination against particular faiths.⁸ Hence, the Free Exercise Clause, as it was originally understood, offered broad protections to religion. The free exercise clauses in the various state constitutions at the time of the Constitution Convention, for example, contain only narrow exceptions justified by compelling state interests, none of which apply to government sponsorship of education.⁹ There is no compelling state interest in mandating that all students receive a secular education, and as such, governments cannot treat religious schools differently due to their sectarian affiliation. The Oklahoma law blocking all Catholic charter schools clearly violates the Constitution's protections towards free exercise as shown by its original public meaning.

Recent legal precedents affirmed the free exercise rights of organizations like St. Isidore. In *Trinity Lutheran Church of Columbia, Inc v. Comer* (2017), the court ruled that the

⁸ Branton J. Nestor, "The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion," *Harvard Journal of Law and Public Policy* 42 (June 2019): 974, <https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2019/06/Nestor-Final.pdf>.

⁹ Nestor, "The Original," 978.

government cannot deny benefits for religious organizations if they are available to similar secular groups.¹⁰ In *Shurtleff v. Boston* (2022), the court decided that the government cannot prohibit religious expression on state property if they allow similar secular messages.¹¹ In *Carson v. Makin* (2022), the court decided that Maine's tuition assistance program cannot exclude religious schools.¹² All these cases illustrate the court's emerging view that the government must, at a minimum, treat religion equally with secular interests. This rationale applies similarly to *St. Isidore*, a school denied public funding and sponsorship simply because of its religious affiliation. Thus, the court should rule in favor of the Charter School Board and strike down the Oklahoma law for violating the Free Exercise Clause.

Both the original public meaning of the Constitution and legal precedents demonstrate that the Oklahoma statute is not justified by the Establishment Clause and violated the Free Exercise Clause. Thus, the Supreme Court should decisively overturn the law and rule in favor of the Charter School Board. This decision would be a momentous step to upholding religious liberty in education and defending the rights of families to choose the best educational path for their children.

¹⁰ "Trinity Lutheran Church of Columbia, Inc. v. Comer," Oyez, Accessed February 3, 2025, <https://www.oyez.org/cases/2016/15-577>.

¹¹ "Shurtleff v. Boston," Oyez, Accessed February 3, 2025, <https://www.oyez.org/cases/2021/20-1800>.

¹² "Carson v. Makin," Oyez, Accessed February 3, 2025, <https://www.oyez.org/cases/2021/20-1088>.