

**TAX-FUNDED EDUCATION SAVINGS ACCOUNT PAYMENTS  
TO RELIGIOUS SCHOOLS VIOLATE STATE CONSTITUTION  
COMPULSION GUARANTEES: THE IOWA EXAMPLE**

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The right of a man to worship God or even to refuse to worship God . . . is as fundamental in a free government like ours as is the right to life, liberty, or the pursuit of happiness. . . . He has no right, however, to ask that the state . . . expend money acquired by public taxation in training his children religiously. . . . To guard against this abuse, most of our states have enacted constitutional and statutory provisions forbidding . . . all use or appropriation of public funds in support of sectarian institutions. . . . In this state the Constitution . . . forbids . . . all taxation for ecclesiastical support.

—Justice Silas Weaver for the Court  
in *Knowlton v. Baumhover*<sup>1</sup>

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<sup>1</sup> 166 N.W. 202, 207 (Iowa 1918).

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#### INTRODUCTION

In 1905, the school board for the Maple River community in Carroll County, Iowa, rented space for the public school in a building owned by Joseph Kuemper.<sup>2</sup> For the next decade, the public school operated in the rented building, using public funds from the school district.<sup>3</sup>

It was all a sham. The space the school board rented for the public school was the second floor of an established Catholic school. The owner of the building, “Joseph Kuemper,” was really Father Kuemper, the priest of Maple River’s St. Francis Catholic Church, just next door.<sup>4</sup> The sole teacher employed by the school board for the school, “Miss Martin,” was really Sister Estella of the Sisters of Charity.<sup>5</sup> The court described the program of the “public” school:

From the beginning and for a period of more than nine years the study of the Catholic catechism and the giving of religious instruction were part of the daily program of instruction in both rooms. The walls were hung with pictures of the Holy Virgin, of Christ crowned with thorns, of the Crucifixion, and others all unmistakably appealing to Catholic sentiment, and the teachers were invariably arrayed in the striking robes of their order. Every influence of association and environment, and of precept and example, to say nothing of authority, were thus contrived to keep those of Catholic parentage loyal to their faith and to bias in the same direction those of non-Catholic parentage.<sup>6</sup>

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<sup>2</sup> *Id.* at 203. Having secured space for the school, the board sold the old school building. *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 203–04. Today, the Catholic high school serving Carroll County is named in honor of Father Kuemper. *History & Identity*, KUEMPER CATH. SCH. SYS., <https://kuemper.org/history-identity> [<https://perma.cc/9MD7-3BVA>] (last visited Mar. 4, 2024).

<sup>5</sup> *Knowlton*, 166 N.W. at 204. The court cited testimony that Sister Estella divided her salary with the sister who taught in the other, admittedly religious, classroom in the building. *Id.* at 206.

<sup>6</sup> *Id.* at 204.

After almost a decade, with the cooperation of two members of the school board,<sup>7</sup> a taxpayer, Sheldon Knowlton, brought an action for injunctive relief, asserting: “That the defendant school directors have been, and are now, illegally and wrongfully . . . appropriating and using the public school funds of such school district in the conduct and maintenance of a private parochial school. . . .”<sup>8</sup> The district court found for the plaintiff “and entered a decree perpetually enjoining the defendants . . . from using or appropriating the moneys of the district to such end. . . .”<sup>9</sup>

On appeal, the Iowa Supreme Court restated the underlying rationale for the constitutional policy against using public funds to support religious instruction:

If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer and infidel—shall not be used directly or indirectly for religious instruction. . . .<sup>10</sup>

The court condemned the use of public funds for religious activities: “In this state, the Constitution (article 1, § 3) forbids . . . all taxation for ecclesiastical support.”<sup>11</sup> In the context of education, the court was equally clear: “[A parent] has no right . . . to ask that the state . . . expend money acquired by public taxation in training his [or her] children religiously.”<sup>12</sup>

In 2023, Carroll County, Iowa is served by the Kuemper Catholic schools, “a preschool through 12th grade school system . . . [t]he mission [of which] is to provide excellent Catholic education of mind, body, and soul to empower all students to achieve to the best of their abilities in fulfillment of God’s call.”<sup>13</sup> There are over

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<sup>7</sup> Appellant’s Abstract of Record at 65–66, *Knowlton v. Baumhover* (Iowa 1915) [hereinafter *Knowlton Appellant’s Abstract*] (testimony of J.J. Egan) (“The complaining parties [before the school board] were Mr. Ralph, Sheldon Knowlton and Mr. Handley. . . .”).

<sup>8</sup> *Id.* at 2–3.

<sup>9</sup> *Knowlton*, 166 N.W. at 203. The trial court decree also “command[ed] the board of directors to provide a school building for the use of the subdistrict, and meanwhile, until such building could be provided, that a suitable room be rented for that purpose elsewhere than in connection with the parochial school.” *Id.*

<sup>10</sup> *Id.* at 206. The court continued: “So well is this understood, it would be a waste of time for us at this point to stop for specific reference to authorities or precedents or to the familiar pages of American history bearing thereon.” *Id.* at 207.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Welcome to Kuemper Catholic School*, KUEMPER CATH. SCH. SYS., <https://kuemper.org/> [https://perma.cc/BJF9-UPHE] (last visited Mar. 4, 2024).

a thousand students in the system.<sup>14</sup> Starting in 2023, the Kuemper Catholic schools will receive public, tax-generated funds from the State of Iowa under a newly created education savings account program.<sup>15</sup> By FY 2027, when income eligibility standards are phased out and enrollments grow without restriction, the Kuemper Catholic schools stands to receive almost \$11,000,000 in public funds annually.<sup>16</sup>

In *Knowlton*, the Iowa Supreme Court found that it violated the compulsion guarantee of the Iowa Constitution to use public funds to support the Maple River School in Carroll County when it operated as a parochial school.<sup>17</sup> How can it be that it would not also violate the Iowa Constitution's compulsion guarantee to use public funds to support the Kuemper Catholic schools in Carrol County? After all, from the perspective of the Iowa Constitution, the religious programs of instruction of the schools are *precisely* the same, and the compulsion guarantee has not been modified since it was drafted in 1844.

How can it be? It cannot. This Article makes the unremarkable and conservative argument that the transfer of public funds to religious schools under Iowa's education savings account program violates the Iowa Constitution's compulsion guarantee.

We start by looking at the Iowa compulsion guarantee, including a review of the Iowa authorities which have construed it, the historical record and setting of its adoption, and the history of its New Jersey antecedent.<sup>18</sup> We then introduce the education savings account mechanism by which Iowa's religious schools stand to receive more than a third of a *billion* dollars annually by FY 2027.<sup>19</sup> After that, we consider whether education savings account transfers of public funds to religious schools are constitutional under Iowa's compulsion guarantee, specifically considering three

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<sup>14</sup> In 2022, the certified enrollments for the Kuemper system were 778 in the elementary and middle school and 280 in the high school, for a total of 1,058 students. *2022–2023 Nonpublic Schools Certified Enrollment*, IOWA DEP'T OF EDUC. [hereinafter IOWA DEP'T OF EDUC., *Enrollment*], <https://educateiowa.gov/documents/2022-2023-nonpublic-schools-certified-enrollment> [<https://perma.cc/5FQR-QMGK>] (last visited Mar. 4, 2024).

<sup>15</sup> See JENNIFER ACTON, LEGIS. SERV. AGENCY, LSB11174HV, FISCAL NOTE: HF 68—EDUCATION SAVINGS ACCOUNTS 1 (Iowa 2023) [hereinafter FISCAL NOTE], <https://www.legis.iowa.gov/docs/publications/FN/1374191.pdf> [<https://perma.cc/T9E8-WBBV>].

<sup>16</sup> The estimate is \$10,735,442, generated by taking an enrollment of 1,312 (the October 2022 official enrollment of 1,058 times the Fiscal Note assumption of a 1.24 growth multiple over two years) times a per pupil education savings account payment of \$8,183 (the current state cost per pupil of \$7,598 times an annual increase of 2.50% as assumed in the Fiscal Note). See *id.* at 5 fig.3. The education savings account payment cannot exceed the actual tuition, but as of the 2023–2024 year, Kuemper Catholic School System tuition rates will be \$7,750 for kindergarten through 6th grade, \$8,300 for 7th and 8th grades, and \$8,850 for 9th through 12th grades. *Tuition Assistance & Tuition Rates*, KUEMPER CATH. SCH. SYS., <https://kuemper.org/tuition-and-tuition-assistance> [<https://perma.cc/M4JD-Y6YZ>] (last visited Mar. 4, 2024).

<sup>17</sup> *Knowlton v. Baumhover*, 166 N.W. 202, 214 (Iowa 1918).

<sup>18</sup> See discussion *infra* Section I.C.

<sup>19</sup> See discussion *infra* Part II; FISCAL NOTE, *supra* note 15, at 1, 5 fig.3.

questions framed by the relevant authorities: first, are the religious schools ministries and are their teachers ministers?; second, do the religious schools teach their students religion?; and third, are the religious schools pervasively religious?<sup>20</sup> We then consider the application of the compulsion guarantee to the education savings account program in light of the Supreme Court's ruling in *Carson v. Makin*.<sup>21</sup> We conclude by asking where we go from here.<sup>22</sup>

Although this discussion focuses on the education savings account program in Iowa, the underlying issue is much broader. Twenty-eight states have compulsion guarantees in their state constitutions.<sup>23</sup> Of those, five have education savings account programs which pay religious school tuition,<sup>24</sup> five have voucher programs for religious school tuition,<sup>25</sup> and seven have favorable tax treatment, either deductions or credits, for religious school tuition.<sup>26</sup> In all, twelve of the twenty-eight compulsion guarantee states have programs which fund religious schools. The remaining sixteen of the twenty-eight do not have such programs,<sup>27</sup> but in many of those states, politicians are pushing for their adoption.<sup>28</sup>

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<sup>20</sup> See discussion *infra* Sections II.A.1–II.A.3.

<sup>21</sup> See discussion *infra* Part III. See generally *Carson v. Makin*, 142 S. Ct. 1987 (2022) (holding Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments violates the Free Exercise Clause).

<sup>22</sup> See discussion *infra* Conclusion.

<sup>23</sup> See *infra* Appendix A.

<sup>24</sup> Arkansas (ARK. CODE ANN. §§ 6-18-2501 to -2511 (West 2023)); Indiana (IND. CODE § 20-51.4-5 (2023)); Iowa (2023 Iowa Acts, House File 68 § 7 (2023)); Tennessee (TENN. CODE ANN. §§ 49-6-2601 to -2612 (West 2023)); and West Virginia (W.VA. CODE ANN. § 18-8-1(m), § 18-9A-25, § 18-31 (West 2023)).

<sup>25</sup> Indiana (IND. CODE § 20-51-1-4.7 (2023)); Maryland (EDUC. H.B. 0300, R00A03.05 (Md. 2022–23)); Ohio (OHIO REV. CODE ANN. §§ 3310.01 to 17 (West 2023)); Vermont (VT. STAT. ANN. tit. 16, § 822 (West 2023)); and Wisconsin (WIS. STAT. § 118.60 (2023)). See Olivia Dance, *Maryland Lawmakers Reach Deal on the Future of BOOST Program*, FOX 45 NEWS (Mar. 31, 2023), <https://foxbaltimore.com/news/local/maryland-lawmakers-reach-deal-on-the-future-of-boost-program> [<https://perma.cc/C296-UURG>]; *What are School Vouchers?*, EDCHOICE, <https://www.edchoice.org/school-choice/types-of-school-choice/what-are-school-vouchers-2/> [<https://perma.cc/8S4D-NJLT>] (last visited Mar. 4, 2024).

<sup>26</sup> Alabama (ALA. CODE § 16-6D-3(4) (2023)); Illinois (35 ILL. COMP. STAT. § 5/201(m) (2023)); Indiana (IND. CODE § 6-3-2-22 (2023)); Iowa (IOWA CODE § 422.12(2)(b) (2023)); Minnesota (MINN. STAT. § 290.0132, subdiv. 4, § 290.0674, subdiv. 1 (2022)); Ohio (OHIO REV. CODE ANN. § 5747.75 (West 2023)); and Wisconsin (WIS. STAT. § 71.05(6)(b)49 (2023)). See *Individual K–12 Tax Credits & Deductions*, EDCHOICE, <https://www.edchoice.org/school-choice/types-of-school-choice/how-do-k-12-education-tax-credits-deductions-work/> [<https://perma.cc/944B-HDEC>] (last visited Mar. 4, 2024).

<sup>27</sup> The sixteen states are Colorado, Connecticut, Delaware, Idaho, Kansas, Kentucky, Michigan, Missouri, Nebraska, New Jersey, New Mexico, Pennsylvania, Rhode Island, South Dakota, Texas, and Virginia. See *infra* Appendix A.

<sup>28</sup> See, e.g., Suzanne Perez, *Kansas House Passes School Choice Bill, Ties It to Special-Ed Funding and Teacher Pay*, NPR (Mar. 15, 2023, 4:04 PM), <https://www.kcur.org/2023>

With the current majority on the United States Supreme Court seemingly determined to give religious schools unprecedented access to public funds, it may be that we should look to our state constitution religious liberty clauses—especially the compulsion guarantees—to maintain an appropriate separation between public and sectarian spheres in the realm of education.

### I. IOWA'S COMPULSION GUARANTEE

The religious liberty provisions of the Iowa Constitution are found in Article 1, Section 3. First is the establishment clause: “The general assembly shall make no law respecting an establishment of religion. . . .”<sup>29</sup> Second is the free exercise clause: “[O]r prohibiting the free exercise thereof. . . .”<sup>30</sup> Last is the compulsion guarantee: “[N]or shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.”<sup>31</sup> The establishment clause and free exercise clause track provisions of the Federal Constitution.<sup>32</sup> The third religious liberty guarantee of the Iowa Constitution, the compulsion guarantee, has no counterpart in the text of the Federal Constitution.

It has been argued that the language of the compulsion guarantee is concrete and specific; that it is neither uncertain nor ambiguous. It follows that construction of the provision is unnecessary and the courts should be guided by the ordinary meaning of the words. In deciding a compulsion guarantee case, albeit one not involving schools, two Iowa Supreme Court Justices evaluated the compulsion guarantee in this respect.<sup>33</sup> Justice Uhlenhopp began by taking issue with the construction analysis engaged in by the majority:

The difficulty with this process of construction is the language of the third part of § 3. Sometimes constitutional clauses are abstract and general such as “due process of law,” and historical antecedents are needed to fill in meaning. . . . Other clauses in

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-03-15/kansas-house-passes-school-choice-bill-ties-it-to-special-ed-funding-and-teacher-pay [https://perma.cc/YS2L-JXEW] (reporting Kansas House of Representatives passage of education savings account measure).

<sup>29</sup> IOWA CONST. art. I, § 3.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Compare id.* (“The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”), with U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”).

<sup>33</sup> *Rudd v. Ray*, 248 N.W.2d 125, 133–37 (Iowa 1976) (Uhlenhopp, J., dissenting, with Rawlings, J., joining in division II).

the Bill of Rights contain broad sweeping guarantees which make historical background useful to understanding. . . . But the language in the third part of § 3 is of the opposite kind, *concrete* and *specific*: no one may be taxed for building or repairing places of worship or for maintaining any minister or ministry.<sup>34</sup>

Having dealt with the abstract and general, Justice Uhlenhopp turned to language that is uncertain or ambiguous:

A constitutional clause may also be uncertain or ambiguous, making the historical setting useful in ascertaining the meaning intended. . . . Here however we have clear, definite, unambiguous language: no taxation for building or repairing places of worship or maintaining any minister or ministry. Hence the principle applies that construction is unnecessary and we are to be guided by the ordinary meaning of the words.<sup>35</sup>

Justice Uhlenhopp's analysis concluded with an observation that the drafters included a broad meaning of the term "minister or ministry":

[T]he framers of the third part of § 3 spoke broadly in connection with ministers. The framers did not limit the proscription to certain kinds or classes of ministers; taxes cannot be used to maintain "any" minister or ministry. We should not strain to find obscurity or ambiguity when the constitutional language is clear.<sup>36</sup>

Justice Uhlenhopp's analysis of the wording of the compulsion guarantee is convincing. Nevertheless, and with the concession that the state-employee prison chaplains at issue in *Rudd v. Ray* are perhaps closer to the most common meaning of the term "minister" than are religious school teachers, we turn to three sources helpful in understanding the way in which education savings account payments to religious schools violate the compulsion guarantee: first, the decisions of the Iowa authorities which have construed the provision; second, the record of the Iowa constitutional conventions where the compulsion guarantee was adopted and the history of the times in which those conventions met; and third, the origin of the language of the Iowa compulsion guarantee, and the decisions of authorities of the state of origin. As it turns out, the three sources support the argument that state-funded education savings account payments of public funds to religious schools violate the compulsion guarantee of the Iowa Constitution.

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<sup>34</sup> *Id.* at 135–36.

<sup>35</sup> *Id.* at 136.

<sup>36</sup> *Id.* at 137.

*A. The Analyses of the Iowa Authorities Which Have Construed the Compulsion Guarantee*

There are only a handful of decisions construing the Iowa compulsion guarantee. *Knowlton v. Baumhover* is the only Iowa Supreme Court case analyzing the compulsion guarantee in the context of the use of public funds for religious schools.<sup>37</sup>

The sequence of events involved in *Knowlton* was not subtle. The Iowa Supreme Court described the Catholic school which already was in operation in the community before the public-school building was sold:

A Roman Catholic house of worship known as the “St. Francis Church” had been erected . . . and there religious services were regularly conducted by priests to whom the pastoral charge of that parish was from time to time committed. By its side was also erected a building in which a parochial school was maintained. This building was of two stories, each having a school-room. The teachers in these rooms were Catholic Sisters, wearing the characteristic garb and regalia of their order, who gave daily instruction to their pupils not only in branches of secular learning, but also in the Catholic catechism and in elementary principles of Catholic faith.<sup>38</sup>

Once the public school was operated in leased space within the Catholic school, the *Knowlton* court described the operation as having religious education at its core:

The building as a whole was to all intents and purposes a single schoolhouse, and the classes taught therein constituted a single school of two departments established and maintained for the express purpose of giving religious training to its pupils, and at the same time affording such pupils, as nearly as practicable, the equivalent of a common school education.<sup>39</sup>

The court found that the school, as actually operated, had become a religious school operated with public funds:

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<sup>37</sup> 166 N.W. 202, 207 (Iowa 1918). The opinion of the court was written by Justice Weaver, with Justices Ladd, Evans, Gaynor, and Stevens concurring. Justice Salinger dissented, with Justice Preston. It should be noted that the dissent went to the means employed by the trial court, not to the underlying question of the legality or constitutionality of using public funds to support a religious school. “It is true both the statute and the Constitution prohibit the appropriation of public money in aid of any private or sectarian school, but, while that establishes that this must not be done, it does not in the least enlarge the powers of the court of chancery on injunctions.” *Id.* at 216 (Salinger, J., dissenting).

<sup>38</sup> *Id.* at 203.

<sup>39</sup> *Id.* at 203–04.



In short, it must be said that with the abandonment of the public schoolhouse and the transfer of the school into the parochial building and its organization and conduct as there perfected the school ceased to have a public character in the sense contemplated by our laws, and became, has since been, and now is a religious school, maintained and conducted with a special view to the promotion of the faith of the church under whose favor and guardianship it was founded.<sup>40</sup>

After nine years of this arrangement, a resident taxpayer filed suit, alleging:

that the school so maintained is not a public school within the meaning of the law, but is, in fact, a parochial or religious school, which was established, and has been and still is being conducted, by and in behalf of the religious organization known as the Roman Catholic Church, and that the board of directors and the treasurer of the district have paid out and expended, and, if not restrained from so doing, will continue to pay out and expend, the public funds of the district for the benefit and support of the said parochial school.<sup>41</sup>

The district court found for the plaintiff “and entered a decree perpetually enjoining the defendants . . . from using or appropriating the moneys of the district to such end . . . .”<sup>42</sup>

It may help explain how the practices in *Knowlton* escaped challenge for a decade to note the testimony that all the students who attended the public school were Catholics,<sup>43</sup> that there were no objections to moving the public school into the St. Francis School,<sup>44</sup> and that Catholics comprised a large majority on the school board.<sup>45</sup> The superintendent of schools testified:

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<sup>40</sup> *Id.* at 206.

<sup>41</sup> *Id.* at 203.

<sup>42</sup> *Id.* The trial court decree also “command[ed] the board of directors to provide a school building for the use of the subdistrict, and meanwhile, until such building could be provided, that a suitable room be rented for that purpose elsewhere than in connection with the parochial school.” *Id.*

<sup>43</sup> *Knowlton Appellant’s Abstract*, *supra* note 7, at 42 (testimony of Vincent O’Brien, a 13-year-old student formerly in the upper room) (“Q. Were there any children that went to that school except those who went to the Catholic church within the last year? A. No.”); *id.* at 80 (testimony of Charles Irlbeck, former president of the school board) (“Most of the scholars that attended school at Maple River are members of the Catholic church.”).

<sup>44</sup> *Id.* at 63 (testimony of Joe Dunck, who was president of the school board in 1905) (“I know that the people without any exception favored the plan. I mean the patrons of the school. They were Catholics.”).

<sup>45</sup> *Id.* (testimony of Joe Dunck) (“I think the majority of the members of the school board

The Catholics under the guidance of their pastor prefer to send their children up to and including the 8th grade to a parochial school. I knew the wishes generally of the people living in that sub-district. A greater part of them, desired to send their children to a parochial school.<sup>46</sup>

The public school located in the St. Francis parochial school taught students in the sixth, seventh, and eighth grades.<sup>47</sup> Of course, while the demographics of the community and the wishes of the parents to have a religious education for their children may explain the scheme to operate the Maple River public school as a parochial school, they do not in any sense justify or excuse it.

The *Knowlton* record is replete with examples which fairly indicate the participants in the Maple River scheme knew that they were doing something improper. This consciousness of guilt was suggested in the arrangement under which the public school was located in the existing St. Francis Parochial School. The lease should have been between the St. Francis Church, which owned the parochial school building, and the Maple River school board, which was renting the property. But in the lease the space for the lessor was left blank.<sup>48</sup> The execution on behalf of the lessor was simply “Jos. Kuemper,”<sup>49</sup> giving no indication that the lease was with the St. Francis Church, of which Father Joseph Kuemper was the priest in charge.<sup>50</sup>

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were members of the Catholic church. I think the proportion of the school board was about one-third Protestants and two thirds Catholic.”).

<sup>46</sup> *Id.* at 76 (testimony of W.T. Bohnenkamp).

<sup>47</sup> *Knowlton v. Baumhover*, 166 N.W. 202, 205 (Iowa 1918) (citing testimony of the superintendent).

<sup>48</sup> *Knowlton Appellant’s Abstract*, *supra* note 7, at 59.

<sup>49</sup> *Id.* at 61. It was signed for the school by “J.M. Dunck, Pres. of the Board.” *Id.*

<sup>50</sup> *Id.* at 57 (statement of appellee attorney Sims) (“Let the records show that Joseph Kuemper, the party named in the resolution read in evidence and with who the school board in question made their contract for the leasing of the school in question was the priest in charge of the property at Maple River Junction at that time.”). The deceptive reference to the “lease with Jos. Kuemper” was not limited to the lease itself. The school board authorization for the lease refers to it as “a lease with Jos. Kempker [sic] for said room . . .” *Id.* at 21–22. And the school board approval of the lease refers to it as “the lease made between Jos. Kuemper and the board for the school room . . .” *Id.*

A second lease, executed nine years later within days of the district court trial in *Knowlton*, correctly identified the lessor as the church. That lease, dated August 30, 1914, was “between St. Francis Church of Maple River Jct., of Carroll County, Iowa” and “School Township of Maple River of Carrol County, Iowa.” It was signed for the school by “Rud. Schiver, President,” and “C. J. Dunck, Secretary.” It was signed for the church by “Rev. Aug. Meyer, President” and “J.H. Fleskes, Secretary.” *Id.* at 17–19. It may speak to the pervasive irregularity of the entire arrangement that J.H. Fleskes, who signed on behalf of the St. Francis church, was also “the duly elected, qualified and acting School Treasurer for said School District, and, by virtue of his office, charged with the custody of all the public

Other examples suggest consciousness of guilt in the proffering of facially unbelievable testimony. For example, members of the school board and school officials testified that they never visited the school and had no idea that the sisters taught the students the catechism.<sup>51</sup> Or the officials involved in the scheme who were quite clear, after it unraveled, that they had always insisted that the public school operating in the St. Francis parochial school be operated according to law.<sup>52</sup> Or the member of the school board who testified that he gave the board the name of Sister Estella Martin to be the teacher of the school, but didn't know how he got her name except that it certainly was not from the priest in charge of the St. Francis church.<sup>53</sup>

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school funds of said school district, and holds the same subject to the order of the said Board of School Directors." *Id.* at 2.

<sup>51</sup> The board members and officers included Peter Beisch, Appellee's Amendment to Abstract at 6, Knowlton v. Baumhover, 166 N.W. at 202 (Iowa 1915) [hereinafter Knowlton Appellee's Amendment to Abstract] (testimony of Peter Beisch) ("Q. Did you ever visit the school? A. I didn't have anything to do with the school. Q. You didn't have much interest in the school? A. No sir."); Joe Dunck, *id.* at 16 (testimony of C.J. Dunck) ("Q. You never was [sic] inside of the school at any time while school was in session? A. No sir."); J.J. Egan, *id.* at 12–13 (testimony of J.J. Egan) ("Q. You didn't take pains to inform yourself about that before, did you? A. No sir, I never did. I never took pains to inform myself as to how the school was conducted in either of these rooms. Never was in this parochial school building."); Knowlton Appellant's Abstract, *supra* note 7, at 65–66 (testimony of J.J. Egan) ("I never knew of my own knowledge, whether the Catechism was taught there or not."); Charles Irlbeck, *id.* at 80 (testimony of Charles Irlbeck) ("I had no knowledge at any time that the upper room was run in any other manner than as a public school. Had no knowledge that there was any Catechism taught there. I never visited the school."); W.S. Pape, *id.* at 82 (testimony of W.S. Pape) ("I never visited the school. Never heard this school was being conducted as a parochial school. Never heard that the Catechism was being taught there."); B.B. Lemker, *id.* at 83 (testimony of B.B. Lemker) ("Never have been in this school room. . . . I did not know the Catechism was being taught in that school. I never heard of it. I have two children attending that school. One in the lower room and one in the upper room. Never heard from the children anything about teaching the Catechism in either room."); and Rudolph Schroer, *id.* at 88 (testimony of Rudolph Schroer) ("I was never in the school. Never visited either of the rooms."). W.T. Bohnenkamp, the County Superintendent of Schools, testified: "I did not hear that they had been teaching Catechism in this room until this trouble came up." *Id.* at 75 (testimony of W.T. Bohnenkamp).

<sup>52</sup> *Id.* at 62 (testimony of Joe Dunck, president of the school board in 1905 when the scheme was instituted) ("The upper room was to be for public school purposes. Personally, I insisted at the time that it be run strictly according to law."); and *id.* at 75 (testimony of W.T. Bohnenkamp, the superintendent of schools) ("[A]fter I came into office and found the condition I tried to make it a point to see that they lived up to the law as much as I could in regard to the public school matters.").

<sup>53</sup> Peter Beish testified that:

Q. Who gave you the name of the teacher that was employed by the school board for the year ending in June, 1914? . . . A. I can't understand that. Q. What is the fact about you and the Catholic priest of

A final example in *Knowlton* of people rather obviously prevaricating to facilitate the transfer of public funds to religious schools was the presence of religious iconography in the St. Francis school room rented for the public school. There was no dispute that the rented room contained religious iconography,<sup>54</sup> and that the nuns who were paid public funds to teach did so in their religious garb.<sup>55</sup> Nevertheless, Father August Myers, the St. Francis pastor in 1915, testified: “I have never noticed anything in the room upstairs different from other public schools.”<sup>56</sup>

On appeal, the Iowa Supreme Court restated the underlying rationale for the policy against supporting religious schools with public funds:

The right of a man to worship God or even to refuse to worship God and to entertain such religious views as appeals to his individual conscience without dictation or interference by any person or power, civil or ecclesiastical, is as fundamental in a free government like ours as is the right to life, liberty, or the pursuit of happiness. Included in that sacred right is that of the parent to instruct and guide his own children in religious training. *He has no right, however, to ask that the state through its school system shall employ its power or authority or expend money acquired by public taxation in training his children religiously.*<sup>57</sup>

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Maple River Junction agreeing as to the name of the teacher that should be reported to the board for the school? A. I can't understand it. Q. What is the fact about you and the Catholic priest who resided in Maple River, and had charge of St. Francis church, talking between yourselves as to who the teacher should be for that building? A. Well, we don't get the teachers, they come. . . . The name came before the board. I don't know how it got there. . . . I don't know how I happened to suggest the name of Sister Estella Martin.

Knowlton Appellee's Amendment to Abstract, *supra* note 51, at 4–5.

<sup>54</sup> Knowlton Appellant's Abstract, *supra* note 7, at 23–24 (testimony of W.T. Ralph) (“There was a picture of the Virgin Mary. Also of Christ wearing Thorns and some pictures of the Crucifixion in the library. That was in the north room on the second floor. It is the room described in this lease.”); *id.* at 39 (testimony of Anna Myers, a 13-year-old student) (“There were bible pictures on the wall. Christ on the Cross, and the Virgin Mary.”).

<sup>55</sup> Knowlton v. Baumhover, 166 N.W. 202, 204 (Iowa 1918) (“[T]he teachers were invariably arrayed in the striking robes of their order.”).

<sup>56</sup> Knowlton Appellant's Abstract, *supra* note 7, at 71 (testimony of Father August Myers). The superintendent of schools deserves points for being at least somewhat more honest than Father Myers. *Id.* at 73 (testimony of W.T. Bohnenkamp) (“I did not observe any difference in the conducting of that school than in any other public school that I was in the habit of visiting, except that Sister Stilla was teaching in the garb of a nun.”).

<sup>57</sup> *Knowlton*, 166 N.W. at 207 (emphasis added).

The *Knowlton* court was clear about the absolute ban on the use of public funds for religious education:

At the bar of the court every church or other organization upholding or promoting any form of religion or religious faith or practice is a sect, and to each and all alike is denied the right to use the public schools or the public funds for the advancement of religious or sectarian teaching.<sup>58</sup>

The “right to use . . . the public funds for the advancement of religious or sectarian teaching,” clearly rejected in *Knowlton* on the basis of the compulsion guarantee, is at issue in the education savings account program.

It might seem curious that such the elaborate scheme in *Knowlton* to secure public funds for a religious school could have been devised by a village priest and would have been implemented in only one isolated location. In fact, neither supposition is true.

There are indications in the *Knowlton* record that the practice complained of—leasing a sectarian school to the public school board and hiring its religious teachers as public school teachers—was not limited to the Maple River school. The county superintendent of public schools testified that in the Roselle Township, just south of the Maple River Township, teachers in a public school taught “clothed in the garb of a Sister of Charity.”<sup>59</sup> When the Iowa Supreme Court opinion came down affirming the trial court in *Knowlton*, the local newspaper in Carroll opined that the decision “will have a direct bearing on other communities in the county, and may be the means of settling out of court many of the questions that have been involved regarding conditions almost identical in character.”<sup>60</sup> And thirty-six years before *Knowlton*, the Iowa Supreme Court considered a case from Dubuque County,

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<sup>58</sup> *Id.* The Iowa Supreme Court upheld the trial court:

It has the authority . . . and it is its duty, to enjoin the defendants and their successors in office from directly or indirectly making any appropriation or use of the public funds for the support or in aid of such parochial school or of any so-called public school maintained or conducted in connection with such parochial school.

*Id.* at 214.

<sup>59</sup> Knowlton Appellant’s Abstract, *supra* note 7, at 76 (testimony of W.T. Bohnenkamp) (“Q. Have you in mind any public school building owned by the public wherein any teachers go clothed in the garb of a Sister of Charity? A. I haven’t this year. I had last year and previous years. Q. Where? A. In Roselle. Q. In a public school building? A. Yes sir.”). When asked whether the teacher who was a sister engaged in religious instruction, the superintendent’s answer was carefully framed: “Q. Was there any religious instruction conducted in that school by the teacher? A. Not in that building.” *Id.*

<sup>60</sup> THE CARROLL TIMES, Jan. 24, 1918, at 5.

the facts of which were similar.<sup>61</sup> In that case, the plaintiff alleged that the local school board “authorized and permitted school to be taught in a private school-house owned by the bishop of the Catholic church for the diocese of Iowa” and that the board “permitted the Catholic catechism to be studied, taught, learned, and recited in the public school of the district.”<sup>62</sup>

Nor was the scheme in *Knowlton* developed by Father Kuemper in 1905. The arrangement complained of in *Knowlton* was almost a textbook example of the “Poughkeepsie Plan,” a scheme developed in Poughkeepsie, New York more than sixty years earlier when Father Patrick E. McSweeney “devise[d] an ingenious solution to the education problem.”<sup>63</sup>

McSweeney arranged for the local school board [in Poughkeepsie, New York] to fund two parish schools, with the informal understanding that the school board hire qualified Catholics (Sisters of Charity) as instructors. In turn, he promised “[n]o religious exercise to be held, nor religious instruction given during the school hours.”<sup>64</sup>

From 1843 to 1898, the board of education was “renting from various church denominations and individuals [sic] school buildings and rooms in which to conduct the public schools . . .”<sup>65</sup> It was reported that schools were rented from “the Baptist, Methodist, Universalist, and Catholic denominations.”<sup>66</sup> Another part of the plan was “the employment as teachers of persons who wear the distinctive dress or garb of a religious order.”<sup>67</sup> Seven years before the same arrangement was initiated in

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<sup>61</sup> See *Scripture v. Burns*, 12 N.W. 760, 761 (Iowa 1882).

<sup>62</sup> *Id.* at 761. The “district court dismissed plaintiff’s petition . . . and refused to hear evidence supporting the allegations of the petition to the effect that the Catholic creed was taught in the school.” *Id.* The Supreme Court affirmed the district court on the procedural ground that plaintiff had not made the predicate demand required by statute and could not proceed by way of mandamus. *Id.*

<sup>63</sup> JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM: A HISTORY* 120 (2003). This is not to be confused with the contemporaneous “Poughkeepsie plan” in horse racing. *Handicap Racing to Save Harness Turf*, THE LEXINGTON HERALD, Apr. 4, 1909, at 14 (“[T]he Poughkeepsie plan, namely, all horses not standing for any portion of the money to be sent to the stable after the conclusion of the third heat and end the race at the fifth heat.”).

<sup>64</sup> MCGREEVY, *supra* note 63, at 120.

<sup>65</sup> *Religion in the Schools: State Supt. Skinner Finds the “Poughkeepsie Plan” Unlawful. City Must Own Its Houses, Teachers Must Be Required to Discontinue Use of Distinguishing Garbs of Orders*, N.Y. TIMES (Dec. 25, 1898), <https://timesmachine.nytimes.com/timesmachine/1898/12/25/102130079.pdf> [<https://perma.cc/LX4K-78EH>].

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

Maple River, the state superintendent of education in New York found the Poughkeepsie Plan unlawful and ordered it to be ended:

[T]his union of interests is no longer desirable nor for the best interests of the schools of the city. It has been and is a cause of irritation and discord among the patrons of the schools; is against the spirit of our institutions, which call for a complete and total severance of Church and State, and is against the letter and spirit of the Constitution. The public school system must be conducted in such a broad and catholic spirit that Jew and Protestant and Catholic alike shall find therein absolutely no cause for complaint as to the exercise, directly or indirectly, of any denominational influence. In this respect every school maintained at public expense should be free, open, and accessible, without reasonable ground for objection from any source whatever.<sup>68</sup>

Fifteen years before Father Kuemper and the Maple River school board acted, the Poughkeepsie Plan was replicated by St. Paul, Minnesota Catholic Archbishop John Ireland, in Faribault and Stillwater, Minnesota. That arrangement was ended in 1894.<sup>69</sup>

The scheme at issue in *Knowlton* replicated key elements of the Poughkeepsie Plan, although the Maple River execution was severely compromised by the practice between 1905 and 1914 of having the teaching sisters recite the catechism in the classroom during school hours.<sup>70</sup>

Nor were the schemes to gain access to public funding for religious schools limited to the Poughkeepsie Plan. Writing in 1941, one commentator noted the ubiquitous nature of restrictions on giving public funds to religious schools: “The

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<sup>68</sup> *Id.* That action was reported in at least one Iowa newspaper. *Sisters Cannot Teach, Public School Decision Against Poughkeepsie Plan*, THE CEDAR RAPIDS EVENING GAZETTE, Dec. 26, 1898, at 4 (reporting decision of New York State Superintendent of Public Instruction against the Poughkeepsie Plan).

<sup>69</sup> MCGREEVY, *supra* note 63, at 120–21. Archbishop Ireland’s advocacy was reported in at least one Iowa newspaper. *Archbishop Ireland’s Mission*, THE DAVENPORT DAILY TIMES, Jan. 6, 1892, at 1 (reporting that St. Paul Minnesota Archbishop Ireland was recalled to Rome for consultation with the Pope “regarding the parochial and public school systems of the United States” and noting that the Archbishop “believes in the adoption of the Poughkeepsie plan”).

<sup>70</sup> *Knowlton v. Baumhover*, Opinion at 3 (filed Sept. 21, 1915, *withdrawn*, Oct. 30, 1915) (Deemer C.J., with Ladd, Gaynor, and Salinger, JJ., concurring) (“The teaching of the catechism in the school was contrary to law, but the practice was discontinued in the manner stated and as it was abandoned in apparent good faith there is no need for an injunction to stop the proceeding.”).

constitutions of forty-six of the United States, thirty-seven of them by explicit reference to sectarian institutions, prohibit the appropriation of public money to schools controlled by religious organizations.”<sup>71</sup> Despite the state constitutional provisions forbidding such assistance, the author reported: “[S]cattered across most of these states by 1937 were at least 340 Catholic schools supported substantially by direct appropriation of public funds.”<sup>72</sup>

The same commentator discussed an Indiana case in which, during the depths of the Great Depression, the Vincennes public school authorities took over and operated the parochial schools in that city after the Catholic education authorities threatened to close the schools for financial reasons and send eight hundred students into the public school system.<sup>73</sup> The public school trustees passed a resolution providing:

[T]hat whereas the effects of the depression have brought about an economical condition in our city by reason of which an emergency exists regarding the operation and maintenance of the parochial schools of Vincennes and whereas the [trustees] are of the opinion that the patrons of our parochial schools are entitled to public aid and assistance during these extraordinary times in which we are living; therefore, be it resolved by the [trustees] that [they] assume the administrative and instructional obligation for the school children of the parochial schools . . . .<sup>74</sup>

On the basis of the finding, but without a formal lease and without paying any rent, the public trustees took over operation of the parochial schools.<sup>75</sup> The trustees hired a cohort of teachers for the parochial schools, all of whom “were Sisters and Brothers in various Catholic orders,” recommended by “various Roman Catholic colleges.”<sup>76</sup> The teachers were paid out of public funds.<sup>77</sup> Although the trustees resolved “that no sectarian instruction shall be permitted during school hours in said schools,” “[e]ach morning immediately prior to the beginning of the school the pupils of each room were caused to attend at the nearby church where they were given religious instructions for thirty minutes by the parish priest.”<sup>78</sup> As the trustees did not realign the attendance boundaries to take account of the new public schools,

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<sup>71</sup> Note, *Catholic Schools and Public Money*, 50 YALE L.J. 917, 917 (1941).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 918–19; *State ex rel. Johnson v. Boyd*, 28 N.E.2d 256, 260 (Ind. 1940).

<sup>74</sup> *Johnson*, 28 N.E.2d at 260 (quoting the July 28, 1933 resolution as amended on August 25, 1935).

<sup>75</sup> *Id.* at 261–62 (“Throughout the period in question the [public board] ‘has paid the administrative and instructional obligations’ of all of the schools mentioned from public school funds.”).

<sup>76</sup> *Id.* at 261.

<sup>77</sup> *Id.* at 262.

<sup>78</sup> *Id.* at 261.



the students who had attended the parochial schools continued to attend the same schools in their new public guise.<sup>79</sup>

The new public schools maintained the décor of the old parochial schools:

In addition to other pictures the school rooms in each of said buildings had hanging on the walls, in view of said students, a picture of Jesus, The Holy Family, The Crucifixion, and George Washington. They also each have an American Flag and a Holy Water fount [sic], in which is kept Holy Water for the use of the pupils. While teaching the teachers wore the characteristic robes of the orders to which they belonged and the sisters always wore a rosary and crucifix in view of the pupils.<sup>80</sup>

Based fundamentally on the errors of the district court in not making an “express finding that the schools in question were parochial schools during the period from 1933 to 1937,”<sup>81</sup> and in the district court not making a finding “that these schools were directed and controlled through the clerical government of the church exercised by and through the Bishop,”<sup>82</sup> the *Johnson* court found no reversible error.<sup>83</sup>

The commentator observed: “Of the nine judicial holdings dealing with the merits of arrangements closely analogous to that in Vincennes . . . eight have found a violation of the state constitution.”<sup>84</sup> One of the eight cases cited is *Knowlton*.<sup>85</sup>

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<sup>79</sup> *Id.* at 262.

<sup>80</sup> *Id.* at 261.

<sup>81</sup> *Id.* at 263.

<sup>82</sup> *Id.* at 266.

<sup>83</sup> *Id.* at 267.

<sup>84</sup> *Catholic Schools and Public Money*, *supra* note 71, at 924. The note cites *State ex rel. Pub. Sch. Dist. No. 6 v. Taylor*, 240 N.W. 573, 574 (Neb. 1932) (holding that the state is not required to fund school conducted as a religious school, “which is not a common or public school within the meaning of the Constitution”); *Collins v. Kephart*, 117 A. 440, 442 (Pa. 1921) (holding that the state cannot fund charitable activities of “any denominational or sectarian institution,” including a sectarian and denominational school); *Knowlton v. Baumhover*, 166 N.W. 202, 204 (Iowa 1918); *Williams v. Stanton Dist.*, 191 S.W. 507, 511–12 (Ky. Ct. App. 1917) (preventing public funds for Presbyterian school leased to public school board or teachers from sectarian school employed by the public school system); *Atchison, T. & S. F. R. Co. v. City of Atchison*, 28 P. 1000, 1001 (Kan. 1892) (invalidating taxes levied to support private and sectarian schools); *Synod of Dakota v. State*, 50 N.W. 632, 635 (S.D. 1891) (prohibiting tuition payments to a sectarian school); *Hlebanja v. Brewes*, 236 N.W. 296, 297 (S.D. 1931) (prohibiting tuition payments to sectarian schools); *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373, 377 (1882) (prohibiting transfer of public funds to sectarian orphanage); *Jenkins v. Inhabitants of Andover*, 103 Mass. 94, 103 (1869) (prohibiting transfer of public funds for school not under public control); *Opinion of the Justices*, 102 N.E. 464, 465 (Mass. 1913) (holding funds raised by taxation may not be used to support religious schools).

<sup>85</sup> *Catholic Schools and Public Money*, *supra* note 71, at 924 n.49.

Although not as directly on point as *Knowlton*, a few other Iowa cases are helpful in understanding the religious liberty compulsion guarantee. Two early Iowa Supreme Court cases dealt with what were termed “occasional and temporary” and “casual” uses of public buildings for religious purposes. *Davis v. Boget* involved the use of public school buildings for religious worship services on weekends.<sup>86</sup> The plaintiff raised the compulsion guarantee.<sup>87</sup> The court in effect conceded the violation but declined to interfere:

[W]e incline to think that the use of a public school building for Sabbath schools, religious meetings, debating clubs, temperance meetings and the like, and which, of necessity, must be occasional and temporary, *is not so palpably a violation of the fundamental law as to justify the courts in interfering.*<sup>88</sup>

Since the religious groups were responsible for any damages, the *Davis* court concluded, “the amount of taxes any one would be compelled to pay by reason of such use would never amount to any appreciable sum.”<sup>89</sup> In contrast, the education savings account program will cost Iowa taxpayers a third of a billion dollars in public funds annually when fully implemented, beyond any question a palpable violation.<sup>90</sup>

Six years after *Davis*, the Iowa Supreme Court again considered the compulsion guarantee in *Moore v. Monroe*.<sup>91</sup> *Moore* involved a challenge to the practice of

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<sup>86</sup> *Davis v. Boget*, 50 Iowa 11, 12–13 (1878).

<sup>87</sup> *Id.* at 15 (“It is argued that the permanent use of a public schoolhouse for religious worship is indirectly compelling the taxpayer to pay taxes for the building or repairing of places of worship.”). The *Davis* court relied upon *Townsend v. Hagan*, 35 Iowa 194 (1872) in the first division of its opinion, as to the authority of the electors, but the compulsion guarantee challenge was not raised in *Townsend*. See *Davis*, 50 Iowa at 2–3.

<sup>88</sup> *Id.* at 15 (emphasis added).

<sup>89</sup> *Id.* at 15–16.

<sup>90</sup> See *infra* note 221.

<sup>91</sup> 20 N.W. 475, 475 (Iowa 1884). In 1882, after *Davis* but before *Moore*, the Iowa Supreme Court considered a case, the facts of which were similar in some respects to *Knowlton: Scripture v. Burns*, 12 N.W. 760 (1882). In *Scripture*, the plaintiff alleged that the local school board “authorized and permitted school to be taught in a private school-house owned by the bishop of the Catholic church for the diocese of Iowa . . .” and that the board “permitted the Catholic catechism to be studied, taught, learned, and recited in the public school of the district . . .” *Id.* at 761. The “district court dismissed plaintiff’s petition . . . and refused to hear evidence supporting the allegations of the petition to the effect that the Catholic creed was taught in the school.” *Id.* The Supreme Court affirmed the district court on the procedural ground that plaintiff had not made the predicate demand required by statute and could not proceed by way of mandamus. The plaintiff’s claims were apparently only statutory in nature, the constitutional compulsion guarantee was not mentioned. In dictum, the Supreme Court allowed that school boards have the authority to rent space in which to conduct school:

public school teachers using class time to read from the Bible, recite the Lord's prayer, and sing religious songs.<sup>92</sup> The plaintiff parent alleged a violation of the compulsion guarantee.<sup>93</sup> Once again, the court in effect conceded the violation<sup>94</sup> but declined to interfere:

The object of the provision, we think, is not to prevent the casual use of a public building as a place for offering prayer, or doing other acts of religious worship, but to prevent the enactment of a law whereby any person can be compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship. The object, we think, was to prevent an improper burden.<sup>95</sup>

In contrast, the education savings account program will support activities which are pervasively religious, not in any sense casual.<sup>96</sup>

The Iowa compulsion guarantee was also construed in the context of religious education in a 1969 opinion of the Iowa Attorney General.<sup>97</sup> At issue was proposed legislation to give tuition grants of public funds to students at private—including religious—colleges and universities. The letter requesting the opinion gave some insight into the structure of the proposal:

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It cannot be doubted that the directors of a school-district may, in a proper case, or when the public school-house is out of repair, or insufficient, and in other cases then the best interest of the school would be subserved thereby, cause the school to be taught in a rented house instead of the public-school building.

*Id.* The *Scripture* court did not indicate whether it would be proper to rent such space from the Catholic bishop and teach sectarian creed in the rented space.

<sup>92</sup> *Moore*, 20 N.W. at 475.

<sup>93</sup> *Id.* In its opinion, the court noted that:

The plaintiff's position is that, by the use of the school-house as a place for reading the Bible, repeating the Lord's prayer, and singing religious songs, it is made a place of worship; and so . . . he, as a taxpayer, is compelled to pay taxes for building a repairing a place of worship.

*Id.* at 475–76.

<sup>94</sup> *Id.* at 476 (“For the purposes of the opinion it may be conceded that the teachers do not intend to wholly exclude the idea of worship. It would follow from such concession that the school-house is, in some sense, for the time being, made a place of worship.”).

<sup>95</sup> *Id.* at 476. The court again conceded the theoretical validity of the plaintiff's position: “It is, perhaps, not to be denied that the principle, carried out to its extreme logical results, might be sufficient to sustain the appellant's position . . .” *Id.*

<sup>96</sup> See discussion *infra* Section II.A.3.

<sup>97</sup> OFF. OF THE IOWA ATT'Y GEN., THIRTY-EIGHTH BIENNIAL REPORT OF THE ATTORNEY GENERAL FOR THE BIENNIAL PERIOD ENDING DECEMBER 31, 1970, at 139–40 (1970) [hereinafter HILL OPINION] (responding to state senator Hon. Eugene M. Hill). The Hill Opinion was signed by Attorney General Richard C. Turner, a Republican.

*Obviously proposing a policy of appropriating directly to the private colleges and universities would be unconstitutional.* Consequently, the proponents of Senate File 295 have chosen the historically traditional route of those seeking state support for private church related schools, and are terming the aid to be granted aid to the student and not to the colleges and universities.<sup>98</sup>

The Attorney General first observed that “it is commonly known and understood that a large percentage of the private schools and colleges in Iowa were founded by a church and are largely church supported and controlled.”<sup>99</sup> He noted that the definition of “accredited private institution” in the proposed legislation—the schools the students of which would have been eligible for public-funded tuition grants—“includes religious colleges as well as non-sectarian colleges.”<sup>100</sup>

As to the question of direct appropriations to religious schools, the Attorney General opined: “There is no question but that a law appropriating funds *directly*, to religious colleges in *direct* support thereof, would violate Iowa’s constitutional prohibition against making a law respecting an establishment of religion. This is the clear requirement of the holding of the Iowa Supreme Court in *Knowlton vs. Baumhover . . .*”<sup>101</sup>

The opinion then turns to the question of indirect appropriations of public funds to religious schools. Noting *Everson v. Board of Education*,<sup>102</sup> a 1947 United States Supreme Court parochial school transportation case, the Attorney General notes the Supreme Court’s contention that the Catholic schools received no state funds. Quoting the *Everson* majority: “The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.”<sup>103</sup>

“In short,” the Attorney General states, “it was the bus company, and not the schools, that got the money.”<sup>104</sup> But that was not the situation before him with the tuition grant scheme:

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<sup>98</sup> *Id.* (emphasis added).

<sup>99</sup> *Id.* at 140.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 141. The Attorney General’s reference to state constitution’s “prohibition against making a law respecting an establishment of religion” is imprecise, since *Knowlton* is cast in terms of the compulsion prohibition, not in terms of the establishment clause, of the state constitution. *Knowlton v. Baumhover*, 166 N.W. 202, 206 (Iowa 1918). The Attorney General says of *Knowlton*: “Although *Knowlton vs. Baumhover* was decided in 1918, it is still the leading Iowa Supreme Court case on the subject of use of public funds for private schools . . .” HILL OPINION, *supra* note 97, at 142.

<sup>102</sup> *Everson v. Bd. of Educ. of Ewing TP.*, 330 U.S. 1 (1947).

<sup>103</sup> HILL OPINION, *supra* note 97, at 143 (quoting *Everson*, 330 U.S. 1).

<sup>104</sup> *Id.*

The situation contemplated by this bill is entirely different. Here it is not a bus company but the colleges that will get the money; the grants are related to the tuition; it is contemplated that the student will pay it to the college; and provisions are made for the State's recovery of the tuition grants from the college, not from the student, if the student should drop out of college and become entitled to a refund. So the students act only as conduits through whom the public funds will flow to the treasuries of the colleges.<sup>105</sup>

The Attorney General dismissed the indirect path by which the money would get from the state treasury to the religious schools:

[The tuition grant bill] does not *directly* support sectarian schools or colleges. Under this proposed new Iowa law, the funds would be paid directly to students who have enrolled in the private colleges and not directly to the colleges. But . . . it is strictly a tuition grant. It is granted for no other purpose than paying tuition or reimbursing the student therefor. The college gets the money.<sup>106</sup>

Arguing that his conclusion was supported by *Everson*, the Attorney General said: "however indirectly accomplished, public funds may not be granted to private colleges."<sup>107</sup>

The Attorney General opined that the proposed indirect tuition transfers to religious colleges would violate Article I, Section 3, Clause 3 of the Iowa Constitution:

The legislature may not by means of statutory enactment do indirectly that which it is prohibited from doing directly, by constitutional provision. If this provision can stand against the prohibition of our constitution then expedients can be devised and circumlocutions discovered by ingenious and imaginative minds to avoid the same prohibition as it relates to our common schools and high schools and ultimately there will be little or no difference to the taxpayers between the burden of supporting a

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* ("[I]t is clear that the famous *Everson* decision is not authority in support of the theory of the proposed bill. On the contrary, the careful precision of the majority opinion impels us to the view that, however indirectly accomplished, public funds may not be granted to private colleges.").

public school and the burden of supporting a private school. For surely there is presently little or no difference between the State's handing public funds directly to a private school and handing them to a pupil to do so.<sup>108</sup>

Given the clear and compelling analysis of *Knowlton* and the Attorney General's opinion, it is remarkable that one of the few times the Iowa Supreme Court has construed the compulsion guarantee, albeit in a case not involving schools, it got the matter completely wrong.<sup>109</sup> In the 1976 case of *Rudd v. Ray*, the Iowa Court held that, notwithstanding the compulsion guarantee, it is permissible for the State of Iowa to use public funds to provide dedicated chapels and state-employee chaplains in the state's prisons.<sup>110</sup> In coming to this remarkable conclusion, the *Rudd* majority conflated the compulsion guarantee with the establishment clause of the Iowa constitution.<sup>111</sup> The *Rudd* majority asserted:

Like similar provisions included in the constitution of all sister states Art. I, § 3 has a common origin and parallel history with the First Amendment to the United States Constitution. All such provisions were aimed at disestablishment of state churches or, in cases of later western states such as Iowa, at preventing the establishment of state churches.<sup>112</sup>

The *Rudd* majority did concede that the language of the Iowa constitution is different than that of the Federal Constitution in that Iowa includes *both* language that exactly tracks the Establishment Clause and, in addition, the compulsion guarantee. But, they asserted, the difference in language did not suggest that the framers of the state constitution intended anything other than a redundant guarantee against a state church:

To the extent our provision differs from the First Amendment to the United States Constitution we think our framers were merely addressing the evils incident to the state church. The framers addressed and provided a defense against the evils incident to a state church, forced taxation to support the same, and the payment of ministers from taxation.<sup>113</sup>

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<sup>108</sup> *Id.* at 144.

<sup>109</sup> This discussion is based on the analysis of *Rudd* in Allan W. Vestal, *Faithfully Enforcing the Religious Liberty Guarantees of the Northwest Territory States*, 34 B.Y.U. J. PUB. L. 403, 426–31 (2020) [hereinafter Vestal, *Faithfully Enforcing*].

<sup>110</sup> 248 N.W.2d 125, 128 (Iowa 1976).

<sup>111</sup> IOWA CONST. art. I, § 3.

<sup>112</sup> *Rudd*, 248 N.W.2d at 130.

<sup>113</sup> *Id.* at 132. *But see* *Griswold Coll. v. State*, 46 Iowa 275, 282 (1877). In *Griswold*, the

The *Rudd* majority conflated the compulsion guarantee and the Establishment Clause, ignoring the plain meaning of the former and the unambiguous history of the latter. The history of state constitution religious liberty adoptions between 1789 and the drafting of the Iowa compulsion guarantee in 1844 helps us to understand the error of the *Rudd* majority.

The *Rudd* majority was grossly misleading in its presentation of the history of state constitutional adoptions of provisions paralleling the Federal Establishment Clause. The majority speaks of “provisions . . . aimed at disestablishment of state churches or, in cases of later western states such as Iowa, at preventing the establishment of state churches.”<sup>114</sup> “[S]imilar provisions,” the *Rudd* majority asserts, were included in the constitution of all the “sister states . . .”<sup>115</sup> This is simply not true.

Following the adoption of the First Amendment, fifteen states were admitted to the Union prior to Iowa in 1846. Fourteen of those fifteen states adopted free-exercise provisions modeled on the Free Exercise Clause of the First Amendment.<sup>116</sup> In contrast, only one—Alabama in 1819—tracked the Establishment Clause of the First Amendment.<sup>117</sup> Consistent with the analysis that establishment had been superseded by issues of compulsion and preference, eleven of the fifteen states admitted between 1789 and 1846 had compulsion guarantees<sup>118</sup> and eleven had preference guarantees.<sup>119</sup> Fourteen of the fifteen had a compulsion guarantee, a preference guarantee, or both.<sup>120</sup>

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Iowa Supreme Court considered whether a house constructed by an Episcopal college for one of its professors was exempt from taxation. The Court reversed the trial court determination that the house was taxable. *Id.* In doing so, the court addressed the argument that exempting church property from taxation was a violation of Article 1, Section 3, Clause 3, the compulsion guarantee:

The argument is, that exemption from taxation of church property is the same thing as compelling contribution to churches to the extent of the exemption. We think the constitutional prohibition extends only to the levying of tithes, taxes, or other rates for church purposes, and that it does not include the exemption from taxation of such church property as the legislature may think proper.

*Id.* In its analysis, the court implicitly both rejected the later *Rudd* analysis subsuming the compulsion guarantee under the establishment clause and confirmed that educational activities were within the scope of the compulsion guarantee’s coverage.

<sup>114</sup> *Rudd*, 248 N.W.2d at 130.

<sup>115</sup> *Id.*

<sup>116</sup> Vestal, *Faithfully Enforcing*, *supra* note 109, at 428 n.126.

<sup>117</sup> ALA. CONST. art. I, § 7 (1819) (“There shall be no establishment of religion by law . . .”).

<sup>118</sup> Vestal, *Faithfully Enforcing*, *supra* note 109, at 428 n.128.

<sup>119</sup> *Id.* at 428 n.129. Preference guarantees protect against the state favoring one religion over another. *Id.* at 422–24. For example, the Wisconsin constitutional provision reads, “nor shall . . . any preference be given by law to any religious establishments or modes of worship . . .” WIS. CONST. art. I, § 18.

<sup>120</sup> The fourteen states are: Alabama, Arkansas, Florida, Illinois, Indiana, Kentucky, Maine, Minnesota, Mississippi, Missouri, Ohio, Tennessee, Texas, and Vermont.

“Following the admission of Iowa to the Union in 1846, the admission of the next fifteen states extended to Wyoming in 1890. All fifteen of those states adopted free-exercise provisions.”<sup>121</sup> “Not one of the fifteen tracked the Establishment Clause of the First Amendment.”<sup>122</sup> Nevertheless, nine of the fifteen had compulsion guarantees<sup>123</sup> and thirteen had preference guarantees.<sup>124</sup> Thirteen of the fifteen had a compulsion guarantee, a preference guarantee, or both.<sup>125</sup> “The admission of the last six states following Wyoming in 1890 present[] a somewhat different picture,” but understandably so.<sup>126</sup> Once again, free-exercise provisions were common, with five of the six states adopting them. But in a change from the pattern following adoption of the First Amendment, half of the new states tracked the Establishment Clause.<sup>127</sup> The reasons for the three Establishment Clause exceptions are clear. Utah in 1895 was unusual because of its history with the Church of Jesus Christ of Latter-day Saints. By the time Alaska and Hawaii became states in 1959, Establishment Clause jurisprudence had ceased to be dormant. Among the final six states, only New Mexico had either a compulsion or preference provision; it had both.

The assertion of the *Rudd* majority that establishment language was included in the constitutions of all the states is wrong: only four states have an establishment clause, so framed, in their initial constitutions.

The majority opinion in *Rudd* was based on an egregious misunderstanding of American religious and political history. The Federal Establishment Clause and the Iowa compulsion guarantee were drafted at very different times, responding to very different conditions. Treating the Iowa compulsion guarantee as a mere restatement of the Establishment Clause is simply wrong.<sup>128</sup>

The error of the *Rudd* majority was avoidable because by 1976, when the error was made, the Iowa Supreme Court had already correctly discussed the compulsion guarantee as a religious liberty protection distinct from the establishment clause in *Griswold*,<sup>129</sup> *Davis*,<sup>130</sup> and *Moore*.<sup>131</sup> The *Rudd* error was particularly egregious

<sup>121</sup> Vestal, *Faithfully Enforcing*, *supra* note 109, at 428–29.

<sup>122</sup> *Id.* at 429.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> The thirteen states are: California, Colorado, Idaho, Kansas, Minnesota, Montana, Nebraska, Nevada, North Dakota, South Dakota, West Virginia, Wisconsin, and Wyoming. *See* Vestal, *Faithfully Enforcing*, *supra* note 109, at 429 n.132.

<sup>126</sup> *See id.* at 429.

<sup>127</sup> UTAH CONST. art. I, § 4 (“The State shall make no law respecting an establishment of religion . . . .”); ALASKA CONST. art. I, § 4 (“No law shall be made respecting an establishment of religion . . . .”); HAW. CONST. art. I, § 4 (amended 1978) (“No law shall be enacted respecting an establishment of religion . . . .”).

<sup>128</sup> Vestal, *Faithfully Enforcing*, *supra* note 109, at 429–30.

<sup>129</sup> *See generally* *Griswold Coll. v. State*, 46 Iowa 275 (1877).

<sup>130</sup> *See generally* *Davis v. Boget*, 50 Iowa 11 (1878).

<sup>131</sup> *See generally* *Moore v. Monroe*, 20 N.W. 475 (Iowa 1884).



because the Iowa Supreme Court had correctly interpreted the state's compulsion guarantee at length six decades earlier, in *Knowlton*.<sup>132</sup> It is, perhaps, indicative of the intellectual weakness of the *Rudd* majority opinion that it didn't even address the substance of *Knowlton*.<sup>133</sup>

The analyses of the Iowa authorities that have carefully construed it confirm that the compulsion guarantee of Article 1, Section 3, Clause 3 is distinct from the establishment provision of the first clause. Further, the *Knowlton* decision makes it clear that the use of tax-generated public funds for religious schools is a violation of the compulsion guarantee.<sup>134</sup>

### *B. The Historical Record and Setting of the Iowa Compulsion Guarantee*

When considering the compulsion guarantee, it is helpful to look at the history of the Iowa constitutional conventions where it was drafted, and the historical context in which the adoption of the compulsion guarantee took place.

The Iowa compulsion guarantee was included in the first constitution drafted for the state in 1844.<sup>135</sup> The historical record is quite spare as to what the drafters intended. There are no available contemporaneous statements of the constitutional convention delegates,<sup>136</sup> and the reports of the debates include many topics related

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<sup>132</sup> Vestal, *Faithfully Enforcing*, *supra* note 109, at 430.

<sup>133</sup> The majority opinion cites *Knowlton* only once, for the proposition that “[w]e have considered Art. I § 3, in very few cases,” and contains no substantive analysis of the case. *See* *Rudd v. Ray*, 248 N.W.2d 125, 132 (Iowa 1976). In contrast, in his persuasive dissent, Justice Uhlenhopp cited *Knowlton* as a main case on the compulsion guarantee and relied on its substance: “In the *Knowlton* case this court stated broadly, ‘In this state the Constitution (article I § 3) forbids the establishment by law of any religion or interference with the free exercise thereof *and all taxation for ecclesiastical support.*’” *See id.* at 135 (Uhlenhopp, J., dissenting) (citing *Knowlton v. Baumhauer*, 166 N.W. 202, 207 (Iowa 1918)).

<sup>134</sup> *See Knowlton*, 166 N.W. at 214.

<sup>135</sup> Allan W. Vestal, “*In the Name of Heaven, Don’t Force Men to Hear Prayers*”: *Religious Liberty and the Constitutions of Iowa*, 66 *DRAKE L. REV.* 355, 431–33 (2018) [hereinafter Vestal, *In the Name of Heaven*]. The constitution of 1844 was drafted in connection with the Iowa Territory’s first ill-fated attempt at statehood. *Id.* at 394. A conflict with Congress about the boundaries of the new state resulted in the rejection of the initial proposal by the voters on two occasions. *Id.* at 394–95. Iowa gained statehood in 1846 when the drafters and voters accepted the congressional preference on boundaries. *Id.* at 396. The constitution of 1844 became the basis for the successful constitution of 1846, and the compulsion guarantee language is identical. *Compare* IOWA CONST. art. II, § 3 (1844), *with* IOWA CONST. art. I, § 3 (1846).

<sup>136</sup> Vestal, *In the Name of Heaven*, *supra* note 135, at 433; *see* FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846 ALONG WITH PRESS COMMENTS AND OTHER MATERIALS ON THE CONSTITUTIONS OF 1844 AND 1846, at 9 (Benjamin F. Shambaugh ed., 1900) [hereinafter SHAMBAUGH, FRAGMENTS].

to the bill of rights, but no debates of the compulsion guarantee itself.<sup>137</sup> The compulsion guarantee was not the subject of discussion during either the constitutional convention of 1846 or the gathering in 1857, when the current constitution was adopted.<sup>138</sup>

However, there are episodes from the constitutional conventions that aid in our understanding of the intention behind the compulsion guarantee. Professor Benjamin F. Shambaugh, the esteemed early 20th-century Iowa historian set the context for one episode from the 1844 constitutional convention:

[T]he pioneers of Iowa were not always puritan in observing the forms of religion. Their liberal attitude and their fearless courage in expressing views on so delicate a subject were displayed in an interesting debate in the Convention on a resolution offered by Mr. Sells to the effect “that the Convention be opened every morning by prayer to Almighty God.”<sup>139</sup>

After initial attempts at compromise—having a prayer before the convention came to order and “providing a room for those who did not wish to hear prayers”—the issue was joined.<sup>140</sup> It is telling that the delegates discarded the language of establishment for the words of voluntarism: voluntary, force, and compulsion.<sup>141</sup> One delegate framed his opposition to official prayer in terms of violating the natural rights of the members:

Mr. Kirkpatrick said that he, too, believed in a “superintending Providence” that “guided and controlled our actions.” He was a firm believer in Christianity, but he “did not wish to enforce prayer upon the Convention.” Prayer, he argued was a moral precept which could not be enforced without violating or infringing the “natural rights” of the members to worship God each in his own way. If “we can enforce this moral obligation, then we have

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<sup>137</sup> Vestal, *In the Name of Heaven*, *supra* note 135, at 433; *see* SHAMBAUGH, FRAGMENTS, *supra* note 136, at 9.

<sup>138</sup> Vestal, *In the Name of Heaven*, *supra* note 135, at 437–38; *see* BENJAMIN F. SHAMBAUGH, HISTORY OF THE CONSTITUTIONS OF IOWA 299–300 (1902) (regarding the 1846 convention) [hereinafter SHAMBAUGH, HISTORY OF THE CONSTITUTIONS]; 1 W. BLAIR LORD, THE DEBATES OF THE CONSTITUTIONAL CONVENTION; OF THE STATE OF IOWA, ASSEMBLED AT IOWA CITY 101 (Luse, Lane & Co. 1857).

<sup>139</sup> SHAMBAUGH, HISTORY OF THE CONSTITUTIONS, *supra* note 138, at 186; BENJAMIN F. SHAMBAUGH, THE CONSTITUTIONS OF IOWA 124–25 (1934) [hereinafter SHAMBAUGH, CONSTITUTIONS OF IOWA]; SHAMBAUGH, FRAGMENTS, *supra* note 136, at 10.

<sup>140</sup> Vestal, *In the Name of Heaven*, *supra* note 135, at 381–82.

<sup>141</sup> *See id.* at 383–84.

a right . . . to make every member of this Convention go upon his knees five times a day.” Mr. Kirkpatrick cared nothing for precedent. “This was a day of improvement. Let those who believed so much in prayer, pray at home.” After all “public prayer was too ostentatious.”<sup>142</sup>

Another delegate framed his opposition in terms of compulsion and violation of the rights of man:

Mr. Bailey . . . thought that “people were becoming more liberal in [their religious] sentiment. No man could say that he ever opposed another on account of religion; he respected men who were sincerely religious; but he wanted to have his own opinions.” Mr. Bailey feared that members might be compelled, under the resolution, “to hear what they were opposed to. This was contrary to the inalienable rights of man. If members did not feel disposed to come, it took away their happiness, contrary to the Declaration of Independence and the principle laid down by Thomas Jefferson, the Apostle of Liberty.”<sup>143</sup>

One delegate opposed the resolution for official prayer “because he thought that it was inconsistent with the principle of religious freedom as set forth in the Bill of Rights.”<sup>144</sup> Another announced his opposition simply: “[i]n the name of Heaven . . . don’t force men to hear prayers.”<sup>145</sup> In the end, the 1844 convention rejected the proposal for official prayer by a vote of forty-four to twenty-six.<sup>146</sup>

Another episode, which occurred during the 1857 convention, also gives an indication of the thinking of the conventions as to matters of religion and helps relate to the religious landscape of the age. One of the delegates proposed changing the wording of the establishment clause.<sup>147</sup> The draft provided: “the general assembly shall make no law respecting *an* establishment of religion.”<sup>148</sup> The proposal was to change “*an* establishment of religion” to “*the* establishment of religion.”<sup>149</sup>

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<sup>142</sup> SHAMBAUGH, CONSTITUTIONS OF IOWA, *supra* note 139, at 125–26.

<sup>143</sup> *Id.* at 127–28 (alteration in original).

<sup>144</sup> *Id.* at 128.

<sup>145</sup> *Id.* at 129.

<sup>146</sup> Vestal, *In the Name of Heaven*, *supra* note 135, at 393. The vote, forty-four to twenty-six, was technically to indefinitely postpone consideration of the resolution; it was, however, never brought back for consideration. SHAMBAUGH, CONSTITUTIONS OF IOWA, *supra* note 139, at 129.

<sup>147</sup> Vestal, *In the Name of Heaven*, *supra* note 135, at 438.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

One of the other delegates explained: “As the section stands now, it is equivalent to saying that there shall be no law for the establishment of any religion. If it was changed so as to read ‘*the* establishment of religion,’ it might seem that it referred to the establishment of some particular religion.”<sup>150</sup> The broader, “an establishment of religion,” language was retained.<sup>151</sup>

A great deal can be learned as to the drafters’ rationale behind the compulsion guarantee by reviewing the history of the times during which the drafters met and acted. The tripartite religious liberty treatment of Iowa’s Constitution—containing an establishment clause, a free exercise clause, and a compulsion guarantee—is explained by the religious landscape of the nation in 1844 when the drafters first met. By that time, the nation was approaching the end of the Second Great Awakening, the Protestant religious revival which began in 1790 and lasted for the next sixty years.<sup>152</sup> Religion was no longer narrow and hierarchical; it had become individual and democratic. Charles Eliot Norton, editor of the *North American Review* explained it:

The relation between God and the soul is original for every man. His religion must be his own. No two men think of God alike. No man or men can tell me what I must think of him. If I am pure of heart, I see him, and know him;—& creeds are but fictions that have nothing to do with the truth.<sup>153</sup>

As a result of the Second Great Awakening, religion in the United States became voluntary and democratic. If every American could speak with God and know his or her own religious truth, if each person’s understanding was as valid as every other person’s, then there was no basis upon which any civil authority could legitimately discriminate among them. Nor could any civil authority legitimately force a citizen to participate in, or give support to, a religious program other than his or her own.<sup>154</sup>

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<sup>150</sup> W. BLAIR LORD, *supra* note 138, at 1007; Vestal, *In the Name of Heaven*, *supra* note 135, at 438.

<sup>151</sup> IOWA CONST. art. 1, § 3 (“The general assembly shall make no law respecting an establishment of religion.”).

<sup>152</sup> See Vestal, *In the Name of Heaven*, *supra* note 135, at 371–72.

<sup>153</sup> *Id.* at 372–73; JAMES TURNER, WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA 133 (quoting Charles Eliot Norton, “editor of the nation’s most respected magazine, the *North American Review*,” as he “spelled out his basic principle of belief for a Midwestern minister” in 1865).

<sup>154</sup> See generally A COSMOPOLITE, A REVIEW OF THE PROSECUTION AGAINST ABNER KNEELAND, FOR BLASPHEMY (Boston 1835). A pamphleteer wrote at the time of the blasphemy trial of Abner Kneeland, the last man imprisoned in the United States for that crime of conscience, describing the spirit of his contemporaries:

[T]he public . . . [he said] are a new race of young people, ardent, generous, liberal, moral people; and though we would not say that a

The voluntary and democratic character of religion in the United States was reflected in an evolution in the status of religious denominations as established official state churches. By 1819, only one of the original thirteen colonies, Massachusetts, still had an established church.<sup>155</sup> It lingered, in greatly weakened form until 1836.<sup>156</sup> Thus, by the time the drafters convened to write Iowa's first constitution in 1844, no state in the Union had an established church.<sup>157</sup>

As Alexis de Tocqueville wrote in 1835, the separation of church and state was complete.<sup>158</sup> The disestablishment of American churches had been accomplished and the establishment issue was dead:

I found that all of these men differed among themselves only on the details; but all attributed the peaceful dominion that religion exercises in their country principally to the complete separation of Church and State. I am not afraid to assert that, during my visit in America, I did not meet a single man, priest or layman, who did not agree on this point.<sup>159</sup>

Thus, when Iowa was admitted to the Union, it was simply not within the contemplation of state constitution drafters that a state might establish an official church.

Through the Second Great Awakening, the drafters of the initial constitutions of newly admitted states drafted “new types of provisions to address the religious liberty problems their new state governments might realistically encounter.”<sup>160</sup> Might the state use public funds to support religious activities, not of a single established state church, but of any church or churches? Might the state treat some churches differently than others, not in the sense of establishing a single state church, but rather by treating some churches more favorably than others?

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majority of them are indifferent to the truths of the christian religion, or unbelievers in its dogmas, we do state it as our decided opinion, that a vast majority are disposed to have perfect freedom of thought and of discussion. . . . [W]hen coercion and the power of the law, are called in support or to spread opinions, then will be seen the rising up of the liberal spirit of the age. This is the prevalent, existing feeling. . . .

*Id.* at 31.

<sup>155</sup> Two, Pennsylvania and Rhode Island, never had established state churches. Ten were disestablished by 1819: Delaware (1776), New Jersey (1776), North Carolina (1776), New York (1777), Virginia (1776–79), Maryland (1785), South Carolina (1790), Georgia (1798), Connecticut (1818), and New Hampshire (1819). Vestal, *Faithfully Enforcing*, *supra* note 109, at 410, 411 n.41.

<sup>156</sup> *Id.* at 411.

<sup>157</sup> Among the states other than the original thirteen, Vermont disestablished in 1807 and the remaining states entered the union without established state churches. *Id.* at 411 n.41.

<sup>158</sup> *Id.* at 411.

<sup>159</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 480 (Eduardo Nolla ed., James T. Schleifer, trans., Liberty Fund 2012) (1835).

<sup>160</sup> Vestal, *Faithfully Enforcing*, *supra* note 109, at 412.

These drafters developed nuanced clauses in response to the situation in which they found themselves in the 19th century. Through the middle of the century, when Iowa was admitted, they adopted two types of “post-establishment religious liberty guarantees.”<sup>161</sup> Compulsion guarantees protected against citizens being compelled to participate in or support religious activities through taxes or otherwise. Preference guarantees protected against the state favoring one religion over another.<sup>162</sup> In the Iowa constitutions of 1844, 1846, and 1857, the drafters included a compulsion guarantee but not a preference guarantee.

There are indications in history as to how Iowans of the 19th century interpreted the compulsion guarantee. For example, in his 1876 inaugural address, Iowa Governor Samuel J. Kirkwood, a Republican, spoke of the prospect of using state funds to support religious schools:

Fears have of late been freely expressed in certain states, and to some extent in our own, that it is a settled purpose with some to divert the school-fund from its legitimate object, and use it, at least partially, for the maintenance of private and sectarian schools, and thus eventually to destroy the school system. I hope this is a groundless fear, or, that if such purpose has been entertained, it will be abandoned.<sup>163</sup>

Governor Kirkwood continued, making what is presumably a reference to the Constitutional religious liberty protection of the compulsion guarantee: “Persistence in it will certainly place those engaged in it in direct hostility to the settled and cherished policy of the state . . . .”

The historical record and setting confirm that the compulsion guarantee of Article 1, Section 3, Clause 3 is religious liberty protection, assuring that citizens are not required to support religious practices in which they do not believe. Reflecting the voluntary and democratic ethos of the period, the compulsion guarantee was not motivated by an antipathy towards religion or any particular religions. Rather, it was motivated by a desire to protect individual autonomy in matters of faith.<sup>164</sup> It was not, in short, a Blaine Amendment. Iowa never adopted that type of anti-Catholic provision. Indeed, when the Iowa compulsion guarantee was drafted, in 1844, James G. Blaine, after whom the odious amendments are named, was a mere boy of 14.<sup>165</sup>

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<sup>161</sup> *Id.*

<sup>162</sup> Later, in the last quarter of the nineteenth century, many states adopted a third type of state constitutional religious provision, the Blaine Amendments. These provisions grew out of anti-Catholic bias and were an attempt to preclude the use of state funds to support Catholic schools. Iowa did not adopt a Blaine Amendment. *Id.* at 424–26.

<sup>163</sup> Inaugural Address of Samuel J. Kirkwood, Governor of Iowa Delivered Before the Two Houses of the General Assembly January 13, 1876, at 10 (Des Moines, R.P. Clarkson 1876).

<sup>164</sup> See Vestal, *Faithfully Enforcing*, *supra* note 109, at 409.

<sup>165</sup> See *id.* at 424.

*C. The Origins of the Iowa Compulsion Guarantee*

Finally, when considering the compulsion guarantee, it is helpful to look at where the language of the provision came from and how that language has been interpreted by the courts of the state of origin.

The specific wording of the Iowa compulsion guarantee is important. Twenty-eight states have compulsion guarantees.<sup>166</sup> Their wording divides them into two groups. The first, larger group are those that speak merely in terms of “supporting” religious activities. For example, South Dakota’s compulsion guarantee provides: “No person shall be compelled to attend or support any ministry or place of worship against his consent . . . .”<sup>167</sup> Similarly, Minnesota provides: “nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent . . . .”<sup>168</sup> Twenty-four of the twenty-eight states with compulsion guarantees can be characterized as such “support guarantees.”<sup>169</sup>

The remaining four of the twenty-eight compulsion guarantee states can be characterized as having “taxation guarantees.” These guarantees speak specifically in terms of not compelling citizens to pay taxes to support religious activities. For example, Michigan’s compulsion guarantee states: “No person shall be compelled . . . against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion.”<sup>170</sup> Alabama,<sup>171</sup> Iowa,<sup>172</sup> Michigan,<sup>173</sup> and New Jersey<sup>174</sup> currently

<sup>166</sup> See *infra* Appendix A.

<sup>167</sup> S.D. CONST. art. VI, § 3.

<sup>168</sup> MINN. CONST. art. I, § 16.

<sup>169</sup> ARK. CONST. art. II, § 24; COLO. CONST. art. II, § 4; CONN. CONST. art. VII; DEL. CONST. art. I, § 1; ILL. CONST. art. I, § 3; IND. CONST. art. I, § 4; KAN. CONST., BILL OF RIGHTS § 7; KY. CONST. § 5; MD. CONST., DECLARATION OF RIGHTS art. 36; MINN. CONST. art. I, § 16; MO. CONST. art. I, § 6; NEB. CONST. art. I, § 4; N.M. CONST. art. II, § 11; OHIO CONST. art. I, § 7; PA. CONST. art. I, § 3; R.I. CONST. art. I, § 3; S.D. CONST. art. VI, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 6; VT. CONST. ch. I, art. 3; VA. CONST. art. I, § 16; W. VA. CONST. art. III, § 15; WIS. CONST. art. I, § 18.

<sup>170</sup> MICH. CONST. art. I, § 4.

<sup>171</sup> ALA. CONST. art. I, § 3 (“[T]hat no one shall be compelled by law . . . to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry . . .”).

<sup>172</sup> IOWA CONST. art. I, § 3 (“[N]or shall any person be compelled to . . . pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.”).

<sup>173</sup> MICH. CONST. art. I, § 4 (“No person shall be compelled . . . against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion.”).

<sup>174</sup> N.J. CONST. art. I, § 3 (“[N]or shall any person be obliged to pay tithes, taxes, or other

have constitutions that use the “tithes, taxes or any other rates” formulation.<sup>175</sup> The first constitution to use the formulation was New Jersey in 1776.<sup>176</sup> By the time Iowa joined the Union in 1846, Georgia (1798),<sup>177</sup> Alabama (1819),<sup>178</sup> and Michigan (1835)<sup>179</sup> adopted the formulation, and New Jersey passed a second constitution (1844)<sup>180</sup> retaining it. Following Iowa in 1844, “tithes, taxes or any other rates” formulations were readopted by Michigan (1850),<sup>181</sup> Iowa (1857),<sup>182</sup> Alabama (1861),<sup>183</sup> Alabama (1865),<sup>184</sup> Alabama (1901),<sup>185</sup> Michigan (1908/1909),<sup>186</sup> New Jersey (1947),<sup>187</sup> Michigan (1963),<sup>188</sup> and Alabama (2022).<sup>189</sup>

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rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.”).

<sup>175</sup> Georgia used the formulation in its constitution of 1798. GA. CONST. art. IV, § 10 (1798) (“[N]or shall he ever be obliged to pay tithes, taxes, or any other rate, for the . . . maintenance of any minister or ministry . . .”). Subsequent Georgia constitutions omitted the formulation, starting with the constitution of 1861. GA. CONST. art. I, § 7 (1861).

Three other states have compulsion guarantees that use some similar terminology. Idaho has language prohibiting compulsion to pay tithes, but not taxes. IDAHO CONST. art. I, § 4 (“No person shall be required to . . . pay tithes against his consent . . .”). Virginia and West Virginia have constitutional provisions which preclude the legislature from authorizing religious societies or state subdivisions from passing taxes for the support of any ministry. VA. CONST. art. I, § 16 (“And the General Assembly shall not . . . pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax . . . for the support of any church or ministry . . .”); W. VA. CONST. art. III, § 15 (“[A]nd the Legislature shall not . . . pass any law requiring or authorizing any religious society, or the people of any district within this state, to levy on themselves, or others, any tax . . . for the support of any church or ministry . . .”).

<sup>176</sup> N.J. CONST. art. XVIII (1776).

<sup>177</sup> GA. CONST. art. IV, § 10 (1798).

<sup>178</sup> ALA. CONST. art. I, § 3 (1819).

<sup>179</sup> MICH. CONST. art. I, § 4 (1835).

<sup>180</sup> N.J. CONST. art. I, § 3 (1844).

<sup>181</sup> MICH. CONST. art. IV, § 24 (1850).

<sup>182</sup> IOWA CONST. art. I, § 3 (1857).

<sup>183</sup> ALA. CONST. art. I, § 3 (1861).

<sup>184</sup> ALA. CONST. art. I, § 4 (1865).

<sup>185</sup> ALA. CONST. art. I, § 3 (1901).

<sup>186</sup> MICH. CONST. art. II, § 3 (1909).

<sup>187</sup> N.J. CONST. art. I, § 3.

<sup>188</sup> MICH. CONST. art. I, § 4.

<sup>189</sup> The language and numbering were unchanged in the Alabama constitution adopted in 2022. ALA. CONST. art. I, § 3 (2022), <https://www.legislature.state.al.us/pdf/lisa/proposed-constitution/2022-constitution-statewide.pdf> [<https://perma.cc/CW9K-6E2H>]; see Taylor Lane & C.P. Bailey, *Alabama 2022 Constitution and Amendments Now in Effect*, NEWS COURIER (Nov. 30, 2022), [https://www.enewscourier.com/news/local\\_news/alabama-2022-constitution-and-amendments-now-in-effect/article\\_18afc294-7018-11ed-ab07-af95f7b57102.html](https://www.enewscourier.com/news/local_news/alabama-2022-constitution-and-amendments-now-in-effect/article_18afc294-7018-11ed-ab07-af95f7b57102.html) [<https://perma.cc/MKZ2-CKS3>].



While it certainly is not to say that the support guarantee formulation is insufficient to bar tax-financed education savings account payments to religious schools, the taxation guarantee formulation provides a more targeted defense against such tax-financed payments.

How, then, was it that the Iowa drafters came to adopt the stronger taxation guarantee formulation? The contemporaneous sources from the Iowa constitutional convention of 1844 do not answer the question. It might be speculated that a drafter originally from New Jersey, probably a lawyer familiar with the 1776 formulation, caused the adoption. This theory is not plausible: there was only one member of the convention whose native state was New Jersey, Andrew Hooten.<sup>190</sup> He was a farmer, not a lawyer, and was not a member of the standing committee on the bill of rights.<sup>191</sup> Another possibility is that the New Jersey language was used because the New Jersey constitution of 1844 had just been ratified and it was in the news. Although the timing works, it seems implausible that the retention without change of a clause from the 1776 New Jersey constitution to its 1844 constitution would be at all newsworthy in Iowa.<sup>192</sup> The most plausible theory is that the Iowa convention adopted the New Jersey formulation because it was substantively preferable to the alternatives. This would be consistent with the other actions the 1844 convention took with respect to matters of religion: rejecting compulsory public prayer and rejecting discrimination based on religious belief.<sup>193</sup>

Given the origins of the Iowa taxation guarantee in the New Jersey provision, it is helpful to see how New Jersey courts have interpreted the provision. The formulation traces back to the initial New Jersey constitution, adopted in 1776.<sup>194</sup> The New Jersey Supreme Court said that the constitution “rejected the establishment of and compelled support for religion in two clauses. The first clause contains an express guarantee of the right to freedom from compelled support.”<sup>195</sup> The compulsion guarantee read:

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<sup>190</sup> Vestal, *In the Name of Heaven*, *supra* note 135, at 436 n.517.

<sup>191</sup> *Id.*

<sup>192</sup> The 1844 New Jersey constitutional convention adjourned on June 29, 1844, and the new constitution was ratified on August 13, 1844. PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at lxxv (1942). The 1844 Iowa constitutional convention convened on the first Monday in October. J.A. Swisher, *Constitution Making in 1844*, 25 PALIMPSEST 311, 313 (1944). The convention approved the 1844 constitution on November 1, 1844. *Iowa Constitution—Conventions*, IOWA LEGIS., <https://www.legis.iowa.gov/law/statutory/constitution/constConventions#> [<https://perma.cc/8PBR-E4YT>]; *see* Vestal, *In the Name of Heaven*, *supra* note 135, at 436.

<sup>193</sup> *See* Vestal, *In the Name of Heaven*, *supra* note 135, at 380 (regarding official prayer); *id.* at 429 (regarding witness competence based on religious belief).

<sup>194</sup> *Freedom From Religion Found. v. Morris Cnty. Bd. of Chosen Freeholders*, 181 A.3d 992, 998 (N.J. 2018).

<sup>195</sup> *Id.*

That no Person shall ever within this Colony be deprived of the inestimable Privilege or worshipping Almighty God in a Manner agreeable to the Dictates of his own Conscience; nor under any Pretence [sic] whatsoever compelled to attend any Place of Worship, contrary to his own Faith and Judgment; nor shall any Person within this Colony ever be obliged to pay Tithes, Taxes, or any other Rates, for the Purpose of building or repairing any Church or Churches, Place or Places of Worship, or for the Maintenance of any Minister or Ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform.<sup>196</sup>

The second clause “contains language similar to the federal Establishment Clause . . . .”<sup>197</sup> The New Jersey Supreme Court found: “The two clauses, in combination, reveal that . . . the freedom from being compelled to fund religious institutions through taxation . . . was a grant of personal liberty . . . .”<sup>198</sup>

The New Jersey constitution of 1776 was notable: “[O]f the twelve states that adopted constitutions from 1776 to 1780, none included a compelled support clause as precise and clear as [New Jersey’s].”<sup>199</sup> Indeed, the less robust formulations of the Pennsylvania constitution of 1776 and the Vermont constitution of 1777 are quite similar to the contemporary support-style compulsion guarantees. Having a formal state constitutional prohibition on the use of tax funds to support religion was common in the early days of the Republic: “Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry.”<sup>200</sup> However, in part based on its specific treatment of taxation, the New Jersey Supreme Court observed that New Jersey’s compulsion guarantee “stands out as particularly specific for its time.”<sup>201</sup>

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<sup>196</sup> *Id.* (quoting N.J. CONST. art. XVIII (1776)).

<sup>197</sup> *Id.* at 999. The second clause reads:

That there shall be no Establishment of any one religious Sect in this Province in Preference to another, and that no *Protestant Inhabitant* of this Colony shall be denied the Enjoyment of any civil Right merely on Account of his religious Principles, but that *all Persons, professing a Belief in the Faith of any Protestant Sect* who shall demean themselves peaceably under the Government as hereby established, shall be capable of being elected into any Office of Profit or Trust, or being a Member of either Branch of the Legislature, & shall fully & freely enjoy every Privilege & Immunity enjoyed by other their Fellow-Subjects.

*Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 1000 (quoting *Locke v. Davey*, 540 U.S. 712, 723 (2004)).

<sup>201</sup> *Id.* at 999–1000.

The New Jersey constitutions of 1844<sup>202</sup> and 1947,<sup>203</sup> which remain in effect, made no substantive changes in the compulsion guarantee.

The ways in which the New Jersey Supreme Court has analyzed and applied the compulsion guarantee are instructive. In *Freedom From Religion Foundation v. Morris County Board of Chosen Freeholders*, the court addressed the constitutionality under the compulsion guarantee of the award of state-funded historic preservation grants to churches. Having traced the history and meaning of the compulsion guarantee as outlined above, the court faced the issue of whether such grants to churches violated the compulsion guarantee—the “Religious Aid Clause” in the nomenclature adopted by the court<sup>204</sup>:

The first step in our analysis is to determine whether the historic preservation grants awarded to repair twelve churches violated the Religious Aid Clause of the State Constitution. In light of the plain language of the clause, the question answers itself. . . . [F]or more than 240 years, the Religious Aid Clause has banned the use of public funds to build or repair any place of worship. . . . We . . . find that the County’s grants ran afoul of the State Constitution’s Religious Aid Clause.<sup>205</sup>

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<sup>202</sup> N.J. CONST. art. I, § 3 (1844) read that:

No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretence [sic] whatever be compelled to attend any place of worship contrary to his faith and judgment; *nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform.*

*Id.* (emphasis added).

<sup>203</sup> N.J. CONST. art. I, § 3 (1947). The current compulsion guarantee clause says that:

No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; *nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.*

*Id.* (emphasis added).

<sup>204</sup> The court refers to the New Jersey compulsion guarantee as the “Religious Aid Clause.” *Morris Cnty.*, 181 A.3d at 994.

<sup>205</sup> *Id.* at 1004, 1006. The second part of the *Morris County* analysis was the question of whether the New Jersey compulsion guarantee was at odds with the Federal Free Exercise

The *Morris County* court spoke of the interest the drafters sought to advance in enacting the compulsion guarantee:

As the history . . . reveals, the interest the [Religious Aid] Clause seeks to advance “is scarcely novel.” The Religious Aid Clause reflects a substantial concern of the State’s founders in 1776: to ensure that taxpayer funds would not be used to build or repair houses of worship, or to maintain any ministry. That choice reversed the approval of established religion . . . it also diverged from the practice of other states that allowed established religion at the time.<sup>206</sup>

The *Morris County* court was clear about the importance of the public policy choice which was expressed in the New Jersey compulsion guarantee: “New Jersey’s antiestablishment interest in not using public funds to build or repair churches or maintain any ministry ‘lay at the historic core of the Religion Clauses.’ . . . New Jersey’s historic and substantial interest against the establishment of, and compelled support for, religion is indeed ‘of the highest order.’”<sup>207</sup> The court was equally clear that the public policy which motivated the compulsion guarantee was not animus towards religion: “[T]he antiestablishment interest New Jersey expressed in 1776 did not reflect animus toward any religion. The Religious Aid Clause was enacted before the Federal Constitution; it is not a Blaine Amendment. No history of discrimination taints the provision.”<sup>208</sup>

Two weeks after *Morris County*, the New Jersey Supreme Court again addressed the New Jersey compulsion guarantee, this time in the context of awarding public-funded grants “to a yeshiva and to a theological seminary as part of a state program to subsidize facility and infrastructure projects for higher education institutions in New Jersey.”<sup>209</sup> Although the *Hendricks* court did not come to a final determination of the matter—it was remanded for development of the record—the decision does provide some insight into the New Jersey compulsion guarantee.<sup>210</sup>

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Clause. *See id.* at 1006–12. The court found “that the application of the Religious Aid Clause in this case does not violate the Free Exercise Clause.” *Id.* at 1012. The *Morris County* court spoke four years before the Supreme Court decision in *Carson*. *See Carson v. Makin*, 142 S. Ct. 1987, 1987 (2022).

<sup>206</sup> 181 A.3d at 1011.

<sup>207</sup> *Id.* at 1012 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023 (2017)).

<sup>208</sup> *Id.*

<sup>209</sup> *ACLU of N.J. v. Hendricks*, 183 A.3d 931, 933 (N.J. 2018).

<sup>210</sup> In addition to the claim based on Article I, Paragraph 3 of the New Jersey Constitution (the Religious Aid Clause or compulsion guarantee), plaintiffs also made claims based on Article 1, Paragraph 4 (the Establishment Clause), and Article VIII, Section 3, Paragraph 3

In remanding the matter for development of the record, the *Hendricks* court indicated three questions to be addressed:

- (1) the sectarian nature of these institutions of higher education;
- (2) whether, in the setting of the curriculum and training programs of these particular institutions, the grant funds will necessarily be used in the “maintenance of any minister or ministry”; and
- (3) the adequacy of promised restrictions, or other curbs, against sectarian use of the grant proceeds at present and into the future.<sup>211</sup>

The New Jersey taxation formulation was special in terms of both its timing and its content. As to the timing of the provision, one commentator noted:

New Jersey is special with regard to the First Amendment because during the adoption of the state Constitution in 1776, the state included a Religious Aid Clause. . . . During the adoption of the Constitution, the Religious Aid Clause was out of the ordinary. At the time, no other state had adopted a provision that clearly refuted the funding of establishments.<sup>212</sup>

New Jersey was also special because of the content of its compulsion guarantee: “The meaning of the Religious Aid Clause was intended to reveal that: ‘. . . the freedom from being compelled to fund religious institutions through taxation . . . was a grant of personal liberty. . . .’”<sup>213</sup> It seems clear that “from the onset, New Jersey always had an interest in denying public funds to support religious advancement.”<sup>214</sup>

The origins of the compulsion guarantee, and the history of its application in the state from which it arose, confirm that the compulsion guarantee is a religious liberty protection designed to preclude the use of tax-generated funds for religious purposes.

## II. IOWA’S EDUCATION SAVINGS ACCOUNT PROGRAM

On January 24, 2023, Iowa Governor Kim Reynolds signed legislation under which public funds will be given to private schools.<sup>215</sup> Technically, the legislation

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(the Donation Clause). *Id.* at 938. The lower court reached only the compulsion guarantee claim. *See id.*

<sup>211</sup> *Id.* at 943.

<sup>212</sup> Sean Pryzbylowski, *Trinity Lutheran Has Diminished the Concept of Separation of Church and State*, 20 RUTGERS J.L. & RELIGION 346, 358–59 (2020).

<sup>213</sup> *Id.* at 358.

<sup>214</sup> *Id.* at 359.

<sup>215</sup> *See* H.F. 68, 90th Gen. Assemb., Reg. Sess. (Iowa 2023), <https://www.legis.iowa.gov>

will permit the transfer of public funds to both religious and non-religious private schools.<sup>216</sup> But of the 183 accredited non-public schools in Iowa, all but seven have a religious or spiritual affiliation.<sup>217</sup> The secular schools enroll just under 2% of the total accredited private school enrollment in the state.<sup>218</sup> Since there is no compulsion guarantee conflict with transferring state funds to non-religious private schools, this discussion focuses on religious private school participation in the tuition funding program, returning to the non-religious private schools when we address the holding of *Carson v. Makin*.<sup>219</sup>

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/legislation/BillBook?ga=90&ba=HF+68 [https://perma.cc/V7PF-SJAH]. The legislation was the subject of a fiscal note from the Fiscal Services Division of the Legislative Services Agency. See FISCAL NOTE, *supra* note 15.

<sup>216</sup> See Stephen Gruber-Miller & Samantha Hernandez, *62% of Iowans Oppose Governor Kim Reynolds' Private School Scholarships Law, Iowa Poll Finds*, DES MOINES REG. (Mar. 19, 2023, 6:00 AM), <https://www.desmoinesregister.com/story/news/politics/iowa-poll/2023/03/19/iowa-poll-kim-reynolds-private-school-accounts-opposed-by-majority/69989541007/> [https://perma.cc/88NP-GWBZ].

<sup>217</sup> The Des Moines Register classified six schools as not having a “religious or spiritual affiliation.” *Id.* We have made one adjustment in this regard. The six schools identified by the newspaper were: Bergman Academy in Des Moines (<https://www.bergmanacademy.org/> [https://perma.cc/Z5BV-QS5S]), Jordahl Academy in Union (<https://jordahlacademy.org/> [https://perma.cc/74AJ-N7LA]), Montessori School of Marion (<https://www.montessorischoolofmarion.org/> [https://perma.cc/V6YU-RMJ6]), Rivermont Collegiate of Bettendorf (<https://www.rivermontcollegiate.org/> [https://perma.cc/5K6E-JUKJ]), Summit Schools of Cedar Rapids (<https://summitschools.org/> [https://perma.cc/9GHB-C2HT]), and Willowwind School of Iowa City (<http://www.willowwind.org/> [https://perma.cc/F2JA-69S7]). E-mail from Tim Webber, Data Visualization Specialist, Des Moines Reg., to NaRayah Runyon, Drake Univ. L. Sch. (June 26, 2023, 9:00 AM) (on file with author). The newspaper did not include the Maharishi School of Fairfield (<https://maharishischool.org/> [https://perma.cc/6FD3-AKSJ]), presumably because it has a spiritual, if not religious, affiliation. See *infra* Appendix B; *infra* Appendix C. It is not clear how the Iowa Supreme Court would classify such a school for purposes of the compulsion guarantee. To err on the side of understating the religious character of the accredited non-public schools involved in the education savings account program, we include the Maharishi School in the group of secular schools. Interestingly, only fifty-eight of Iowa’s ninety-nine counties have accredited non-public schools. FISCAL NOTE, *supra* note 15, at 2.

<sup>218</sup> See IOWA DEP’T OF EDUC., *Enrollment*, *supra* note 14; *infra* Appendix C. The seven secular schools in our calculation enroll a total of just 671 students, with the indicated 2022–2023 certified enrollments: Bergman Academy (308), Jordahl Academy (2), Maharishi School (126), Montessori School of Marion (9), Rivermont Collegiate (79), Summit Schools (78), and Willowwind School (69). IOWA DEP’T OF EDUC., *Enrollment*, *supra* note 14. The cumulative enrollment of 671 is just 1.99% of the total 2022–2023 certified enrollment for Iowa non-public schools of 33,692. *Id.*

<sup>219</sup> See discussion *infra* Conclusion. See generally *Carson v. Makin*, 142 S. Ct. 1987 (2022).

Of the 176 accredited religious private schools in Iowa for the 2022–2023 school year, 61% are Catholic schools, and 39% are non-Catholic Christian schools.<sup>220</sup> There are no accredited non-Christian religious schools in the state.

The amount of the public funds which will be given to religious schools is not trivial; the official estimate is that, after four years, the Students First Act will result in a transfer of \$341,100,000 annually from the state’s general fund to recipient schools.<sup>221</sup>

The new program provides for the creation of “education savings account[s]” to finance the tuition obligations of parents who choose to send their children to religious primary and secondary schools.<sup>222</sup> However, the term “education savings account” is fundamentally misleading. While the term conjures up images of dedicated parents sacrificing to save money from modest household budgets to finance their children’s education, the reality is that the education savings accounts are wholly supported with public funds.<sup>223</sup>

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<sup>220</sup> See *infra* Appendix B (107 Catholic and 69 non-Catholic Christian schools). The Catholic schools had a cumulative enrollment of 22,713, or 67% of the total. See *infra* Appendix B. The non-Catholic Christian schools enrolled 10,308, or 31%. See *infra* Appendix B. Although there are wide variations within all three groups, the average Catholic school enrolled 212 students, the average non-Catholic Christian school enrolled 149, and the average non-religious school enrolled 96. See *infra* Appendix B; *infra* Appendix C. The Catholic schools range in enrollment between 32 and 1,318, the non-Catholic Christian schools between 12 and 663, and the non-religious schools between 2 and 308. See *infra* Appendix B; *infra* Appendix C.

<sup>221</sup> FISCAL NOTE, *supra* note 15. The actual figure may greatly exceed the estimates. As the initial period for enrollment in the education savings account program drew to a close, applications for 25,500 students had been received, exceeding the official 14,000 estimate by over 80%. See Tom Barton, *ESA Signups Double Expectations*, THE COURIER (July 3, 2023), [https://wcfcourier.com/esa-signups-double-expectations/article\\_18c84ff7-8a73-5a1e-b1d0-d172b06d9cf9.html](https://wcfcourier.com/esa-signups-double-expectations/article_18c84ff7-8a73-5a1e-b1d0-d172b06d9cf9.html) [<https://perma.cc/5FL3-LKZ9>]. At that rate, the initial year cost for the program will exceed the budgeted \$107.4 million by \$87.9 million, bringing the total cost to \$195.3 million. See *id.* As the allocation is a “standing unlimited appropriation,” the full amount will be funded, even from state reserve funds if necessary. *Id.* By August 8, 2023, with the number not finalized, the state had approved 18,600 applications for participation in the education savings account program. Caleb McCullough, *Iowa OKs 18,600 Private School Education Savings Accounts*, THE GAZETTE (Aug. 9, 2023, 7:51 AM), <https://www.thegazette.com/state-government/iowa-oks-18600-private-school-education-savings-accounts/#> [<https://perma.cc/4EPN-ZMEF>].

<sup>222</sup> IOWA CODE § 257.11B (2023) (“Education Savings Account Program”); see, e.g., Press Release, Kim Reynolds, Governor, Iowa, Gov. Reynolds Signs Students First Act into Law (Jan. 24, 2023), <https://governor.iowa.gov/press-release/2023-01-24/gov-reynolds-signs-students-first-act-law> [<https://perma.cc/3LHD-3CJD>].

<sup>223</sup> IOWA CODE § 257.11B. These state-funded education savings accounts should not be confused with Coverdell Education Savings Account, which is a taxpayer-funded savings account for qualified education expenses created under Federal law. See *Topic No. 310, Coverdell Education Savings Accounts*, IRS, <https://www.irs.gov/taxtopics/tc310#> [<https://perma.cc/DJ6F-4FRP>] (last visited Mar. 4, 2024). Contributions to a Coverdell Education

In fact, the education savings accounts are nothing but a ledger entry within the state treasury.<sup>224</sup> The new program establishes an “education savings account fund . . . in the state treasury under the control of the department of education consisting of moneys appropriated to the department of education for the purpose of providing education savings account payments. . . .”<sup>225</sup> Per student allocations of general revenues to the education savings account fund are to “be equal to the regular program state cost per pupil for the same school budget year.”<sup>226</sup>

The term “education savings account” is also misleading to the extent that it suggests broad parental discretion in determining how the “savings” are to be expended. In fact, the use of education savings account payments is strictly controlled by the state:

Education savings account payments shall be made available to parents and guardians . . . for the payment of qualified educational expenses. . . . Parents and guardians shall first use educational savings account payments for all qualified education expenses that are tuition and fees for which the parent or guardian is responsible for payment at the pupil’s nonpublic school. . . .<sup>227</sup>

After the religious school is paid its tuition, any remaining funds in the education savings account can only be used “for other qualified educational expenses” as defined in the statute.<sup>228</sup> Unused funds in a student’s education savings account carry over from year to year for so long as the student is eligible for the program, and ultimately revert to the state general fund.<sup>229</sup>

Finally, the term “education savings account” is also misleading to the extent that it suggests parental involvement making payments of qualified expenses. In fact, the state has entered a contract with a third party which will transmit payments from the education savings accounts.<sup>230</sup> Tuition payments to schools will be made directly

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Savings Account are not deductible, and distributions are not Federally taxable to the extent of the beneficiary’s qualified educational expenses. *Id.*

<sup>224</sup> Indeed, the statute uses the term “education savings account payment” to describe the transfer of state funds to the education savings account. IOWA CODE § 257.11B.2.a.(1) (“[T]he following pupils who attend a nonpublic school for that school budget year shall be eligible to receive an education savings account payment . . .”).

<sup>225</sup> IOWA CODE § 257.11B.5.

<sup>226</sup> *Id.* § 257.11B.4.

<sup>227</sup> *Id.* § 257.11B.2.b.

<sup>228</sup> *Id.* “Qualified educational expenses” are defined, beyond tuition and fees, as including, among others, textbooks, curriculum fees, software, course of study materials, and standardized test fees. *Id.* § 257.11B.1.b.(1) “Qualified educational expenses” exclude transportation costs, food and refreshments, clothing, and disposable materials (paper, notebooks, pencils, pens, and art supplies). *Id.* § 257.11B.1.b(2).

<sup>229</sup> *Id.* § 257.11B.6.c.

<sup>230</sup> Erin Murphy, *N.Y. Firm Will Be Paid \$4.3 Million to Operate Iowa’s New Private School Funding Program*, THE GAZETTE (May 26, 2023, 11:18 AM), <https://www.thegazette.com>



to the school through electronic funds transfers.<sup>231</sup> Payments for non-tuition qualified educational expenses will also be made exclusively through the third-party vendor.<sup>232</sup>

The new Iowa legislation provides for the transfer of tax-generated state funds to religious schools.<sup>233</sup> In the next section we shall consider whether the education savings account transfers to religious schools are allowed under the compulsion guarantee of the Iowa Constitution.

*A. Do Tax-Funded Education Savings Account Payments to Religious Schools Violate the Iowa Compulsion Guarantee?*

Against what constitutional standard should the education savings account program be judged? Article 1, Section 3, Clause 3 of the Iowa Constitution provides in relevant measure: “nor shall any person be compelled to . . . pay . . . taxes . . . for . . . the maintenance of any minister, or ministry.”<sup>234</sup> Thus, one way to frame the question is: are religious schoolteachers ministers; are religious schools ministries? In

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.com/state-government/new-york-company-to-be-paid-4-3-million-to-operate-iowas-new-private-school-funding-program/ [https://perma.cc/SXG5-LG6R].

<sup>231</sup> See *Odyssey Training Webinar PowerPoint for Accredited Nonpublic Schools*, IOWA DEP’T EDUC., https://educateiowa.gov/documents/odyssey-training-webinar-powerpoint-accredited-nonpublic-schools [https://perma.cc/K955-PN5G] (last visited Mar. 4, 2024). “Odyssey utilizes Stripe as our secure payment processor. Each participating school must submit banking information, including routing and account numbers. . . . Payments to participating schools will be sent via ACH to the bank account provided.” *Id.* at 30 (emphasis omitted). “School inputs tuition and fee amounts for students . . . . When input is completed, click ‘Generate Invoice[.]’ This invoice will be submitted to the state for review and payment.” *Id.* at 34. “Once the invoice from the state is approved, the funding will be sent to the school. Funds are sent directly to the bank account submitted as part of the school registration process.” *Id.* at 35.

<sup>232</sup> Murphy, *supra* note 230 (“[The vendor] will host a marketplace that will serve as the only eligible place for Iowa families to spend ESA funding on those other eligible expenses. Any purchases made outside [the vendor’s] marketplace will not be eligible for reimbursement, a company official said this week during a webinar.”).

<sup>233</sup> Like Iowa, the education savings account programs of the other states which have compulsion guarantees—Arkansas (ARK. CODE ANN. §§ 6-18-2501 to -2511 (West 2023)), Indiana (IND. CODE §§ 20-51.4-4-2, 20-51.4-5-1 (2023)), Tennessee (TENN. CODE ANN. §§ 49-6-2601 to -2612 (West 2023)), and West Virginia (W. VA. CODE ANN. §§ 18-31-1 to -13 (West 2023))—provide state general-revenue funds for private school, including religious school, tuition.

<sup>234</sup> IOWA CONST. art. I, § 3. Article 1, Section 3, Clause 3 also provides that “[N]or shall any person be compelled to . . . pay . . . taxes . . . for building or repairing places of worship. . . .” *Id.* art. I, § 3, cl. 3. Since tuition paid to religious schools—and state funds paying such tuition—go to build and repair the religious school buildings, a finding that such religious schools are ministries, and some of their teachers are ministers, would seem to also make the finding that state funds are being used to build and repair places of worship. Rather than make the redundant argument, I simply note that such building and repair is another reason the education savings account program violates the compulsion guarantee.

*Knowlton*, the Iowa Supreme Court framed the compulsion guarantee question in two additional ways. First, does the program at issue “expend money acquired by public taxation in training . . . children religiously”?<sup>235</sup> Second, does the program constitute the “use or appropriation of public funds in support of sectarian institutions”?; is it “taxation for ecclesiastical support”?<sup>236</sup> In other words, is the recipient school pervasively religious?

The following discussion considers whether, by giving public funds to religious schools, the education savings account program violates the compulsion guarantee, framed in three ways: (1) are the religious schools ministries and are their teachers ministers; (2) do the religious schools teach their students religion; and (3) are the religious schools pervasively religious? We look to three sources to help answer those questions: first, the *Knowlton* decision of the Iowa Supreme Court directly on point;<sup>237</sup> second, the *Our Lady of Guadalupe School v. Morrissey-Berru* decision of the United States Supreme Court on a related question;<sup>238</sup> and finally, the public representations of the Iowa religious schools themselves.

### 1. Are Religious Schools Ministries and Are Their Teachers Ministers?

In *Knowlton*, the Iowa Supreme Court considered a public school which functioned as the equivalent of a parochial school:

In short, so far as its immediate management and control were concerned, the manner of imparting instruction, both secular and religious, and the influence and leadership exercised over the minds of the pupils, it was a thoroughly and completely religious parochial school as it could well have been had it continued in name as well as in practice the school of the parish under the special charge and supervision of the church, its clergy and religious orders.<sup>239</sup>

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<sup>235</sup> *Knowlton v. Baumhover*, 166 N.W. 202, 203 (Iowa 1918). Is the school “established and maintained for the express purpose of giving religious training to its pupils”? *Id.*

<sup>236</sup> *Id.* at 206. Is the school “a religious school, maintained and conducted with a special view to the promotion of the faith of the church under whose favor and guardianship it was founded”? *Id.* at 206.

<sup>237</sup> *Id.* at 214 (“[The court] has the authority . . . and . . . duty to enjoin the defendants . . . from directly or indirectly making any appropriation or use of public funds for . . . support or in aid of such parochial school. . .”).

<sup>238</sup> 140 S. Ct. 2049, 2063–66 (2020) (determining when schools and their employees are sufficiently involved in religious education to qualify for the ministerial exemption in Title VII employment discrimination protections).

<sup>239</sup> *Knowlton*, 166 N.W. at 204. Interestingly, a 1912 book lists the Maple River school correctly as a Catholic school: “St. Francis, Maple River, enrollment 70, two rooms, eight

The court observed:

[T]he school ceased to have a public character in the sense contemplated by our laws, and became, has since been, and now is a religious school, maintained and conducted with a special view to the promotion of the faith of the church under whose favor and guardianship it was founded.<sup>240</sup>

That the *Knowlton* court found it a violation of Article 1, Section 3, Clause 3, of the Iowa Constitution to fund the religious school at issue must mean that it found the school to be a “ministry” within the meaning of the compulsion guarantee.<sup>241</sup> If that school was a ministry, there is no argument that the religious private schools to be funded under the education savings account program are not ministries as well.

That teachers in religious schools are ministers was confirmed by the analysis of the United States Supreme Court in the 2002 case of *Our Lady of Guadalupe School*.<sup>242</sup> The case involved the “ministerial exception”<sup>243</sup> as to certain employment claims of employees of religious institutions announced in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.<sup>244</sup> Writing for the Court, in an opinion joined by all but Justices Sotomayor and Ginsburg, Justice Alito expanded the coverage of the ministerial exception.<sup>245</sup> Reversing the Ninth Circuit, Justice Alito explained which employees of religious schools are ministers.<sup>246</sup>

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grades . . .” 1 PAUL MACLEAN, HISTORY OF CARROLL COUNTY IOWA: A RECORD OF SETTLEMENT, ORGANIZATION, PROGRESS AND ACHIEVEMENT 22 (1912).

<sup>240</sup> *Knowlton*, 166 N.W. at 206.

<sup>241</sup> *Id.* at 206–07.

<sup>242</sup> *See* 140 S. Ct. at 2066.

<sup>243</sup> Merriam-Webster dictionary defines “ministerial” in three ways. *Ministerial*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/ministerial> [<https://perma.cc/5F7N-U73A>] (last visited Mar. 4, 2024). The first is “of, relating to, or characteristic of a minister or the ministry.” *Id.* The second is:

Being or having the characteristics of an act or duty prescribed by law as part of the duties of an administrative office [or] relating to or being an act done after ascertaining the existence of a specified state of facts in obedience to a legal order without exercise of personal judgment or discretion.

*Id.*

The third is “acting or active as an agent.” *Id.* It goes without saying that Justice Alito’s analysis of the ministerial exception in *Our Lady of Guadalupe School* is the first: of, relating to, or characteristic of a minister or the ministry.

<sup>244</sup> *See* 565 U.S. 171, 188 (2012).

<sup>245</sup> *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2066–68 (holding that the *Hosanna-Tabor* factors should be interpreted broadly so as to not distort the ministerial exemption analysis).

<sup>246</sup> *See id.* at 2067–69 (explaining that the Ninth Circuit’s analysis of the ministerial exemption was interpreted too rigidly and required reversal).

The case involved two teachers at Catholic primary schools in the Archdiocese of Los Angeles, Agnes Morrissey-Berru and Kristen Biel, both of whom were found to be within the ministerial class.<sup>247</sup> Morrissey-Berru was a lay fifth and sixth grade teacher.<sup>248</sup> Justice Alito noted that “[l]ike most elementary school teachers, she taught all subjects, and since [Our Lady of Guadalupe School] is a Catholic school the curriculum included religion.”<sup>249</sup> “As a result, she was her students’ religion teacher.”<sup>250</sup> Justice Alito noted:

Under the prescribed curriculum, she was expected to teach students, among other things “to learn and express belief that Jesus is the son of God and the Word made flesh”; to “identify the ways” the church “carries on the mission of Jesus”; to “locate, read and understand stories from the Bible”; to “know the names, meanings, signs and symbols of each of the seven sacraments”; and to be able to “explain the communion of saints.” She tested her students on that curriculum in a yearly exam.<sup>251</sup>

She “was expected to attend faculty prayer services,” and required to “participate in [s]chool liturgical activities, as requested.”<sup>252</sup> As to her students:

Morrissey-Berru prepared her students for participation in the Mass and for communion and confession. She also occasionally selected and prepared students to read at Mass. And she was expected to take her students to Mass once a week and on certain feast days . . . and to take them to confession and to pray the Stations of the Cross.<sup>253</sup>

She also prayed with her students:

Her class began or ended every day with a Hail Mary. She led the students in prayer at other times, such as when a family member was ill. And she taught them to recite the Apostle’s

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<sup>247</sup> See *id.* at 2066.

<sup>248</sup> See *id.* at 2078.

<sup>249</sup> *Id.* at 2056.

<sup>250</sup> *Id.* The Court notes that “[l]ike all teachers in the Archdiocese of Los Angeles, Morrissey-Berru was ‘considered a catechist,’ *i.e.*, ‘a teacher of religio[n].’” *Id.* at 2057. Further, “[c]atechists are ‘responsible for the faith formation of the students in their charge each day.’” *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 2056.

<sup>253</sup> *Id.* at 2057.

Creed and the Nicene Creed, as well as prayers for specific purposes, such as in connection with the sacrament of confession.<sup>254</sup>

Her employment agreement “stated that the school’s mission was ‘to develop and promote a Catholic School Faith Community,’ and it informed Morrissey-Berru that ‘[a]ll [her] duties and responsibilities as a Teache[r were to] be performed within this overriding commitment.’”<sup>255</sup> The “agreement made clear that teachers were expected to ‘model and promote’ Catholic ‘faith and morals.’”<sup>256</sup> She was evaluated consistent with those expectations:

The school reviewed Morrissey-Berru’s performance under religious standards. The “Classroom Observation Report” evaluated whether Catholic values were “infused through all subject areas” and whether there were religious signs and displays in the classroom. Morrissey-Berru testified that she tried to instruct her students “in a manner consistent with the teachings of the Church,” and she said that she was “committed to teaching children Catholic values” and providing a “faith-based education.” And the school principal confirmed that Morrissey-Berru was expected to do those things.<sup>257</sup>

Morrissey-Berru did not have the formal title of “minister” and did not have extensive formal religious training.<sup>258</sup> The Court found her to have been within the ministerial exception.<sup>259</sup>

Biel was a lay first and fifth grade teacher. Justice Alito noted that she also “taught all subjects, including religion.”<sup>260</sup> Biel’s employment agreement was, according to Justice Alito, “in pertinent part nearly identical to Morrissey-Berru’s.”<sup>261</sup> Biel’s responsibilities under the faculty handbook resembled those of Morrissey-Berru.<sup>262</sup> Justice Alito noted that “[l]ike Morrissey-Berru, Biel instructed her

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 2056.

<sup>256</sup> *Id.* The Court notes that she could have been terminated “for ‘conduct that brings discredit upon the School or the Roman Catholic Church.’” *Id.* at 2057.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 2058.

<sup>259</sup> *Id.* at 2066.

<sup>260</sup> *Id.* at 2058.

<sup>261</sup> *Id.* (“The agreement set out the same religious mission; required teachers to serve that mission; imposed commitments regarding religious instruction, worship, and personal modeling of the faith; and explained that teachers’ performance would be reviewed on those bases.”).

<sup>262</sup> *Id.* at 2058–59.

Biel’s agreement also required compliance with the St. James faculty handbook, which resembles the OLG handbook. The St. James handbook defines “religious development” as

students in the tenets of Catholicism,”<sup>263</sup> and she worshipped with her students.<sup>264</sup> Like Morrissey-Berru, Biehl was evaluated consistent with those expectations.<sup>265</sup>

Biel did not have the formal title of “minister” and did not have extensive formal religious training.<sup>266</sup> The Court found that she fit within the ministerial exception.<sup>267</sup>

What is relevant to the ministerial finding under *Our Lady of Guadalupe School*? As Justice Alito explained, the title of minister is neither necessary nor sufficient for the finding.<sup>268</sup> Indeed, Justice Alito credited the title that they shared: “both Morrissey-Berru and Biel had titles. They were Catholic elementary school

the school’s first goal and provides that teachers must “mode[l] the faith life,” “exemplif[y] the teachings of Jesus Christ,” “integrat[e] Catholic thought and principles into secular subjects,” and “prepar[e] students to receive the sacraments.” *Id.* (citations omitted).

<sup>263</sup> *Id.* at 2059.

She was required to teach religion for 200 minutes each week, and administered a test on religion every week. She used a religion textbook selected by the school’s principal, a Catholic nun. The religious curriculum covered “the norms and doctrines of the Catholic Faith including . . . the sacraments of the Catholic Church, social teachings according to the Catholic Church, morality, the history of Catholic saints, [and] Catholic prayers.”

*Id.* (citations omitted).

<sup>264</sup> *Id.* The Court found that:

Biel worshipped with her students. At St. James, teachers are responsible for “prepar[ing] their students to be active participants at Mass, with particular emphasis on Mass responses,” and Biel taught her students about “Catholic practices like the Eucharist and confession.” At monthly Masses, she prayed with her students. Her students participated in the liturgy on some occasions by presenting the gifts (bringing bread and wine to the priest). Teachers at St. James were “required to pray with their students every day,” and Biel observed this requirement by opening and closing each school day with prayer, including the Lord’s Prayer or a Hail Mary.

*Id.* (alteration in original).

<sup>265</sup> *Id.* The Court wrote:

As at OLG, teachers at St. James are evaluated on their fulfillment of the school’s religious mission. St. James used the same classroom observation standards as OLG and thus examined whether teachers “infus[ed]” Catholic values in all their teaching and included religious displays in their classrooms. The school’s principal, a Catholic nun, evaluated Biel on these measures.

*Id.* (alteration in original).

<sup>266</sup> *Id.* at 2066.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 2063–64 (“Simply giving an employee the title of ‘minister’ is not enough to justify the exception. And by the same token, since many religious traditions do not use the title ‘minister,’ it cannot be a necessary requirement.”).

*teachers*, which meant that they were their students' primary teachers of religion. The concept of a teacher of religion is loaded with religious significance. The term 'rabbi' means teacher, and Jesus was frequently called rabbi."<sup>269</sup>

Additionally, a given level of formal academic preparation is neither necessary nor sufficient. While a level of formal academic preparation may be relevant,<sup>270</sup> especially with respect to elementary school teachers, it is not dispositive:

[I]nsisting in every case on rigid academic requirements could have a distorting effect. This is certainly true with respect to teachers. Teaching children in an elementary school does not demand the same formal religious education as teaching theology to divinity students. Elementary school teachers often teach secular subjects in which they have little if any special training. In addition, religious traditions may differ in the degree of formal religious training thought to be needed in order to teach.<sup>271</sup>

Justice Alito nicely summarized the question of ministerial status: "What matters, at bottom, is what an employee does."<sup>272</sup> He spoke of "a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school,"<sup>273</sup> and quoted with approval from his own *Hosanna-Tabor* concurrence "that the [ministerial] exception should include 'any "employee" who . . . serves as a . . . *teacher of its faith*."<sup>274</sup>

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<sup>269</sup> *Id.* at 2067.

<sup>270</sup> *Id.* at 2064. Justice Alito wrote:

[T]he academic requirements of a position may show that the church in question regards the position as having an important responsibility in elucidating or teaching the tenets of the faith. Presumably the purpose of such requirements is to make sure that the person holding the position understands the faith and can explain it accurately and effectively.

*Id.*

<sup>271</sup> *Id.* Justice Alito's discussion on this point concludes: "In short, these circumstances, while instructive in *Hosanna-Tabor*, are not inflexible requirements and may have far less significance in some cases." *Id.* Later, Justice Alito helpfully repeats the point: "The significance of formal training must be evaluated in light of the age of the students taught and the judgment of a religious institution regarding the need for formal training." *Id.* at 2067–68.

<sup>272</sup> *Id.* at 2064.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., concurring)). Justice Alito nicely documents the importance of religious education to different faiths, "show[ing] the close connection that religious institutions draw between their central purpose and educating the young in the faith," within Catholicism, Protestantism, Judaism, Islam, The Church of Jesus Christ of Latter-day Saints, Seventh-day Adventism, and others within "the rich diversity of religious education in this country . . ." *Id.* at 2064–66.

Justice Alito's conclusion was straightforward:

[I]t is apparent that Morrissey-Berru and Biel qualify for the [ministerial] exemption. . . . [T]hey both performed vital religious duties. Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility. As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities.<sup>275</sup>

In his concurrence, which Justice Gorsuch joined, Justice Thomas distilled the holding: “I agree with the Court that Morrissey-Berru’s and Biel’s positions fall within the ‘ministerial exception,’ because, as Catholic school teachers, they are charged with ‘carry[ing] out [the religious] mission’ of the parish schools.”<sup>276</sup>

In *Our Lady of Guadalupe School*, Justice Alito found that “[e]ducating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught. . . .”<sup>277</sup> In determining whether the Iowa education savings account program violates the compulsion guarantee of the Iowa Constitution, it should be asked whether Iowa’s religious schools proclaim an equivalent mission. Justice Alito was undoubtedly correct to caution that the use or omission of the term “minister” is not dispositive. Nevertheless, it is instructive that a significant number of the religious schools that stand to receive public funds under the education savings account program describe themselves as “ministries” and their teachers as “ministers.” For example, Kuemper Catholic School speaks of “the ministry of Catholic education . . . .”<sup>278</sup> Other schools say they are part of the “teaching ministry of the

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<sup>275</sup> *Id.* at 2066.

<sup>276</sup> *Id.* at 2069 (Thomas, J., concurring) (alterations in original).

<sup>277</sup> *Id.* at 2066.

<sup>278</sup> John Steffes, *Who We Are*, KUEMPER CATH. SCH., <https://www.kuemper.org/who-we-are> [<https://perma.cc/G36L-9W28>] (last visited Mar. 4, 2024).



Church,<sup>279</sup> “the teaching ministry of the Parish,”<sup>280</sup> “ministries of the diocese,”<sup>281</sup> “the educational ministry of the Catholic Church,”<sup>282</sup> “[t]he ministries of the parish and the school,”<sup>283</sup> or simply refer to “[our] ministries.”<sup>284</sup> Some speak of their school as part “the ministry of Christian education,”<sup>285</sup> or as being a “ministry” of a specific church.<sup>286</sup> Reference is made to “[o]ur ministry-minded faculty.”<sup>287</sup> Two schools present themselves as having “a Christ-centered educational program that ministers to the needs of the whole child . . . .”<sup>288</sup> The regional organization of eight Lutheran

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<sup>279</sup> *School*, BURLINGTON NOTRE DAME SCH., <https://www.burlingtonnotredame.com/page/school> [<https://perma.cc/Q94D-J63Z>] (last visited Mar. 4, 2024) (“Burlington Notre Dame, Inc. is dedicated to fulfilling the teaching ministry of the Church by promoting Catholic values and assisting students in reaching their full personal potential through Christ-centered academic and co-curricular programs.”).

<sup>280</sup> *About*, PRINCE OF PEACE CATH. SCH., <https://www.prince.pvt.k12.ia.us/about> [<https://perma.cc/EU5X-B3YL>] (last visited Mar. 4, 2024) (“We, the Jesus Christ Prince of Peace Catholic Education System, serve to facilitate the teaching ministry of the Parish. Our purpose is to provide educational programs which promote Gospel values and Catholic Tradition in the context of a changing world.”).

<sup>281</sup> *Wills/Bequests/Planned Giving*, SPALDING CATH. SCH., <https://www.spaldingcatholic.org/cms/one.aspx?portalId=247020&pageId=305054> [<https://perma.cc/XL4S-98QN>] (last visited Mar. 4, 2024) (“Catholic Schools, Parishes and other ministries of the diocese. . . .”).

<sup>282</sup> SETON CATH. SCH., <https://setonschool.org/> [<https://perma.cc/CP2J-W62B>] (last visited Mar. 4, 2024) (“The Goal of Catholic education at Seton Catholic School is the fulfillment of the educational ministry of the Catholic Church and has as its primary objective the on-going formation and the development of each individual’s God-given gifts.”).

<sup>283</sup> *Ms. Sara Stevenson Rooney*, CHRIST THE KING CATH. SCH., <https://cksdsmoines.com/people/ms-sara-stevenson-rooney> [<https://perma.cc/J83Z-ZMTD>] (last visited Mar. 4, 2024) (“The ministries of the parish and the school really align with Catholic social teaching . . . .”).

<sup>284</sup> *Ministries*, ST. PAUL’S LUTHERAN CHURCH & SCH., <https://www.stpaulswaverly.org/ministries> [<https://perma.cc/E8N5-ST9D>] (last visited Mar. 4, 2024) (“Ministries: From birth to old age, we strive to grow in our faith and knowledge. St. Paul’s gives children, individuals, and families the resources they need to grow in faith at home, school, and church. Our ministries build relationships that foster growth.”) (discussing various programs at St. Paul’s Lutheran Church & School).

<sup>285</sup> *BRUIT*, HILLCREST ACAD., <https://www.hillcrestravens.org/alumni/bruit/> [<https://perma.cc/3DFF-RGC4>] (last visited Mar. 4, 2024) (discussing “the ministry of Christian education and the mission of Hillcrest Academy”).

<sup>286</sup> *E.g.*, CEDAR VALLEY CHRISTIAN SCH., FAM. HANDBOOK 4 (2022), [https://www.cedarvalleychristianschool.org/editoruploads/files/FamilyHandbook-22-23\\_Updated\\_6-8-22.pdf](https://www.cedarvalleychristianschool.org/editoruploads/files/FamilyHandbook-22-23_Updated_6-8-22.pdf) [<https://perma.cc/RV6L-UZXR>] (“Cedar Valley Christian School is a ministry of Cedar Valley Bible Church and as such follows its doctrinal statement.”); *School Policies*, ST. PAUL’S LUTHERAN CHURCH & SCH., <https://stpaulslutheranchurch.snappages.site/school-policies> [<https://perma.cc/MQ7T-L2SD>] (last visited Mar. 4, 2024) (“St. Paul’s Lutheran School is a ministry of St. Paul’s Lutheran Church . . . .”).

<sup>287</sup> *Admissions*, MARSHALLTOWN CHRISTIAN SCH., <https://mcsiowa.org/admissions/> [<https://perma.cc/6997-ZPBY>] (last visited Mar. 4, 2024).

<sup>288</sup> *Home*, TRINITY LUTHERAN SCH., <https://www.tlsboone.us> [<https://perma.cc/H83T-2MZX>] (last visited Mar. 4, 2024) (“The mission of Trinity Lutheran School, in partnership with parents and our LCMS congregation, is to provide a Christ-centered educational

schools lists education as one of its “ministry areas.”<sup>289</sup> Other schools characterize themselves as being “an educational support ministry for families in the faith community,”<sup>290</sup> “this important ministry,”<sup>291</sup> “this ministry,”<sup>292</sup> “a school ministry,”<sup>293</sup> or simply “the ministry.”<sup>294</sup>

Of course, the ministerial test under which the Iowa education savings account program will be judged does not require that *every* teacher at a religious school satisfy the test. The program does not differentiate among school employees; transfers of state funds to religious schools provide undifferentiated support of the entire religious enterprise.<sup>295</sup> As Justice Alito observed in *Our Lady of Guadalupe School*,

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program that ministers to the needs of the whole child in nurturing them to live in service to God and man.”); *Our Story*, ZION-ST. JOHN LUTHERAN SCH., <https://zsjpaullina.org/our-story.php> [<https://perma.cc/X4X8-88JH>] (last visited Mar. 4, 2024) (“The mission of Zion-St. John Lutheran School, in partnership with parents and the congregations, is to provide a Christ-centered educational program which ministers to the needs of the ‘whole child’ in nurturing the student to live in service to God and man.”).

<sup>289</sup> *Elementary Education*, IOWA DIST. W. THE LUTHERAN CHURCH—MO. SYNOD, <http://www.idwlcms.org/elementary-education.php> [<https://perma.cc/KCP9-APDF>] (last visited Mar. 4, 2024) (“Ministry Areas” includes “Education,” which includes “Elementary Education,” containing links to eight schools: Trinity Lutheran School (Boone), Clarinda Lutheran School (Clarinda), Unity Ridge Lutheran School (Denison), Mt. Olive Lutheran School (Des Moines), St. Paul Lutheran School (Fort Dodge), Zion-St. John Lutheran School (Paullina), St. Paul’s Lutheran School (Sioux City), and Iowa Great Lakes Lutheran School (Spencer)).

<sup>290</sup> *Our Mission*, GRAND VIEW CHRISTIAN SCH., <https://www.grandviewchristianschool.org/about/mission.cfm> [<https://perma.cc/VRB2-FEH4>] (last visited Mar. 4, 2024) (“Grand View Christian School functions as an educational support ministry for families in the faith community.”).

<sup>291</sup> Candice Vos, *True Knowledge*, SULLY CHRISTIAN SCH. (Apr. 30, 2021), <https://sullychristian.org/news/true-knowledge/> [<https://perma.cc/NY65-LFRS>] (“As we work daily to raise up the next generation of young Christians, please continue to uphold us in prayer and support us in this important ministry!”).

<sup>292</sup> *Parent/Student Handbook*, SIOUX CTR. CHRISTIAN SCH. 29 (2016), [https://www.siouxcenterchristian.com/editoruploads/files/Parent-Student%20Handbook\(1\).pdf](https://www.siouxcenterchristian.com/editoruploads/files/Parent-Student%20Handbook(1).pdf) [<https://perma.cc/E9AG-4UDM>] (“We need to continue to have this ministry meet our present needs, but also to prepare for the future.”).

<sup>293</sup> *School*, TRINITY LUTHERAN CHURCH SCH., <https://www.trinitydavenport.org/school> [<https://perma.cc/L2HF-JXMJ>] (last visited Mar. 4, 2024).

<sup>294</sup> *Employment*, SIOUX CTR. CHRISTIAN SCH., <https://www.siouxcenterchristian.com/connectwithus/employment.cfm> [<https://perma.cc/Q7CC-4B2K>] (last visited Mar. 4, 2024) (“If you feel called to be a part of the ministry here at SCCS, we look forward to discussing with you what God is doing through Sioux Center Christian School.”).

<sup>295</sup> Nor, in all candor, could it. A program transferring state funds to religious schools for the purpose of supporting, for example, physical education teachers would also run afoul of the compulsion guarantee of the Iowa Constitution in at least two ways. First, it is not at all clear that physical education teachers do not perform a ministerial function. After all, the teachers in *Morrissey-Berru* were required to ensure that “Catholic values were ‘infused through all subject areas,’” and to “‘integrat[e] Catholic thought and principles into secular subjects . . . .” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2057, 2059

“The religious education and formation of students is the very reason for the existence of most private religious schools . . . .”<sup>296</sup> If Iowa’s religious schools are, therefore, ministries within the meaning of the compulsion guarantee of the Iowa Constitution, the transfer of public funds to them is unconstitutional.

## 2. Do the Religious Schools Teach Their Students Religion?

Do religious schools teach their students religion? As Justice Alito noted in *Our Lady of Guadalupe School*, the answer is obvious: “[S]ince [Our Lady of Guadalupe School] is a Catholic school, the curriculum included religion.”<sup>297</sup>

A few examples illustrate the importance of religious education in the activities of the Iowa religious schools<sup>298</sup>:

- The Morning Star Academy in Bettendorf announces: “A comprehensive and foundational core of Bible, English, Math, Science, and History is essential and non-negotiable.”<sup>299</sup>
- Christ the King School in Des Moines says of its “Faith Based Curriculum”: “The religious formation of children is the primary reason for the existence of Catholic schools. Thus, Christ the King School’s religious education program is of special curricular importance. Scripture, doctrine, prayer, and liturgy are related to children at their developmental level, beginning with their own experiences. Prayer is an important part of the day. It begins and ends each day, lunchtime and is experienced daily in religion class.”<sup>300</sup>

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(2020) (alteration in original). Second is the substitution effect: providing state funding for physical education teachers frees up non-state religious school funds for the religious program of the school. This is one of the reasons that the existing state programs that use state funds to provide religious schools with services are problematical under the compulsion guarantee.

<sup>296</sup> *Id.* at 2055.

<sup>297</sup> *Id.* at 2056. The Court notes that “[l]ike all teachers in the Archdiocese of Los Angeles, Morrissey-Berru was ‘considered a catechist,’ *i.e.*, ‘a teacher of religio[n].’” *Id.* at 2057. Further, “[c]atechists are ‘responsible for the faith formation of the students in their charge each day.’” *Id.*

<sup>298</sup> For a listing of the religious education activities of all 176 accredited non-public schools which have a religious identity, *see infra* Appendix B.

<sup>299</sup> *Academics*, MORNING STAR ACAD., <https://www.morningstaracademy.org/academics.html> [<https://perma.cc/3H2V-75VC>] (last visited Mar. 4, 2024).

<sup>300</sup> *Why Choose CKS?*, CHRIST THE KING SCH., <https://cksdesmoines.com/why-choose-cks> [<https://perma.cc/3H2V-75VC>] (last visited Mar. 4, 2024).

- The Iowa Great Lakes Lutheran School in Spencer says of its program: “The main purpose for establishing and maintaining our school is to teach God’s Word to your child in order that the student may grow in knowledge and faith in his Savior, Jesus Christ. This is done through daily instruction and devotions here at school and by encouraging all families of children enrolled in IGLLS to attend church services and Sunday school regularly. Each Monday and on days following special church services, every pupil is asked whether or not the student attended services.”<sup>301</sup>
- The Diocese of Sioux City has as one of its standards for Mission and Catholic Identity: “An excellent Catholic school adhering to mission provides a rigorous academic program for religious studies and catechesis in the Catholic faith, set within a total academic curriculum that integrates faith, culture, and life.”<sup>302</sup>
- The Clarinda Lutheran School says that it “provides students with magnificent opportunities to learn about Christ and the works he does in our world. With Weekly Chapels, Bible/Religion classes, a Yearly Theme and verse, your child will find Christ in everything we do.”<sup>303</sup>

In fact, all the religious schools which stand to receive public funding under the Iowa education savings account program teach their students religion.<sup>304</sup>

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<sup>301</sup> *Iowa Great Lakes Lutheran School Parent/Guardian Handbook*, IOWA GREAT LAKES LUTHERAN SCH. 4 (2023), [https://www.iglls.org/\\_managedFiles/files/files/1692710544.pdf](https://www.iglls.org/_managedFiles/files/files/1692710544.pdf) [<https://perma.cc/EZ4E-HG76>].

<sup>302</sup> *Building for the Future: Strategic Plan 2016–2021*, DIOCESE OF SIOUX CITY CATH. SCHS. 2, [https://cdnsm5-ss13.sharpschool.com/UserFiles/Servers/Server\\_242142/File/About%20Us/Long%20Range%20Strategic%20Plan/Strategic\\_Plan\\_for\\_web.pdf](https://cdnsm5-ss13.sharpschool.com/UserFiles/Servers/Server_242142/File/About%20Us/Long%20Range%20Strategic%20Plan/Strategic_Plan_for_web.pdf) [<https://perma.cc/35FP-GTDE>] (last visited Mar. 4, 2024).

<sup>303</sup> *Interested?*, CLARINDA LUTHERAN SCH., <https://clarindalutheranschool.com/interested-in-cl/> [<https://perma.cc/4ZYY-27GA>] (last visited Mar. 4, 2024).

<sup>304</sup> *See infra* Appendix B, item f., for each of the 176 accredited private schools which has a religious identity. Each includes information about the school’s religious education program. For the two OneSchool Global schools the record is nuanced; the schools say: “The Church Community believes that the classroom is not the place for religion, and as such there are no church services or religion based subjects taught across OneSchool Global campuses.” *Education*, PLYMOUTH BRETHREN CHRISTIAN CHURCH, <https://www.plymouthbrethrenchristianchurch.org/education/> [<https://perma.cc/6YM8-NDSU>] (last visited Mar. 4, 2024). At the same time, the schools describe their program as: “Christian education focused on building the next generation of world changing disciples for Christ through innovative hands-on education.” *One School*, FACEBOOK, <https://www.facebook.com/OneSchoolSparks> [<https://perma.cc/FLN5-GTJ6>] (last visited Mar. 4, 2024). And they announce their ethos as being

### 3. Are the Religious Schools Pervasively Religious?

Are the religious schools pervasively religious? Two types of public statements of the religious schools are instructive. First, what is the self-proclaimed mission of the school? A few mission statement examples illustrate the pervasive presence of religion in mission statements of the Iowa religious schools<sup>305</sup>:

- Holy Family Catholic Schools, in Dubuque, states: “Our Mission[] [is to] form[] disciples of Jesus Christ . . . .”<sup>306</sup>
- Hull Christian School proclaims: “The mission of Hull Christian School is to educate covenant children in the light of God’s Word, preparing them for a life of Christian discipleship, responsible stewardship, and humble service in His Kingdom.”<sup>307</sup>
- Trinity Lutheran School in Cedar Rapids states as its mission: “Know Christ + Grow in Christ + Make Christ Known.”<sup>308</sup>
- St. Patrick’s School in Sheldon has as its mission: “School, Church, and Home Working in Unity to Spread God’s Eternal Love.”<sup>309</sup>
- Community Lutheran School in Wapsie Valley has as its mission: “Providing a Christian environment for a quality education while inspiring students to go forth living Christ-centered lives as witnesses of the one true faith in God’s Kingdom.”<sup>310</sup>

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that “[t]he truth and authority of the Holy Bible and strong family values underpin the commitment of the School to provide quality in every facet of education—curriculum, teachers, facilities, management, and discipline—in a safe and caring environment.” *About Us*, ONESCHOOL GLOB., <https://www.oneschoolglobal.com/about-us/#about-section-2> [https://perma.cc/8RQY-AR9J] (last visited Mar. 4, 2024).

<sup>305</sup> For a listing of the mission statements of all 176 religious accredited non-public Iowa schools, see *infra* Appendix B.

<sup>306</sup> *About Us*, HOLY FAM. CATH. SCHS., <https://www.holyfamilydbq.org/about-us/> [https://perma.cc/NL4E-X9AM] (last visited Mar. 4, 2024).

<sup>307</sup> *Mission Statement*, HULL CHRISTIAN SCH., <https://www.hullchristian.com/about-hcs/mission-statement.cfm> [https://perma.cc/3XD3-U4S5] (last visited Mar. 4, 2024).

<sup>308</sup> *Trinity Lutheran School*, TRINITY LUTHERAN CHURCH & SCH., <https://www.trinitycr.org/lutheran-school/> [https://perma.cc/5Y5G-CY3E] (last visited Mar. 4, 2024).

<sup>309</sup> *Mission*, ST. PATRICK’S CATH. SCH., <https://www.stpatssheldon.org/mission> [https://perma.cc/V2CF-TWF6] (last visited Mar. 4, 2024).

<sup>310</sup> *Home*, CMTY. LUTHERAN SCH., <https://communitylutherschool.com/index.html> [https://perma.cc/LB8V-RE35] (last visited Mar. 4, 2024).

- Ames Christian School states its mission as: “Ames Christian School provides a personalized Christ-centered education, developing students spiritually and academically, to impact the world through Christ.”<sup>311</sup>

Second, are religious values infused across the curriculum? A few website examples illustrate the pervasive presence of religion across the curriculums of the Iowa religious schools<sup>312</sup>:

- Newton Christian Day School describes its program as: “An education submerged in the Word of God . . . .”<sup>313</sup>
- Sioux City Catholic Schools declares that: “The teaching of the Catholic faith, with a focus on Jesus Christ, will permeate all academic content areas.”<sup>314</sup>
- Central Lutheran School in Benton says: “We believe that the Christian teacher is committed to providing Christian instruction based on the doctrines of the Lutheran Church–Missouri Synod. Teachers, who have been Synodically trained or have received instruction the Lutheran doctrine, integrate Christian instruction in all subjects.”<sup>315</sup>
- Xavier Catholic Schools, in Cedar Rapids, says: “With Catholicity interwoven into the fabric of everything we do in our schools, there are *higher values, higher standards, a higher calling for service, and a higher purpose* through our Catholic teaching and faith in place.”<sup>316</sup>
- Unity Christian High School in Orange City states: “The biblical truth that resounds in our Christian school’s curriculum is that all things in the world belong to God. The task of a Christian school teacher is to help reveal God’s grand story in this world. Thus, a teacher’s task is

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<sup>311</sup> *About Us*, AMES CHRISTIAN SCH., <https://www.ameschristianschool.org/about-us> [<https://perma.cc/7RLV-7434>] (last visited Mar. 4, 2024).

<sup>312</sup> For a listing of the statements about religion across the curriculum of all 176 religious accredited non-public Iowa schools, see *infra* Appendix B.

<sup>313</sup> *Our Mission*, NEWTON CHRISTIAN SCH., <https://www.newtonchristianschool.com/> [<https://perma.cc/8358-TEQR>] (last visited Mar. 4, 2024).

<sup>314</sup> *Strategic Plan 2023–2028*, DIOCESE OF SIOUX CITY, <https://scdiocese.org/strategic-plan23> [<https://perma.cc/6W7Z-KNYM>] (last visited Mar. 4, 2024).

<sup>315</sup> *About Us*, CENTRAL LUTHERAN SCH., <https://centrallutherschool.org/about-clc/> [<https://perma.cc/M2NX-SLZ3>] (last visited Mar. 4, 2024).

<sup>316</sup> *About*, XAVIER CATH. SCHS., <https://crxaviercatholicschools.org/our-mission> [<https://perma.cc/V3HU-MTZ8>] (last visited Mar. 4, 2024).

one of Christian-storytelling, of seeking out and helping students to ‘See The Story’ in all areas of study.”<sup>317</sup>

- Holy Family Catholic Schools in Dubuque proclaims: “Our Catholic faith is at the heart of all we do at Holy Family Catholic Schools.”<sup>318</sup>
- The Diocese of Davenport states: “Our schools will infuse a rigorous academic program with the timeless message of Jesus Christ. . . .”<sup>319</sup>
- Faith Academy Iowa City: “We believe the Bible to be the inerrant word of God; a guide for us in all areas of life. Because of this, all our classrooms will be saturated with Biblical truth.”<sup>320</sup>
- Hull Christian School proclaims: “Education at Hull Christian School is based on the infallible truth found in the Bible. Out of this truth our school reflects the Christian virtues of love, compassion, respect and obedience. Hull Christian believes our school to be marked as distinctively Christian in a world tainted with sin.”<sup>321</sup>

In fact, all the religious schools which stand to receive public funding under the Iowa education savings account program are pervasively religious.<sup>322</sup>

Of course, there are other indications of a pervasive religious element in Iowa’s religious accredited private schools. For example, Holy Family Catholic Schools, in Dubuque, gives assurance that: “Every classroom displays visible signs of our Catholic identity.”<sup>323</sup> Whether “there were religious signs and displays in the classrooms” was one of the factors noted in the evaluation of the teachers in *Our Lady*

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<sup>317</sup> *Teaching for Transformation*, UNITY CHRISTIAN HIGH SCH., <https://www.unitychristian.net/tft> [<https://perma.cc/5JTC-3THG>] (last visited Mar. 4, 2024).

<sup>318</sup> *Our Catholic Identity*, HOLY FAM. CATH. SCHS., <https://www.holyfamilydbq.org/about-us/catholic-identity/> [<https://perma.cc/NL4E-X9AM>] (last visited Mar. 4, 2024).

<sup>319</sup> *Schools*, DIOCESE OF DAVENPORT, <https://davenportdiocese.org/schools> [<https://perma.cc/L5NC-K2MN>] (last visited Mar. 4, 2024).

<sup>320</sup> *Academics*, FAITH ACAD., <https://www.faithacademyiowa.org/academics/> [<https://perma.cc/L5CR-N96F>] (last visited Mar. 4, 2024).

<sup>321</sup> *Strategic Direction of Hull Christian School*, HULL CHRISTIAN SCH., <https://www.hullchristian.com/about-hcs/strategic-direction-of-hull-christian-school.cfm> [<https://perma.cc/W8X7-TVJ4>] (last visited Mar. 4, 2024).

<sup>322</sup> See *infra* Appendix B, items e. (mission statement) and g. (religious values infused) for each of the 176 accredited private schools which have a religious identity. All include information about the schools’ pervasive religious nature.

<sup>323</sup> *Our Catholic Identity*, *supra* note 318.

of *Guadalupe School*.<sup>324</sup> Religious imagery is ubiquitous among the religious schools that will receive public funds under the education savings account program.<sup>325</sup>

#### 4. Applying the Underlying Rationale

The compulsion guarantee of the Iowa Constitution is a religious liberty protection which ensures that citizens are not required to fund religious activities in which they do not join.<sup>326</sup> It is appropriate to consider how taxpayers might not join in the religious activities funded by the public through the education savings account program. There are two ways in which this occurs. The first is the classic reason underlying the compulsion guarantee: citizens whose beliefs on matters of religion differ from those of the sect conducting the religious activity. The second is the obverse: citizens whose participation in the religious activity is barred by the

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<sup>324</sup> 140 S. Ct 2049, 2057, 2059 (2020).

<sup>325</sup> See generally Lutheran Interparish Sch., *Photos*, FACEBOOK, <https://www.facebook.com/lutheraninterparish/photos> [<https://perma.cc/3EL5-DL73>] (last visited Mar. 4, 2024); Inwood Christian Sch., *Photos*, FACEBOOK, <https://www.facebook.com/InwoodChristian/photos> [<https://perma.cc/4S42-DLHQ>] (last visited Mar. 4, 2024); Aquin Cath. Sch., *Photos*, FACEBOOK, <https://www.facebook.com/aquincatholiccascade/photos> [<https://perma.cc/5JMD-Y83C>] (last visited Mar. 4, 2024); Beckman Cath. High Sch., *Photos*, FACEBOOK, <https://www.facebook.com/BeckmanCatholic/photos> [<https://perma.cc/VE8W-J3WM>] (last visited Mar. 4, 2024); *Deacon Garza Visits 5th Grade*, SACRED HEART SCH., <https://sacredheartschoolwdm.org/photoalbums/deacon-garza-visits-5th-grade> [<https://perma.cc/YC2V-U8HG>] (last visited Mar. 4, 2024); Dowling Cath. High Sch., *Photos*, FACEBOOK, <https://www.facebook.com/dowlingcatholic/photos> [<https://perma.cc/D4TA-JB4E>] (last visited Mar. 4, 2024); St. Mary Sch., *Photos*, FACEBOOK, <https://www.facebook.com/photo.php?fbid=735683818558548&set=pb.100063508095644.-2207520000.&type=3> [<https://perma.cc/2YH8-63YV>] (last visited Mar. 4, 2024); *Our School*, ST. THOMAS AQUINAS, WEBSTER CITY ST. MARY, WILLIAMS, <https://stthomaswc.org/photoalbums/our-school> [<https://perma.cc/DET7-TYTE>] (last visited Mar. 4, 2024); St. Paul Lutheran Sch. Fort Dodge, *Photos*, FACEBOOK, <https://www.facebook.com/stpaulschoolfd/photos> [<https://perma.cc/VXH9-FS5T>] (last visited Mar. 4, 2024); St. Francis of Assisi Sch., *Photos*, FACEBOOK, <https://www.facebook.com/stfrancisassischool/photos> [<https://perma.cc/P82V-J5Z3>] (last visited Mar. 4, 2024); Bosco Cath. Sch. Sys., *Photos*, FACEBOOK, <https://www.facebook.com/photo/?fbid=2924740340999015&set=pb.100061930315403.-2207520000> [<https://perma.cc/EF8N-J6B5>] (last visited Mar. 4, 2024); Columbus Cath. High Sch., *Photos*, FACEBOOK, <https://www.facebook.com/photo.php?fbid=725573272527222&set=pb.100052236684569.-2207520000.&type=3> [<https://perma.cc/BFZ2-BPZJ>] (last visited Mar. 4, 2024); Blessed Maria Assunta Pallotta Middle Sch., *Photos*, FACEBOOK, <https://www.facebook.com/photo/?fbid=4179229868763689&set=pb.100063631810258.-2207520000> [<https://perma.cc/CTJ6-DTQR>] (last visited Mar. 4, 2024); Immaculate Conception Elementary Sch., *Photos*, FACEBOOK, <https://www.facebook.com/photo/?fbid=714899783812321&set=pb.100058769181674.-2207520000> [<https://perma.cc/XS44-P6B3>] (last visited Mar. 4, 2024) (examples of religious imagery).

<sup>326</sup> IOWA CONST. art. I, § 3.



discrimination of the sect conducting the activity. Both are present in the case of religious schools given public funds under the education savings account program.

As to the first way, there are many citizens whose beliefs on matters of religion differ from those of the sects with which the religious schools are affiliated. The religious affiliations of Iowa's accredited private schools are simple. Only seven of the 183 accredited private schools are not religious.<sup>327</sup> All of the religious accredited private schools are either Catholic or non-Catholic Christian.<sup>328</sup> There are no accredited private schools in Iowa with Jewish, Muslim, Hindu, Buddhist, Bahá'í, Rastafari, Druze, Sikh, Taoist, Native American, Wiccan, atheist, agnostic, or any other non-Christian affiliations. None.

The religious affiliations of Iowa's citizens are significantly different than the religious affiliations of the schools which stand to benefit from public funding under the education savings account program. A 2014 study of the religious composition of Iowa's adult population by the Pew Research Center reported only slightly more than three-quarters of the population identifying as Christian, with more than three times as many Protestants as Catholics.<sup>329</sup> Atheists, agnostics, and respondents reporting "religious 'nones'" were over one-fifth of the population.<sup>330</sup> Non-Christian Faiths were 1% of the population.<sup>331</sup>

With almost a quarter of the population not affiliated with the religious groups which have schools—over 40% in the more recent study<sup>332</sup>—the number of citizens protected by the compulsion guarantee is very substantial.

The second way in which citizens might not join in the religious activities funded by the education savings account program is when citizens who do not share the religious faith of the favored sect are discriminated against by the sect conducting the religious activity. For example, one Christian school reserves the right to discriminate against prospective students based on religion, gender identity, and sexual orientation: "As a Christian school, Hull Protestant Reformed Christian

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<sup>327</sup> See *infra* Appendix C.

<sup>328</sup> See *supra* text accompanying note 220.

<sup>329</sup> *Religious Landscape Study, Adults in Iowa*, PEW RSCH. CTR. (2014), <https://www.pewresearch.org/religion/religious-landscape-study/state/iowa/> [<https://perma.cc/FLQ6-AKKJ>] (last visited Mar. 4, 2024). The study indicated Christians at 77%, with Protestants at 60% and Catholics at 18%. See *id.* Mormons, Orthodox Christians, Jehovah's Witnesses, and "Other Christians" each were less than 1% each. See *id.* A 2020 study put Christians at 58.7%, with Protestants at 44% and Catholics at 14.7%. Ryan P. Burge & Paul A. Djupe, *The Religious Composition of the Iowa Electorate*, RELIGION IN PUB. (Feb. 3, 2020), <https://religioninpublic.blog/2020/02/03/the-religious-composition-of-the-iowa-electorate/> [<https://perma.cc/L6YF-YCUS>].

<sup>330</sup> *Id.* The study indicated atheists were 4%, agnostics were 2%, and "nothing in particular" were 16%. *Id.* A 2020 study indicated that 30.6% put "None." *Id.*

<sup>331</sup> *Id.* The study indicated Muslims were 1%, with Jewish, Buddhist, Hindu, "Other World Religions," and "Other Faiths" each were less than 1%. See *id.* A 2020 study put "All Others" at 10.7%. *Id.*

<sup>332</sup> *Id.*

School reserves the right to discriminate or impose qualifications based on religion, gender identity, or sexual orientation. . . .<sup>333</sup> Another school discloses that it discriminates based on sexual orientation, gender identity, religion, and creed.<sup>334</sup>

Without more, such discrimination is illegal under the baseline non-discrimination policy set forth in the Iowa Civil Rights Act provision on schools: “It is an unfair or discriminatory practice for any educational institution to discriminate on the basis of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability in any program or activity.”<sup>335</sup> But the statute carves out a limited exception for discrimination for religious reasons: “Nothing in this section shall be construed as prohibiting any bona fide religious institution from imposing qualifications based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose. . . .”<sup>336</sup>

Stipulating that the schools at issue are “bona fide religious institutions,” which strengthens the argument that they are included within the coverage of the compulsion guarantee, it would still be necessary that it be “related to a bona fide religious purpose” for the discrimination to be within the limited exception.<sup>337</sup> It would be an interesting exercise for the schools which invoke the limited exception in the Iowa Civil Rights Act to explain what “bona fide religious purpose” is served by excluding students from their schools based on their sexual orientation or gender identity.<sup>338</sup>

Other schools are less forthcoming; they merely omit certain types of discrimination from their non-discrimination statements. For example: “Central Iowa

<sup>333</sup> *Hull Protestant Reformed Christian School Parent-Student Handbook*, HULL PROTESTANT REFORMED CHRISTIAN SCH. 38 (2023), [https://www.hprcs.com/Parent\\_Student\\_Handbook\\_-\\_5\\_4\\_23\\_1.pdf](https://www.hprcs.com/Parent_Student_Handbook_-_5_4_23_1.pdf) [<https://perma.cc/HVE4-HEYE>].

<sup>334</sup> *Admissions*, ANKENY CHRISTIAN ACAD., <http://aca eagles.net/admissions/> [<https://perma.cc/U2KM-46TX>] (last visited Mar. 4, 2024). The school’s website says:

ACA does not discriminate on the basis of race, color, gender, nationality and ethnicity, socioeconomic status, age, or disability in the administration of its admission, education, financial assistance, extracurricular policies, or employment policies and other school sponsored programs. Note: As a bona fide religious organization, we impose qualifications based on a bona fide religious purpose. (Refer to school’s doctrinal statement.) Sexual orientation, gender identity, religion, and creed have been excluded from this policy in accordance with Iowa Code 216.9(2) (2003)[.]

*Id.* It should be noted that the policy appears inconsistent with the statutory provision. Section 216.9.1 includes “creed” in the list of unfair or discriminatory practices, but § 216.9.2 does not include “creed” in the bona fide religious purpose exception. IOWA CODE § 216.9.1–2 (2003).

<sup>335</sup> *Id.* § 216.9.1 (2022).

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *See Matthew 19:14* (King James) (“But Jesus said, Suffer little children, and forbid them not, to come unto me: for of such is the kingdom of heaven.”).

Christian School does not discriminate on the basis of race, color, national ethnic orig [sic] in its educational programs or activities.”<sup>339</sup> The problem with many of these abbreviated listings is that they omit some types of discrimination which are on the statutory baseline list that are not included in the bona fide religious purpose exception. For example, the Central Iowa Christian School omits creed, sex, and disability, which are in the baseline listing of prohibited types of discrimination<sup>340</sup> and are not within the bona fide religious purpose exception.<sup>341</sup>

Other schools have admissions policies which discriminate based on the characteristics or behavior of the prospective student’s parents:

The following criteria is used to determine if our school is the right fit for your child at this time[:] At least one parent or guardian has a personal testimony of a relationship with Jesus Christ. There is membership in, or regular attendance at, a church in which the Bible is sincerely believed to be the inspired word of God which is the basis for all life and learning. . . . Parents desiring to send students to Community Christian School are in a Biblical marriage which is defined as a covenant relationship between one man and one woman. Single parents or guardians are in a Biblical relationship.<sup>342</sup>

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<sup>339</sup> *Admissions*, CENT. IOWA CHRISTIAN SCH., <https://www.centraliowachristianschool.org/admissions> [<https://perma.cc/D4EM-7HH5>] (last visited Mar. 4, 2024); *see also Cedar Valley Christian School Application for Enrollment*, CEDAR VALLEY CHRISTIAN SCH., <https://www.cedarvalleychristianschool.org/editoruploads/files/Student-Application.pdf> [<https://perma.cc/6AF5-NYPU>] (last visited Mar. 4, 2024) (“ADMISSIONS POLICY: Cedar Valley Christian School admits students of any race, sex, color, national and ethnic origin to all the rights and privileges, progress and activities generally accorded or made available to students at the school. It does not discriminate on the basis of race, sex, color, national and ethnic origin in administration of its educational policies and athletic or other school administered programs.”); *About Us*, CENT. LUTHERAN SCH., <https://centrallutheranschool.org/about-clsl/> [<https://perma.cc/9GN9-3XFB>] (last visited Mar. 4, 2024) (“Central Lutheran School does not discriminate on the basis of race, color, national or ethnic origin, sex, or disability in administration of its educational policies, scholarship and loan programs, athletic and other school administered programs.”).

<sup>340</sup> *See* IOWA CODE § 216.9.1.

<sup>341</sup> *See id.* § 216.9.2.

<sup>342</sup> *Admissions*, CMTY. CHRISTIAN SCH., <https://www.ccsfd.org/admissioninfo> [<https://perma.cc/7FVZ-KH86>] (last visited Mar. 4, 2024); *see also Enrollment Requirements*, AMES CHRISTIAN SCH., <https://www.ameschristianschool.org/enrollment> [<https://perma.cc/S8P5-UEY9>] (last visited Mar. 4, 2024) (“All students must come from a home where at least one parent or guardian has a personal relationship with Jesus Christ and is in complete accord with the policies, methods, and obligations of the school.”).

Others add requirements of membership, or perhaps only regular attendance, at a suitable church, “a Bible-believing church,”<sup>343</sup> or “a church that affirms historic Christian orthodoxy (doctrine, faith, teaching, practice), consistent with [the school’s beliefs].”<sup>344</sup>

Presumably, these religious schools would claim that the forms of discrimination in which they engage come within the permissible “religious” category in the limited exception. Of course, they would have to make the case that excluding a student, for example because her parents are married but not in a Biblical covenant marriage, is for a “bona fide religious purpose.”<sup>345</sup>

In fairness, it should be acknowledged that not all the accredited religious schools have a policy of discriminating against some classes of citizens. As one might expect, the non-discrimination policy of the only Quaker school in the group, Scattergood Friends School in West Branch, is quite robust:

Scattergood Friends School is committed to supporting a diverse community of adults and youths. Scattergood Friends School does not discriminate on the basis of ethnic or national origin, religion, age, economics, gender identity, genetic information,

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<sup>343</sup> See *Admissions, Requirements*, TIMOTHY CHRISTIAN SCH., <https://timothychristian.school.net/admissions/> [<https://perma.cc/74SZ-68RK>] (last visited Mar. 4, 2024) (“We ask that families attend a Bible-believing church regularly and are committed to teaching their children about Christ at home.”); see also *Admissions Process*, TRI-STATE CHRISTIAN SCH., <https://www.tscs.org/admissions-process.html> [<https://perma.cc/K8JE-AN62>] (last visited Mar. 4, 2024) (“[O]ne custodial parent (preferably both) must be a born-again believer who is in agreement with the TSCS Statement of Faith and is actively living out their faith in a Bible-believing church. A parent is not required to be a member of a church but at least be active in attendance. A Pastoral Reference form is required for enrollment.”).

<sup>344</sup> *Admissions Criteria*, DES MOINES CHRISTIAN SCH., <https://www.dmcs.org/admissions/admission-criteria> [<https://perma.cc/PZ37-U7C6>] (last visited Mar. 4, 2024). The school’s website says:

At least one parent or guardian must be a professing believer in Jesus Christ and provide a written Christian testimony. It is preferred that both parents provide written faith testimonies. At least one parent must be in full agreement with and willingly sign the DMC Statement of Faith. At least one parent must agree to respectfully support the School’s position and teaching on all social and doctrinal issues as defined in the DMC Biblical Convictions for Christian Education. Student(s) and at least one parent commit to growing in their relationship with Christ and regularly attend a church that affirms historic Christian orthodoxy (doctrine, faith, teaching, practice), consistent with the DMC Statement of Faith, through that church’s public creed, confession, core beliefs, or statement of faith.

*Id.*

<sup>345</sup> IOWA CODE § 216.9.2.

sexual orientation, physical ability and veteran status in administration of its educational policies, enrollment, or hiring policies, and other school-administered programs.<sup>346</sup>

Or, as Scattergood restates its policy: “Who is a Scattergoodian? They might come from Brooklyn, Kabul, or Des Moines. Their biggest passion might be social justice, biology, or Ultimate Frisbee. They might be Quaker, Muslim, Jewish, Christian, or atheist. They all believe in promoting a positive learning environment for all.”<sup>347</sup>

Other schools also have robust non-discrimination policies. One Lutheran school provides: “All are Welcome: St. Paul’s welcomes all. No matter your ability, ethnicity, gender, gender identity, place of origin, race, religion, or sexual orientation, there is a place for you here.”<sup>348</sup> Another example is a Catholic school whose policy provides:

In alignment with Catholic Church teachings, Holy Family believes all members of our school community are responsible for advancing an understanding of and respect for diversity as it includes, but is not limited to ability, age, belief, ethnicity, family structure, sex, race, religion, sexual orientation, and socioeconomic status. Therefore, Golden Eagles will hold one another accountable to behavior worthy of our Catholic environment.<sup>349</sup>

Some schools cast their policies in terms of inclusiveness, at least to a point. One Lutheran school provides: “At Clarinda Lutheran School, we welcome all denominations of Christianity.”<sup>350</sup> A large, urban Catholic high school is inclusive at the start: “Dowling Catholic High School is committed to serving the Greater Des Moines Catholic community and embracing learners of all faiths.”<sup>351</sup> It turns out “all faiths” is imprecise, as the policy continues: “In an environment that is faithful, caring and dedicated, Dowling Catholic forms each student to become a Christ-centered leader.”<sup>352</sup>

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<sup>346</sup> *Employment Opportunities*, SCATTERGOOD FRIENDS SCH., <https://scattergood.org/employment-opportunities/> [<https://perma.cc/8SUQ-AMRN>] (last visited Mar. 4, 2024).

<sup>347</sup> *Who is a Scattergoodian?*, SCATTERGOOD FRIENDS SCH., <https://scattergood.org/who-is-a-scattergoodian/> [<https://perma.cc/EH46-5MR8>] (last visited Mar. 4, 2024).

<sup>348</sup> *About St. Paul’s School*, ST. PAUL’S LUTHERAN SCH., <https://www.stpaulswaverly.org/about-school> [<https://perma.cc/7V6J-X3YU>] (last visited Mar. 4, 2024).

<sup>349</sup> *Holy Family Catholic Schools Parent and Student Policy & Procedure Manual 2023–2024*, HOLY FAM. CATH. SCHS. 1, 4 (2023), <https://www.holyfamilydbq.org/wp-content/uploads/2022/06/HFCS-Policy-Procedure-Handbook.pdf> [<https://perma.cc/N293-JL42>].

<sup>350</sup> *Interested?*, CLARINDA LUTHERAN SCH., <https://clarindalutheranschool.com/interested-in-cls/> [<https://perma.cc/RQM4-X3MA>] (last visited Mar. 4, 2024).

<sup>351</sup> *Admissions*, DOWLING CATH. HIGH SCH., <https://www.dowlingcatholic.org/admissions/enrollment-process-for-incoming-freshmen> [<https://perma.cc/V9N9-4NZN>].

<sup>352</sup> *Id.*

The number of citizens who would be subjected to discrimination by the various sects with which the religious schools are affiliated would be very substantial. For example, consider the admissions program of the Hull Protestant Reformed Christian School, cited above for its policy claiming the right to discriminate on the basis of religion, gender identity, and sexual orientation. For a child to be admitted, the child's parents "must be a member in good standing of a reformed Christian church which has adopted the Heidelberg Catechism, Canons of Dordt, and Belgic or Netherlands Confession as their official creeds."<sup>353</sup> The parents "must commit to maintaining a Christian home," and "must consent to the Society's Constitution, By-Laws, Rules, and Policies."<sup>354</sup> The Protestant Reformed Church has three congregations in Iowa, one in Doon and two in Hull, with a combined membership of around 900.<sup>355</sup> Iowa has a population of almost 3.2 million.<sup>356</sup> With less than .03% of the state's population eligible to send their children to the Hull Protestant Reformed Christian School, the number of citizens being protected by the compulsion guarantee is very substantial.

The disparity between the religious affiliations of the schools which stand to receive public funds under the education savings account program and the Iowa population, and the number of Iowans who would be discriminated against by those schools, are illustrations of why the religious freedom protections of the compulsion guarantee make the state funding program unconstitutional.

The religious liberty protection of the compulsion guarantee would be sufficient even it was only a single citizen whose faith was denied by the activities of other religions being funded with public funds to which the disfavored citizen contributed; even if only a single citizen was discriminated against by excluding a single citizen from participating in the activities of favored religious groups. But the popular opposition to the education savings account program was not in any way so limited: the education savings account program was opposed by over 60% of Iowans.<sup>357</sup>

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<sup>353</sup> *Hull Protestant Reformed Christian School, Parent-Student Handbook*, HULL PROTESTANT REFORMED CHRISTIAN SCH. 1, 10 (2023), [http://www.hprcs.com/Parent\\_Student\\_Handbook\\_-\\_5\\_4\\_23\\_1.pdf](http://www.hprcs.com/Parent_Student_Handbook_-_5_4_23_1.pdf) [<https://perma.cc/3SUF-4F3J>]. There is a mechanism by which parents who are not members of a Protestant Reformed Church may qualify by interview with a committee. *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Church Listings PR Churches (USA & Canada)*, PROTESTANT REFORMED CHURCHES IN AM., <http://www.prc.org/about/listings/churches/usa-canada> [<https://perma.cc/WB5C-YQ6T>] (last visited Mar. 4, 2024). The three Protestant Reformed Churches in America congregations in Iowa had a combined membership of 946 adherents in 2020. The Association of Religion Data Archives, *Top 5 Protestant Reformed Churches in America States (2020)*, <https://www.thearda.com/us-religion/group-profiles/groups?D=668> [<https://perma.cc/K7DB-2LFH>].

<sup>356</sup> *QuickFacts: Iowa*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/IA/PST045222> [<https://perma.cc/EPP8-D4DZ>] (last visited Mar. 4, 2024).

<sup>357</sup> See Gruber-Miller & Hernandez, *supra* note 216 (reporting 62% in opposition, 34%

III. THE *CARSON V. MAKIN* COMPLICATION

The determination that payments of public funds to religious schools under the education savings account program violate the compulsion guarantee of the Iowa Constitution does not end the inquiry. In 2022, the United States Supreme Court decided *Carson v. Makin*, striking down the exclusion of religious schools from participation in a Maine tuition assistance program, and complicating our way forward.<sup>358</sup>

Because of its sparse population in rural areas, Maine provided tuition assistance for families living in areas where the local authorities did not operate schools.<sup>359</sup> Parents in such a situation might direct state-funded tuition assistance grants to private schools.<sup>360</sup> In 1981, the program was amended to require that the receiving schools be “nonsectarian.”<sup>361</sup>

The *Carson* majority, in an opinion authored by Chief Justice Roberts, found that the Maine exclusion of sectarian schools from the tuition assistance grant program violated the Free Exercise Clause; “Maine may provide a strictly secular education in its public schools,” the Court said.<sup>362</sup> The analysis continued: “A State need not subsidize private education. . . [b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”<sup>363</sup>

It is perfectly compatible with *Carson* for a state to decide, as a matter of fundamental policy, that it will not use state funds to support religious schools, which we now understand to mean that it may not use state funds to support secular private schools either. If a state made such a fundamental policy choice, the appropriate place to memorialize it would be in the state constitution. As long as that fundamental policy is implemented in a way that does not differentiate between religious and secular private schools, it comports with the Federal Free Exercise Clause under *Carson*.

Why might a state implement such a policy? As in 1844, the underlying rationale would be one of religious liberty, that citizens ought not be forced through their

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in favor, and 4% unsure). The education savings account program was narrowly favored by Republicans (51% to 44%) but was opposed by independents (63% to 34%) and Democrats (82% to 12%). *Id.* It was narrowly favored by Evangelicals (49% to 46%) but was opposed by Catholics (57% to 39%) and Protestants (57% to 39%). *Id.* Iowans with children under the age of 18 opposed the program (59% to 38%), as did parents with children in public school (61% to 36%). *Id.* The program to finance religious schools with public funds was signed by the Governor just two weeks after it was introduced. *Id.*

<sup>358</sup> See 142 S. Ct. 1987, 2002 (2022).

<sup>359</sup> *Id.* at 1993.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 1994.

<sup>362</sup> *Id.* at 2000.

<sup>363</sup> *Id.* (quoting *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020)).

payment of taxes to facilitate a religion with which they do not agree.<sup>364</sup> If anything, the case for such a provision has grown stronger over the past one hundred and eighty years as our nation has grown more diverse in matters of religion.

Iowa's education savings account program does not exclude religious schools from participation in public-funded payments from the education savings accounts, so it does not violate the Federal Free Exercise Clause under the *Carson* analysis. But if plaintiffs successfully sued to strike down education savings account payments to religious schools as violative of Article 1, Section 3, Clause 3 of the Iowa Constitution, it would create a situation, under *Carson*, implicating the Federal Free Exercise Clause. This would invite the Federal courts to intervene, declaring the state's compulsion guarantee invalid as applied, and forcing Iowa to fund education savings account payments to religious schools.

Of course, there is a way to honor both the Federal Free Exercise Clause as currently interpreted by the Supreme Court and the state constitution religious liberty compulsion guarantee. If the state constitution prohibits payments to religious schools, and the Federal Constitution requires the state to treat private religious and non-religious schools the same, the answer is a holding that the state is prohibited from funding *both* religious and non-religious schools.

The solution is for the plaintiffs challenging the Iowa education savings account program to request that the Iowa Supreme Court first strike down the transfer tax-funded payments to religious schools as violative of the state's compulsion guarantee, and then, in the same opinion, to strike down the remaining education savings account tax-funded payments to non-religious schools as violative of the Federal Free Exercise Clause.<sup>365</sup>

#### CONCLUSION

In determining whether allocating tax-generated public funds to religious schools violates the compulsion guarantee of the Iowa Constitution, it is helpful to be clear about what is at issue and what is not. Whether religious schools provide valuable educational opportunities to some students is not the question. I am perfectly willing to stipulate that some students in some situations benefit from having access to religious schools.

Neither is it the question of whether parents have a free exercise right to have their children attend religious schools; of course, parents have that right to access religious schools precisely because the schools provide religious experiences that implicate the free-exercise rights of the students and their parents under the Federal and state constitutions, confirming that the schools are indeed ministries.

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<sup>364</sup> See *id.* at 2005.

<sup>365</sup> The Iowa Supreme Court might also declare the resulting state-funded education savings account payments to non-religious schools as a violation of the Free Exercise Clause of the Iowa Constitution, if it wants to adopt the reasoning of *Carson*. See *generally id.*



What is at issue here is whether taxpayers should be required to subsidize religious sects by *paying* for access to such religious schools with public funds. The *Knowlton* court addressed this issue nicely:

Neither do we, expressly or by implication, disparage parochial or private schools for those whose consciences or preferences lead them to make use of such means for the education of their children. We can and do hold in high respect the convictions of those who believe it desirable that secular and religious instruction should go hand in hand, and that the school which combines mental and spiritual training is best adapted to the proper development of character in the young. The loyalty to their professed principles which leads such persons to found and maintain schools of this class at their private expense, while at the same time bearing their equal burden of taxation for the support of public schools, is worthy of admiration, and convincing proof of their sincerity.<sup>366</sup>

But, the *Knowlton* court went on to observe that the parental decision to have one's children attend a religious school does not mean the government should subsidize the choice:

But it is doubtless true that this double burden (double only because voluntarily assumed) sometimes renders those who bear it susceptible to the misleading argument that, because they thus carry an extra load for conscience's sake, there is something wrong in the policy which forbids them to make the public school a means for accomplishing the end for which the parochial school is designed. . . . The spirit which would make the state sponsor for any form of religion or worship, and the religion, whether Protestant or Catholic, which would make use of any of the powers or functions of the state to promote its own growth or influence, are . . . inconsistent with the equality of right and privilege and the freedom of conscience which are essential to the existence of a true democracy.<sup>367</sup>

In 1844, the drafters of the Iowa constitution reflected the voluntary and democratic religious convictions of their time. In Article 1, Section 3, Clause 3, they wrote a religious liberty guarantee that citizens would not be compelled to pay taxes

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<sup>366</sup> *Knowlton v. Baumhover*, 166 N.W. 202, 212 (Iowa 1918).

<sup>367</sup> *Id.*

for the state to fund religious activities with which, inevitably, some citizens would disagree.

In 1918, the Iowa Supreme Court in *Knowlton* applied that religious liberty guarantee to strike down the use of state funds to support what was, for all intents and purposes, a parochial school. The court proclaimed that it is the duty of courts “to enjoin the defendants and their successors in office from directly or indirectly making any appropriation or use of the public funds for the support or in aid of such parochial school, or of any so-called public school maintained or conducted in connection with such parochial school.”<sup>368</sup> In short, “[a parent] has no right . . . to ask that the state . . . expend money acquired by public taxation, in training his [or her] children religiously.”<sup>369</sup>

In 2023, the Iowa courts have a duty to enjoin state officials from directly or indirectly making any appropriation or use of public funds for support of religious schools under the education savings account program. In the end, this simply is not a difficult judgment if approached in good faith. The compulsion guarantee prohibits the state from collecting taxes to fund ministries, to train children religiously. Religious schools are ministries. They teach their students religion. They are pervasively religious. Ergo, the practice of supporting them with public funds is unconstitutional.

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In September of 1890, The Kansas Catholic newspaper printed an editorial on the Poughkeepsie Plan.<sup>370</sup> The editorial outlined the agreement as:

[A]n arrangement by which the pastor rented the parochial school building to the public school board for a nominal rental, and the expences [sic] of the school were then to be paid out of the public school fund. But the teachers were to be selected by the public school board, the public school text books were to be used, and the school was to be conducted in all things according to the rules for the government of the public schools made by the public school board.<sup>371</sup>

The writers were candid that although the selection of teachers was formally done by the public school board, in fact they were selected by the parish priest.<sup>372</sup> The

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<sup>368</sup> *Id.* at 214.

<sup>369</sup> *Id.* at 207.

<sup>370</sup> See generally *The Poughkeepsie Plan*, THE KAN. CATH., Sept. 18, 1890. The editorial, which responded to Archbishop Ireland’s speech to the National Education Association, in which he advocated adoption of the Plan “as a means of giving at least a measure of fair play to Catholics,” was apparently reprinted from The Michigan Catholic newspaper. *Id.* at 2.

<sup>371</sup> *Id.*

<sup>372</sup> *Id.* (“[T]he teachers named by the pastor of the parochial school were appointed by the

editorial noted that the teachers were “three Sisters of Charity and five lay teachers. It is to be presumed that the lay teachers are Catholics.”<sup>373</sup>

The element of the Plan which caused concern for the editorial writers was the agreement that religious instruction not take place in the classroom or during regular school hours.<sup>374</sup> This compromise troubled the writers:

Now, while it must be conceded that such a Catholic school is better than no Catholic school at all—and better in an almost incomprehensible degree than the ordinary public school—yet it will be observable to all real Catholics that such a school is not in the real way, a Catholic school.<sup>375</sup>

For the editorial writers, this was not a compromise worth making:

Now, the Poughkeepsie plan excludes the Catholic religion from the school room during the school hours. Should the Catholic religion be excluded from the Catholic school for one hour? Remember, in a real Catholic school the Catholic religion is *always* present—in the teacher’s manner and garb, in the child’s conception of the very purpose of the teacher, in the crucifix on the wall, in the statue of the Blessed Virgin or of the patron saint in the niche or on the bracket over the teacher’s desk—not to speak of the prayer said at certain hours during the day—the Hail Mary when the clock strikes, the Angelus when the noon hour sounds, etc., etc., Oh, that we had time and ability to set forth here the difference between a real Catholic school and the ordinary American public school!<sup>376</sup>

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school board . . . [because] the priests who have been successive pastors of that church have been popular in the city and have been able to keep the school board in good disposition and willing to continue the ‘plan’ in the spirit intended by the priest who established it.”)

<sup>373</sup> *Id.*

<sup>374</sup> *Id.* (“But the Poughkeepsie plan provided that there should be no religious teaching during the legal school hours and that whatever religious instruction was given should be out of, and either before or after, the legal school hours.”)

<sup>375</sup> *Id.*

<sup>376</sup> *Id.* The editorial allowed that the Plan might be appropriate for a parish “where the people were so poor that they could not at all support a parochial school” because “it would furnish for their children a school that would be taught by Catholic teaches [sic], some of whom would be religious, whose manners and garb would be of themselves teachers of morals and religion.” *Id.*

In the end, the Kansas editorial writers thought the compromise too great: “May God protect the Catholics of the United States if we are ever driven to make such arrangement as that called the ‘Poughkeepsie plan’ for general acceptance.”<sup>377</sup>

The Poughkeepsie plan as agreed to in Maple River called for the same compromise. Although the public board formally appointed the teachers, they were sisters designated by the parish priest.<sup>378</sup> There was to be no religious instruction in the classroom or during school hours.<sup>379</sup> But the priest and the teaching sister simple reneged on that portion of the agreement and for almost a decade taught the catechism and gave religious instruction in the classroom during regular school hours.<sup>380</sup>

The contemporary education savings account scheme lacks even the nuance of the Poughkeepsie Plan. There is no pretense that public funds will not be used to support religious education. And that is why the education savings act is unconstitutional under Iowa’s religious freedom compulsion guarantee.

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<sup>377</sup> *Id.* The same month, an editorial appeared in *The Luxemburger Gazette*, an Iowa Catholic newspaper published in predominantly Catholic Dubuque, but with a statewide readership. These editorial writers also came out against the Poughkeepsie Plan because of what would be given up:

Because in a truly Catholic school religion should permeate all aspects of school instruction and specifically all books should breathe the Catholic spirit. School should open and close with Catholic prayers. In every classroom at least a crucifix should be displayed. In primers and coursebooks kids should be exposed to the Bible, its history, the life of Saints and the deeds of Catholic men. In History the accomplishments of the Catholic church for humanity should be discussed lively and Luther and other sect leaders should be characterized appropriately, in science the questionable hypotheses of atheist academics should be eradicated and disproven, and all instruction should simply create an intimate connection with religion.

*The Poughkeepsie Plan*, *THE LUXEMBURGER GAZETTE*, Sept. 30, 1890, at 4 (translated from the original German).

<sup>378</sup> *Knowlton v. Baumhover*, 166 N.W. 202, 210 (Iowa 1918).

<sup>379</sup> *See id.*

<sup>380</sup> *See id.* at 204 (“From the beginning, and for a period of more than nine years, the study of the Catholic catechism and the giving of religious instruction were part of the daily program of instruction in both rooms.”).

**APPENDICES**

## A. STATE CONSTITUTION COMPULSION GUARANTEES

1. Alabama: ALA. CONST. art. I, § 3 (“[T]hat no one shall be compelled by law . . . to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry . . .”).
2. Arkansas: ARK. CONST. art. II, § 24 (“[N]o man can, of right, be compelled to . . . erect, or support any place of worship; or to maintain any ministry against his consent.”).
3. Colorado: COLO. CONST. art. II, § 4 (“No person shall be required to . . . support any ministry or place of worship, religious sect or denomination against his consent.”).
4. Connecticut: CONN. CONST. art. VII (“[N]o person shall by law be compelled to . . . support . . . any congregation, church or religious association.”).
5. Delaware: DEL. CONST. art. I, § 1 (“[N]o person shall or ought to be compelled . . . to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his or her own free will and consent . . .”).
6. Idaho: IDAHO CONST. art. I, § 4 (“No person shall be required to . . . support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent . . .”).
7. Illinois: ILL. CONST. art. I, § 3 (“No person shall be required to . . . support any ministry or place of worship against his consent . . .”).
8. Indiana: IND. CONST. art. I, § 4 (“[N]o person shall be compelled to . . . erect, or support, any place of worship, or to maintain any ministry, against his consent.”).
9. Iowa: IOWA CONST. art. I, § 3 (“[N]or shall any person be compelled to . . . pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.”).
10. Kansas: KAN. CONST. BILL OF RIGHTS § 7 (“[N]or shall any person be compelled to . . . support any form of worship . . .”).

11. Kentucky: KY. CONST. BILL OF RIGHTS § 5 (“[N]or shall any person be compelled . . . to contribute to the erection or maintenance of any [place of worship], or to the salary or support of any minister of religion . . .”).
12. Maryland: MD. CONST. DECLARATION OF RIGHTS, art. 36 (“[N]or ought any person to be compelled to . . . maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry . . .”).
13. Michigan: MICH. CONST. art. I, § 4 (“No person shall be compelled . . . against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion.”).
14. Minnesota: MINN. CONST. art. I, § 16 (“[N]or shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent . . .”).
15. Missouri: MO. CONST. art. I, § 6 (“That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion . . .”).
16. Nebraska: NEB. CONST. art. I, § 4 (“No person shall be compelled to attend, erect or support any place of worship against his consent . . .”).
17. New Jersey: N.J. CONST. art. I, § 3 (“[N]or shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.”).
18. New Mexico: N.M. CONST. art. II, § 11 (“No person shall be required to . . . support any religious sect or denomination . . .”).
19. Ohio: OHIO CONST. art. I, § 7 (“No person shall be compelled to . . . erect or support any place of worship, or maintain any form of worship, against his consent . . .”).
20. Pennsylvania: PA. CONST. art. I, § 3 (“[N]o man can of right be compelled to . . . erect or support any place of worship, or to maintain any ministry against his consent . . .”).

21. Rhode Island: R.I. CONST. art. I, § 3 (“[N]o person shall be compelled . . . to support any religious worship, place, or ministry whatever, except in fulfillment of such person’s voluntary contract . . .”).
22. South Dakota: S.D. CONST. art. VI, § 3 (“No person shall be compelled to attend or support any ministry or place of worship against the person’s consent . . .”).
23. Tennessee: TENN. CONST. art. I, § 3 (“[N]o man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent . . .”).
24. Texas: TEX. CONST. art. I, § 6 (“No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent.”).
25. Vermont: VT. CONST. ch. I, art. 3 (“[T]hat no person ought to, or of right can be compelled to . . . erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience . . .”).
26. Virginia: VA. CONST. art. I, § 16 (“No man shall be compelled to . . . support any religious worship, place, or ministry whatsoever . . .”).
27. West Virginia: W. VA. CONST. art. III, § 15 (“No man shall be compelled to . . . support any religious worship, place, or ministry whatsoever . . .”).
28. Wisconsin: WIS. CONST. art. I, § 18 (“[N]or shall any person be compelled to . . . erect or support any place of worship or to maintain any ministry, without consent . . .”).

## B. ACCREDITED 2022 NON-PUBLIC SCHOOLS IN IOWA

1. [School name]
  - a. Location / district / school:
  - b. Religious identity:
  - c. Enrollment:
  - d. ESA public funds estimate (Year 3): \$
  - e. Mission:
  - f. Religious education:
  - g. Religious values infused:

[The complete Appendix B, with the indicated entries for all 183 accredited private schools, is available at: [http://wm.billofrightsjournal.org/?page\\_id=1190](http://wm.billofrightsjournal.org/?page_id=1190).

Alternatively, view Appendix B of this Article on the *William & Mary Bill of Rights Journal's* Repository, found here: <https://scholarship.law.wm.edu/wmborj>.]



## C. ACCREDITED 2022 NON-PUBLIC NON-RELIGIOUS SCHOOLS IN IOWA

1. Bergman Academy
  - a. Location / district / school: Des Moines / 1737 / 8505
  - b. Religious identity: None
  - c. Enrollment: 308
  - d. ESA public funds estimate (Year 3): \$2,458,764
  
2. Jordahl Academy
  - a. Location / district / school: BCLUW (Grundy)/ 0540 / 8225
  - b. Religious identity: None
  - c. Enrollment: 2
  - d. ESA public funds estimate (Year 3): \$15,966
  
3. Maharishi School
  - a. Location / district / school: Fairfield / 2169 / 8502
  - b. Religious identity: None
  - c. Enrollment: 126
  - d. ESA public funds estimate (Year 3): \$1,005,858
  
4. Montessori School of Marion
  - a. Location / district / school: Linn-Mar / 3715 / 8101
  - b. Religious identity: None
  - c. Enrollment: 9
  - d. ESA public funds estimate (Year 3): \$71,847
  
5. Rivermont Collegiate
  - a. Location / district / school: Bettendorf / 0621 / 8110
  - b. Religious identity: None
  - c. Enrollment: 79
  - d. ESA public funds estimate (Year 3): \$630,657
  
6. Summit Schools Inc
  - a. Location / district / school: Cedar Rapids / 1053 / 8200
  - b. Religious identity: None
  - c. Enrollment: 78
  - d. ESA public funds estimate (Year 3): \$622,674
  
7. Willowwind School
  - a. Location / district / school: Iowa City / 3141 / 8102
  - b. Religious identity: None

- c. Enrollment: 69
- d. ESA public funds estimate (Year 3): \$550,827