

THE ORIGINALIST CASE AGAINST VOUCHERS: THE FIRST AMENDMENT, RELIGION, AND AMERICAN PUBLIC EDUCATION

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The perpetual practice in all sects to teach no other morals to their youth than those of their own creed, introduces dangerous effects, foment divisions amongst mankind, [and] subjects liberal and solid sentiments to religious prejudices. . . [I]f the Legislature wish to establish a perfect plan of moral instruction, they should propose a code that will no longer keep alive those religious prejudices among the different sects.

–Anonymous (William Smith), 1797¹

In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.

–Justice Clarence Thomas²

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1. Smith’s essay may be found in BENJAMIN JUSTICE, *THE FOUNDING FATHERS, EDUCATION, AND “THE GREAT CONTEST”*: THE AMERICAN PHILOSOPHICAL SOCIETY PRIZE OF 1797, at 234 (2013).

2. *Mitchell v. Helms*, 530 U.S. 793, 829 (2000).

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INTRODUCTION

Does giving public school vouchers to religious organizations violate the First Amendment's Establishment Clause? To a surprising degree, this urgent policy question of the twenty-first century has been informed by historical interpretations of the intellectual landscape of the late eighteenth century. Indeed, on the broad question of providing any public support for religious schools, the Supreme Court has consistently invoked "original meanings" reasoning since the very first Establishment Clause case, *Everson v. Board of Education*.³ Since the 1980s, however, a new politicization of historical interpretation in jurisprudence has fused with efforts to privatize all sectors of American government. Strident critics of public schooling have turned to history to make the case that school voucher programs that include religious schools are constitutionally permissible. Some have gone further and use history to make the radical argument that American public schools as they currently exist are actually *unconstitutional* because they exclude religious organizations or are hostile to them.⁴ In *Zelman v. Simmons-Harris*, a majority of the Supreme Court agreed with the former proposition—that a Cleveland voucher program that included religious schools did not violate the First Amendment establishment prohibitions.⁵ Elsewhere Justice Thomas has

3. 330 U.S. 1 (1947).

4. See Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 *FORDHAM L. REV.* 493 (2003); Luke A. Lantta, *The Post-Zelman Voucher Battleground: Where to Turn After Federal Challenges to Blaine Amendments Fail*, *LAW & CONTEMP. PROBL.* 213 (2004); Ira C. Lupu, *Increasingly Anachronistic Case against School Vouchers*, 13 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 375 (1999); Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say*, *U. CHI. LEGAL F.* 123 (1991).

5. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2012).

suggested sympathy with the latter position—arguing that state constitutional bans on public funding for religious schools should be “buried now.”⁶

The following account challenges the idea that a doctrine of original meaning supports public voucher programs for religious schools. Weighing the narrow historical claims of formalist interpretations on their own terms, and looking beyond them to a more historically comprehensive view of past meanings and intentions, the originalist case is *against* vouchers. That the Constitution requires vouchers is false. That the Constitution permits them depends on how narrowly one inquires into the original meaning of the First Amendment as it related to theories of public education in the early republic. Certainly state-level constitutional prohibitions against public vouchers for religious schools are well aligned with the original meanings of the federal Constitution.

Making this case requires venturing into territory rarely visited by legal scholars and jurists in the voucher wars: educational plans, educational “research,” and educational law of the 1780s and 1790s.⁷ While this lacuna may be explained by the fact that there were no modern public schools at the time of the ratification of the First Amendment, there were most certainly plans for them, alongside state and federal policies with clear trajectories regarding the relationship between religious bodies and universal civic education, some these works written by the founding fathers themselves. In these documents we see that public education for political purposes was viewed as a vital component of a republican form of government, while the public schools were viewed not as merely neutral public spaces subject to “true private choice” (the Supreme Court’s guiding principle in *Zelman*), but as special sites of civic reproduction in which religious organizations had tenuous claims, at best.

Without wading too deeply into the morass of what constitutes the best form of originalist jurisprudence—which is to say, a jurisprudence that is informed in some way by the original historical meaning of constitutional laws—this Article engages in a catholic originalist inquiry to enrich the conversation about the original meaning of the First Amendment and its relationship to public education.⁸ Part I begins by briefly reviewing the role of originalist interpretation in public school establishment jurisprudence. Part II provides a brief overview of the historical context of American formal education in late eighteenth century. The next four Parts consider different categories of evidence from the first two decades of the early republican period (roughly 1780-1800), when the Constitution and Bill of Rights were drafted and ratified, and the country’s intellectual and political leaders imagined state

6. *Mitchell*, 530 U.S. at 829.

7. One critical exception is the work of Steven K. Green. See STEVEN K. GREEN, *THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE* (2012).

8. By lowercase “c” catholic I mean general, including major concerns of various strains of the originalist thought.

systems of mass, public education that were suited to the genius of the American form of government. Part III examines Thomas Jefferson and James Madison's views on religious establishment in mass, public education through their legislative proposals in Virginia and their public and private writings. Part IV seeks to understand the broader intellectual context in which Jefferson and Madison wrote (asking how mainstream their ideas were) by examining the most comprehensive public school plans written before or concurrently to the ratification of the First Amendment. So-called "living originalists" who consider context and meaning to understand the principles of the First Amendment and their application will find these sources congenial. Part V examines a singular event in the 1790s: an essay contest sponsored by the American Philosophical Society (APS) asking contestants to design a system of public education suited to the "genius" of the new national government.⁹ This little-known set of remarkable sources has been absent in First Amendment debates on public education, and it useful to formalists as a "public act" as well as to living originalists who are more interested in contextual meanings. Part VI examines education-related laws developed during the early republic, including the Northwest Ordinances of 1785 and 1787, state constitutions, and state statutory law. Formalist originalists will find these types of sources more congenial to original meanings, though some scholars tend to weigh types of laws differently.¹⁰

Several themes emerge clearly and consistently across these categories of evidence. Part VII explores these in detail and sketches out their implications for contemporary debates about the meaning of nineteenth-century school history. From a practical standpoint, national systems of education did not contemplate voucher systems or church-based systems financed publicly because such plans were not feasible outside of large cities, of which there were few. Second, establishment concerns stemming from a sense of individual freedom from coercion, as well as substantive concerns about the divisive nature of sect-specific religion and its anti-republican political tendencies, gave

9. Reprinted in JUSTICE, *supra* note **Error! Bookmark not defined.**, at 234. For a general overview of the APS, see EDWARD CARLOS CARTER, "ONE GRAND PURSUIT": A BRIEF HISTORY OF THE AMERICAN PHILOSOPHICAL SOCIETY'S FIRST 250 YEARS, 1743-1993 (1993).

10. *E.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013). The Northwest Ordinance, some argue, as a federal law (though it came before the First Amendment) carries more weight than state laws, while within state law, state constitutions are more indicative of "public meaning" than other kinds of laws or things that people said or did about them. Such a selective methodology of public meaning has several serious flaws which will become apparent upon closer inspection: (a) the text does not authorize us to judge the its meaning by this methodology, (b) the constitution outlines a republican form of government that presupposes a limited franchise and a difference between what leaders do on behalf of the people and "the people" would do if the government were a democracy (c) some state constitutional provisions tell us very little about preexisting education laws and were not meant to, and (d) some states did not ratify state constitutions at all, but nevertheless did adapt existing education laws in the early republican period to reflect what they saw as the new meaning of religious establishment.

pause to many writers about the desirability of ecclesiastical involvement in mass education. Finally, while state constitutions and statutory law did not establish anything resembling modern public schools, the decades surrounding the ratification of the First Amendment saw substantial movement in several states toward disestablishing religion within provisions for mass education.

This Article then concludes by briefly exploring the implications of a more historically robust originalist doctrine for contemporary debates about school choice. The purpose of this section is not to draw upon current research for or against school choice based on their academic effectiveness, but to stick to a purely originalist perspective. Such a focus leads me to three observations. First, permitting (let alone requiring) the indiscriminate funding of religious groups to provide mass, public education runs against the original meaning of the First Amendment, threatening the very basis of a republican form of government as the founders understood it. Second, the best way forward for proponents of school choice, *ceteris paribus*, would be to repudiate their flawed originalist interpretations and embrace the revolutionary aspects of their consumerist doctrine: that “true private choice” makes good sense today, even if it did not in the late eighteenth or nineteenth centuries.¹¹ Likewise, those opposed to privatizing mass education need look no further than the original intentions of the Founding Fathers of the Republic and the meaning of the laws they enacted to preserve a republican form of government.

Third, and perhaps most importantly, exploring the educational ideas and laws of the early republican period has a clear policy upshot beyond the parochial debates of legal historians. After all, at the federal level, voucher programs are now permissible. Where they pass state constitutional muster, the question is whether we *want* them. The national conversation on school reform today focuses on two unsatisfactory ways of answering that question: neoliberalism (enhancing consumer choice) and social efficiency (enhancing test performance and career development).¹² The men who designed and led the American republic imagined public education for a different reason: the development of civic intelligence and virtue, characterized by reason, tolerance,

11. True private choice has become the Court’s new standard in resolving Establishment cases in public education. Such a conception was wholly foreign to the early national period, when educational provisions focused almost exclusively on the responsibility of government to provide education, not on the individual’s right to consume it. For the Court’s position and an account of its evolution since *Everson*, see *Mitchell v. Helms*, 530 U.S. at 873-99 (Souter, J., dissenting); and *Zelman v. Simmons-Harris*, 536 U.S. 639, 686-716 (2002) (Souter, J., dissenting).

12. The neoliberal position emphasizes consumer choice as the panacea for the ills of public education. Maximizing individual choice through charter schools, and voucher programs, neo-voucher programs (which give tuition tax credits), the neoliberal argument goes, not only creates market mechanisms to improve schools, but is a good unto itself. The other position, social efficiency, emphasizes public education for the development of human capital. Improving the skills and competitiveness of American children in the international marketplace (and measuring these skills through aggressive testing regimes), ensures individual equal opportunity and broad social progress. School choice, in this vision, is permissible but constrained by the need for regulation.

and common political values. An inquiry into the original meanings of religious establishment in public schooling challenges us to think less about developing neutral procedural matters like consumer choice, or banal ones like standardized test performance, and instead ask questions of political substance. For ultimately, it was the quest for common ideological ground that inspired the founding father's theories and plans for mass education. That the later development of and provision for public education often failed to live up to those high ideals, which were consistent with those of the Constitution, should not lead us to give up on the prospect of a common national identity or shared public reason. Indeed, the architects of the Constitution saw no other way for the republic to succeed. Arguably, neither should we.

I. ENDURING SIGNIFICANCE OF ORIGINAL MEANING IN EDUCATION JURISPRUDENCE

Since the very first Establishment case in public-school policy, *Everson*,¹³ Supreme Court justices have turned to history to justify their decisions, largely as First and Fourteenth Amendment matters, though they have also referenced the history of state constitutional law. In *Everson*, history provided the rationale for a ruling that claimed the existence of a high wall of separation between church and state—a much cherished principle of the political left today, and one that historians at the time roundly (and rightly) criticized as oversimplistic.¹⁴ Over the ensuing decades, as Steven K. Green has shown, judges continued to make (and make up) history in key First Amendment decisions, fuelling debates about the appropriate role of past meanings in present jurisprudence, with the political right increasingly asserting a strict textualism on the bench to counter the dominant liberal-separationist agenda rooted in broad constitutional principles that transcend specific textual meanings, or the absence of such.¹⁵ By the 1980s, the political right claimed history as its justification for tearing down that wall, developing what conservatives claimed was a more positivist and “pure” historical methodology rooted in textualism that rendered them the most objective arbiters of law while avoiding judicial excesses.¹⁶ By its second term, the Reagan Administration doubled down on history as intellectual purity, using “original meaning” as a guiding principle of the Justice Department on the one hand, while nominating federal judges who

13. 330 U.S. 1 (1947).

14. See Steven K. Green, *Bad History: The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1722 (2005). Green cites several prominent historians at the time who criticized the decision, and additionally offers his own analysis of its flaws.

15. See *id.*

16. See ANTONIN SCALIA, *MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83 (2003).

appeared sympathetic to the position.¹⁷ Strict adherence to original historical meanings of constitutional text became its own belief system and even earned its own name: “Originalism.”¹⁸ Historians and legal scholars have been rightly scornful of this history-making as well. Judged by its explicit exclusion of basic historical methods (and lack of clear justification for its narrow methodology within the very text it chose to adhere to), capital “O” Originalism as a methodology produces even worse historical interpretations than what preceded it, while simultaneously hobbling justices from developing a cogent and publicly transparent theory of jurisprudence when their constrained view of history lets them down.¹⁹

Concomitant to these historical developments has been a reform movement to deregulate and privatize mass public education which, in addition to raising federal constitutional issues, has collided with century-old state-level constitutional prohibitions against the public funding of religious schools.²⁰ The two movements—the rise of originalism as a conservative doctrine and the rise of a movement to privatize public education—were directly related, both products of the rightward shift in American politics and mobilization of religious conservatives, and both reactions against perceived excesses of the Civil Rights Movement.²¹ In the resulting churn of jurisprudence, so-called “school choice”—in the form of minimally regulated charter schools, voucher programs and tuition tax credit programs that may include religious schools—has been upheld at least in part the name of original meanings of the First Amendment and its incorporation through the Fourteenth Amendment. Opponents to school vouchers have claimed, in part, original meanings as well.²² The opponents to vouchers are correct, as I argue below, for more reasons than they claim.

The basic originalist problem is this: The Constitution and Bill of Rights make no mention education as a function of the federal government or a responsibility of state government. Likewise the Fourteenth Amendment guarantees to all citizens due process and equal privileges or immunities

17. See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006).

18. See JACK M. BALKIN, *LIVING ORIGINALISM* 101 (2011).

19. Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. REV.* 1 (2009); Post & Siegel, *supra* note 17; Green, *supra* note 14; H. Jefferson Powell, *Rules for Originalists*, 73 *VA. L. REV.* 659 (1987); Jack N. Rakove, *The Original Intention of Original Understanding*, 13 *CONST. COMMENT.* 159 (1996). On the ways in which originalism leads to even more arbitrary jurisprudence, see BALKIN, *supra* note 18, at 23.

20. See Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 *HARV. J.L. & PUB. POL'Y* 551 (2003); Steven K. Green, *Blaming Blaine: Understanding the Blaine Amendment and the No-Funding Principle*, 2 *FIRST AMEND. L. REV.* 107 (2004); K. Green Steven, *The Insignificance of the Blaine Amendment*, *BYU L. REV.* 295 (2008).

21. See Post & Siegel, *supra* note 17.

22. Compare Justice Thomas's formalist concurring opinion in *Zelman v. Simmons-Harris*, 536 U.S. 639, 677-84 (2002), against Justice Stevens's dissent, *id.* at 684-86.

(although the Supreme Court quickly gutted the latter in the infamous *Slaughterhouse Cases*).²³ But that amendment makes no mention of education either. Thus with few exceptions the court has engaged public educational issues during the twentieth century vis-à-vis the Fourteenth Amendment's presumed incorporation of First Amendment rights, including its guarantee that "Congress shall make no law respecting an establishment of religion."²⁴ An originalist approach thus requires understanding the meaning of an eighteenth-century amendment, incorporated in the mid-twentieth century through an amendment written in the mid-nineteenth century, applied to twenty-first-century policy. Compounding this problem is the central and extremely emotional place that education has in American's personal and civic lives. No wonder that judges and legal scholars turn again and again to national narratives to justify their decisions in this area. No wonder, either, that these historical narratives are invariably partisan.²⁵

Several historical issues in particular are at stake. The first is the question of Madison and Jefferson's understanding of the scope of the establishment clause. In *Everson*, the majority decision and the two dissents were unanimous in their belief in the centrality of Jefferson and Madison's political views to the original meaning of the First Amendment, seeing the establishment clause and the free exercise clause as being, in Justice Rutledge's phrase, "correlative and coextensive," so that the degree of religious freedom citizens enjoy depends on the degree of government non-involvement in religious matters. Importantly, none of the justices considered Madison and Jefferson's views on mass, public education and the role they saw for establishment and free exercise within such schools.²⁶ The one mention of educational history, in Justice Jackson's dissent, locates the origin of public education to around the year 1840, and claims erroneously that these schools were strictly secular in content.²⁷ Madison and Jefferson's views on

23. 83 U.S. 36 (1873).

24. The most notable exception is the first: *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), which struck down an Oregon law mandating attendance at public (as opposed to private) schools. The Court ruled that this law violated the contractual rights of the schools, though it also intimated that the parental right to determine a child's education had some relevance as well.

25. I include my own work in this characterization. See Benjamin Justice, *The Blaine Game: Are Public Schools Inherently Anti-Catholic?*, 109 TEACH. COLL. REC. 2171-206 (2007); J.P. Viteritti, *Blaine's Cause and Effects*, 110 TEACH. COLL. REC. 482-86 (2008).

26. Jefferson and Madison shared an elaborate theory of public education that offered a detailed application of the principles of the First Amendment. See text accompanying note 47.

27. 330 U.S. 1, 23 (1947). Justice Jackson writes, "Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development, dating from about 1840. It is organized on the premise that secular education can be isolated from all religious teaching, so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion." *Id.* In fairness to the Justice, he referenced the dominant history education textbook of the time: ELLWOOD P. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED

establishment remain salient in contemporary jurisprudence, particularly for living originalists, who seek to understand underlying principles and reject constitutional text as temporally fixed in meaning.²⁸

A second question is how indicative were Madison and Jefferson's views of the broader context? Was the *Everson* Court mistaken in placing the intellectual (and literal) authors of the First Amendment at the center of the original meaning of the First Amendment, or were they mistaking Virginia for the whole United States?²⁹ Are there other ways to determine the original meaning of the Amendment that give equal weight to the great diversity of religious establishment, and religious opinion, in the United States with regard to the unique role that public education plays in a republican form of government?

Third, what does religion's role in late-eighteenth-century federal and state laws concerning the provision and regulation of mass education tell us about the original educational meaning of the First Amendment? This question is more appealing to formalist originalists, but it's also more challenging than it seems. No state provided public education in the modern sense, and the federal government's involvement in education only lightly touched the regulation of the Northwest Territory through land ordinances.³⁰ In state constitutions the text is, itself, a discussion of principles and the public good which reflected broad assumptions about the homogeneity of the people and their interests, in which formalist interpretations provide limited utility.³¹ Statutory education law provides for more specific understanding, though it was even more rarely applicable to mass, public education than constitutional provisions and more specific to particular times and places, and was usually constrained by practical limitations that no longer obtain.

STATES (1934); see also EDGAR W. KNIGHT, *EDUCATION IN THE UNITED STATES* (1941). For a revision of this view, see William J. Reese, *The Public Schools and the Great Gates of Hell*, 32 *EDUC. THEORY* 9-17 (1982); and Timothy L. Smith, *Protestant Schooling and American Nationality, 1800-1850*, 53 *J. AM. HIST.* 679-95 (1967).

28. A good example is Justice O'Connor's discussion of the Virginians in her dissenting opinion in *City of Boerne v. Flores*, 521 U.S. 507, 555 (1997) (O'Connor, J., dissenting). O'Connor viewed school vouchers as constitutionally permissible in *Zelman*, but still values constitutional principles embedded in the history of the First Amendment over a highly restricted textualism. See *id.*

29. See, e.g., John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 *MICH. L. REV.* 2793 (2001).

30. In his concurrence in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), for example, Justice Scalia notes that the Northwest Ordinance may be evidence that those who adopted our Constitution "believed that the public virtues inculcated by religion are a public good." *Id.* at 400. But reaching this conclusion, Justice Scalia does not provide a rigorous examination of the original meaning or scope of those supposed public virtues or the nature of their inculcation. The narrow textualism of the decision lacks sufficient historical definition.

31. Donald S. Lutz, *The Theory of Consent in the Early State Constitutions*, 9 *PUBLIUS* 11, 19, (1979); John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776-1900*, 42 *AM. J. LEG. HIST.* 1 (1998).

Finally, how do we make sense of establishment ideas when mass, public education did arise in the United States in the decades before the Civil War? How did the original meanings of the First Amendment obtain, if at all? These questions are well known and much pursued by historians of American education, but to legal scholars are usually more narrowly confined to questions of establishment or free exercise, and tend to gravitate to state law and legal battles or to textualism, missing the broader educational context. The question of the religious origins and early development of public education matter both for understanding the emerging historical contours the First Amendment as the United States developed into a modern state, but also because they presage the rise of a robust body of state constitutional law after the Civil War. *Zelman*, *Mitchell*, and the entire pedigree of case law back to *Everson* raise a question that was fundamental to the two great foundational periods of Constitutional law, the early republic and Reconstruction: which configuration of mass education is consistent with a republican form of government?

A disheartening quality of all questions of establishment jurisprudence in education law in our current age of ascendant originalism is that judges are still making “bad history,” in a context where that history is given increasing ideological authority.³² In each of these issues posed above—the connection between Jeffersonian and Madisonian disestablishment and their applicability to public school plans, the landscape of thinking on the subject beyond those two men, the connection between religion in early national law and in the development of mass, public education, the Supreme Court has failed to provide high quality historical reasoning, while thoughtful scholars are (predictably) no closer to a consensus.

In what follows I do not propose to cut the Gordian knot with a single definitive stroke, but rather to introduce early republican educational thought and action into the debate on school vouchers, in a manner that addresses the major concerns of (broad and restricted) originalism. My approach is catholic, encompassing evidence congenial to multiple approaches of originalist inquiry. I begin with the framers, focusing on the educational ideas of the Jefferson and Madison, whose writings once dominated constitutional jurisprudence but have been eclipsed in recent years by a more narrowly focused textualism. I then move to other public leaders and larger organizations to establish a more general landscape of ideas, forms of public meaning, which should address originalists on the left and right who seek to deepen their understanding of historical meaning both of the First Amendment and of early republican educational text. I then finish by exploring text itself in federal and state laws of the early republic, though in these instances I locate that exploration within a historical context of social meaning and do not commit myself to a particular subgroup or school of textual originalism.³³

32. See Green, *supra* note 14.

33. For a brief overview, see Berman, *supra* note 19, at 9; see also DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* (2005).

II. EDUCATION AND RELIGION IN THE LATE EIGHTEENTH CENTURY
UNITED STATES

Before proceeding further into a critical analysis of the original meanings of the First Amendment vis-à-vis mass public education, it is important to distinguish briefly the ways in which education and religion were qualitatively different than they are today. Early republican educational provisions, where they even existed at all, were *not* public in the modern sense of being universal and civically purposed, nor did they draw strict distinction between public and private spheres of funding and oversight. Before the mid-nineteenth century, most states did not have anything resembling “state” systems of education for the masses. In southern states, colonial tradition and law left the education of youth to families and private ventures, while religious authorities saw the provision of education as a missionary activity, but not part of the regular duties of Anglican ministers. In middle Atlantic colonies, by comparison, a great variety of educational patterns existed, representing a great diversity of cultural and political traditions, settlement patterns, and religious beliefs. Some towns raised money in common for a school serving the whole community; other places relied on academies, venture schools, denominational charity schools or for-pay seminaries, or simply had no schools at all. Colonial governments aided individual schools on a case-by-case basis. Clear distinctions between private and public education did not exist, nor was schooling considered the only, or even best mode of learning.³⁴

Among the thirteen original states, only three had anything resembling state-wide systems of education carried over from colonial times: Massachusetts, Connecticut, and New Hampshire. In these cases, the law defined education in terms of supply, not demand (provision, not rights). Laws dating to the seventeenth century required towns reaching a certain size to provide a school for any boys (and increasingly between the late eighteenth and early nineteenth century, girls)³⁵ seeking a basic education, while even larger towns were required to provide grammar schools to prepare young men for college. Compliance with these laws was inconsistent, the quality of the schools was spotty, and the mandated school term was so short that serious students paid tuition directly to the schoolmaster to continue studies after the public funds ran out. The reason for these laws, at least initially, was linked to configurations of religious establishment and basic settlement patterns: tightly settled villages and towns with a central green and a central, publicly supported church had both the ideology and the demography to support state-mandated local schools.³⁶

34. For a brief overview of the conditions and traditions of education in the thirteen original colonies, see WAYNE J. URBAN & JENNINGS L. WAGONER, *AMERICAN EDUCATION: A HISTORY* 15-63 (2009).

35. Kathryn Kish Sklar, *The Schooling of Girls and Changing Community Values in Massachusetts Towns, 1750-1820*, 33 *HIST. EDUC. Q.* 511-42 (1993).

36. See URBAN & WAGONER, *supra* note 34, 15-63.

By the time of the American Revolution, cities and large towns across the United States boasted a prodigious private marketplace for education that existed alongside the town-supported and charity schools. This was true in the South, the Mid-Atlantic, and New England.³⁷ Thus education was not viewed in law as an individual right in the modern sense—indeed, when education became a individual, constitutional right as a legal matter remains a contentious question today.³⁸ State education laws focused instead on the responsibility of authorities of provide educational opportunities: parents to ensure the literacy of their children, masters to educate their apprentices, and towns of certain sizes to provide schools that were, for part of the year at least, free. Congregationalists viewed literacy as necessary for the salvation of all children, which may have been regarded as a kind of right in a religious sense; but the structure of the secular law was not framed in terms of securing an education as a right either in any colonial charter or early republican state constitutions.

Religion, too, was markedly different in the late-eighteenth century. The American revolution was a remarkably secular event, guided by Enlightenment political theories and fought for largely secular ends. Certainly preachers used their pulpits to promote both sides, and religious grievances with the Church of England was one of the many causes. But we should not mistake the late eighteenth century with the mid-nineteenth. In 1790 no more than twenty percent of adult Americans were members of a church. Average Americans understood their world through pagan traditions of magic and supernatural forces as well as explicitly Protestant beliefs.³⁹ Due to centuries of European political conflict, Catholics were viewed in law and custom with great suspicion, just as Protestants were viewed in Catholic countries. The basic structure and principles of the U.S. Constitution, including disestablishment of religion and right of free exercise, were inherently contradictory to the monarchical traditions of established European state religions, be they Anglicanism in England or Roman Catholicism in France and Spain.⁴⁰ The popular claim today that America is a nation founded on Christian principles says more about our current national politics than it does about what actually happened in the past.

By the 1780s and 1790s, the idea that the future of new republic depended on the education of its citizens exploded in popular magazines and

37. See CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860*, at 13-29 (1983).

38. Eastman, *supra* note 31.

39. JON BUTLER ET AL., *RELIGION IN AMERICAN LIFE: A SHORT HISTORY* 142-60 (2008).

40. Indeed, even the nature of “establishment” in America had departed dramatically from European modes by the time of the Revolution. As Leonard Levy has shown, “No American state at the time [of the ratification of the First Amendment] maintained an establishment in the European sense of having an exclusive or state church designated by law.” LEONARD WILLIAMS LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 9 (1986).

newspapers.⁴¹ The dominant ideologies of the day converged on this point. Enlightenment thinkers saw the possibility for social and intellectual progress and the perfection of human happiness, while they looked to the fall of ancient republics as a warning; Radical Whigs emphasized education as liberty-enhancing and a political necessity—making future leaders virtuous and wise and the people who needed to keep an eye on them even more so; Calvinists saw education as necessary for social control and salvation. The Tory view, that the mass of men ought not be educated, withered during the Revolution except insofar as enslaved African people were concerned, and there it thrived, cabined within the white republic.⁴² Leading revolutionary luminaries, as well as less well-remembered leading men of the day, wrote about the role of education in the republic and designed elaborate plans for national systems of public schools.⁴³ As we will see below, states included educational pronouncements in their constitutions and a few even attempted to create free schools for common people by statute. Benjamin Franklin and Noah Webster tried to reinvent a distinctly American version of the English language, while in addition to writing distinctly American common school textbooks, Webster wrote a federal catechism to be recited by school children.⁴⁴ Meanwhile, Nancy Beadie has shown, government at various levels worked cooperatively with voluntary organizations, creating a legal frameworks enabling local action on educating the public, while trans-local organizations, particularly freemasons, filled in the void.⁴⁵

III. JEFFERSON AND MADISON: THE PERILS OF ESTABLISHMENT

As the intellectual architects of the First Amendment, Jefferson and Madison are the logical starting place for this originalist inquiry.⁴⁶ Since

41. See “*The Great Contest*”: *The American Philosophical Society Education Prize of 1795 and the Problem of American Education*, 114 AM. J. EDUC. 191 (2008).

42. For an overview of competing intellectual traditions, see LORRAINE SMITH PANGLE, *THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS* 11-31 (1993). On the absence of the Tory view in America, see KAESTLE, *supra* note 37, at 35. On the education of black Americans, see HILARY J. MOSS, *SCHOOLING CITIZENS: THE STRUGGLE FOR AFRICAN AMERICAN EDUCATION IN ANTEBELLUM AMERICA* (2009).

43. DAVID B. TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954*, at 23-27 (1987); see also BRIAN W. DOTTS, *THE POLITICAL EDUCATION OF DEMOCRATUS: NEGOTIATING CIVIC VIRTUE DURING THE EARLY REPUBLIC* (2012).

44. NOAH WEBSTER, *DISSERTATIONS ON THE ENGLISH LANGUAGE WITH NOTES, HISTORICAL AND CRITICAL* (1789); NOAH WEBSTER, *NOAH WEBSTER’S ADVICE TO THE YOUNG AND MORAL CATECHISM* (Wallbuilder Press, 3d. ed., 1993); see also RICHARD M. ROLLINS, *THE LONG JOURNEY OF NOAH WEBSTER* (1980).

45. Nancy Beadie, “*Encouraging Useful Knowledge*” in *the Early Republic: The Roles of State Governments and Voluntary Organizations*, 85, in JUSTICE, *supra* note **Error! Bookmark not defined.**

46. See Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUPREME COURT REV. 302 (1990); see also LEVY, *supra* note 40, at 60; THOMAS J.

Everson, their ideas served as the historical touchstones for a separationist view of establishment in public education, though they are invoked by others as well.⁴⁷ The treatment of their ideas on separation of church and state are voluminous and need not be repeated here. The primary sources of their views on education include Jefferson's *Bill for the More General Diffusion of Knowledge* to the Virginia Legislature (which they both promoted), Jefferson's *Notes on the State of Virginia*, his plans and writing on the University of Virginia, and various other incidental sources including letters by both men.⁴⁸ Holding differing but complimentary political views, the two were close friends, productive collaborators, and agreed on religion's place in government.⁴⁹ When it came to government-sponsored education, they were strict separationists.

A. *The Place of Religion in Jefferson's Plans for Public Education*

Jefferson's educational philosophy and legislative proposals reflected his political beliefs: that a republican form of government depended on the intelligence and virtue of the people, and that religious coercion was among the worst forms of tyranny. His *Bill for the More General Diffusion of Knowledge* was part of a slew of revolutionary bills that he and a small committee of Virginia legislators began writing in 1777 and submitted to the legislature in 1779 seeking to remake Virginia's entire legal system into a republican framework. There were 126 proposals in all, attacking a range of anti-republican colonial legacies—entails, primogeniture, excessive punishment, and even a bill for the gradual abolition of slavery. The legislature eventually passed fewer than half of these, the most famous being Bill 82, the *Statute for Religious Freedom*, which disestablished religion in the state and guaranteed free exercise of religion, and became the model for the First Amendment to the Constitution. Although he celebrated the success of the *Statute for Religious Freedom*, Jefferson considered the education bill to be the most important of the lot.⁵⁰ Considering its direct connection to the origins of the First Amendment, the *Bill for the General Diffusion of Knowledge* is a significant measure to consider when seeking the original meaning of the First Amendment as it applied to concepts of public education.

CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 134 (1986).

47. For example, direct references to the ideas of Jefferson, Madison, or both can be found in such landmark public school establishment cases as *Lemon v. Kurtzman* 403 U.S. 602 (1971) (Douglas, J., concurring); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *City of Boerne v. Flores*, 521 U.S. 507 (1997); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Souter, J., dissenting).

48. For both men I will refer to writings appearing in THOMAS JEFFERSON, WRITINGS (1984); JAMES MADISON, WRITINGS (1999).

49. See generally REASON AND REPUBLICANISM: THOMAS JEFFERSON'S LEGACY OF LIBERTY, 3 (Gary L. McDowell & L. Sharon Noble eds., 1997).

50. JENNINGS L. WAGONER, JR., JEFFERSON AND EDUCATION 32 (2004).

For Jefferson, the purpose of public education was primarily political, and his school plan reflected his most fundamental values: egalitarianism, meritocracy, and an enlightened citizenship free from what he saw as the worst aspects of traditional religion: bigotry, superstition, and coercion. “Millions of innocent men, women and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned,” he wrote later in *Notes on the State of Virginia*. “What has been the effect of coercion? To make one half the world fools, and the other half hypocrites.”⁵¹

The preamble to the education bill identified its political aims explicitly:

[I]t is believed that the most effectual means of preventing [a republic from descending into tyranny] would be, to illuminate, as far as practicable, the minds of the people at large, and more especially to give them knowledge of those facts, which history exhibiteth, that, possessed thereby of the experience of other ages and countries, they may be enabled to know ambition under all its shapes, and prompt to exert their natural powers to defeat its purposes.⁵²

But an educated “people at large” is insufficient. Some must have advanced education to rule as an aristocracy of merit, and should be identified early and given the opportunity to rise regardless of their background:

And whereas it is generally true that the people will be happiest whose laws are best, and are best administered, and that laws will be wisely formed, and honestly administered, in proportion as those who form and administer them are wise and honest; whence it becomes expedient for promoting the publick [sic] happiness that those persons, whom nature hath endowed with genius and virtue, should be rendered by liberal education worthy to receive, and able to guard the sacred deposit of the rights and liberties of their fellow citizens, and that they should be called to that charge without regard to wealth, birth, or other accidental condition or circumstance; but the indigence of the greater number disabling them from so educating, at their own expense, those of their children whom nature hath fitly formed and disposed to become useful instruments for the public . . .⁵³

This latter theory of enlightened leadership goes some way toward rehabilitating Jefferson’s notoriously fickle view of constitutional government as radically dependent on the politics of the moment and subject to constant threat of rebellion. Social and political upheaval, he believed, was a failure of education.⁵⁴ His view of enlightened leadership also offers some challenge to narrow textualist proposition that the ideas of leaders do not matter—only the

51. *Notes on the State of Virginia*, in JEFFERSON, *supra* note 48, at 286. For a general overview, see Eugene R. Sheridan, *Liberty and Virtue: Religion and Republicanism in Jeffersonian Thought*, 242-63 in THOMAS JEFFERSON AND THE EDUCATION OF A CITIZEN, (James Gilreath ed., 1999).

52. JEFFERSON, *supra* note 48, at 365.

53. *Id.*

54. In response to Shays’ Rebellion he wrote, “The people cannot be all, & always, well informed. The part which is wrong will be discontented, in proportion to the importance of the facts they misconceive. If they remain quiet under such misconceptions, it is lethargy, the forerunner of death to the public liberty.” Letter from Thomas Jefferson to William Stephens Smith, Nov. 1787, in JEFFERSON, *supra* note 48, at 911.

text of laws passed by supermajorities and other “public acts” can be considered in originalist inquiry.⁵⁵ In a republic, Jefferson reminds us, leaders represent the interest of their constituents, but not necessarily their constituent’s ideas. This is what makes a republic far superior to a democracy. “The people,” at least those who were included in the limited franchise, would keep their leaders in check by weighing the effects of the laws and their administration, but the people could not legislate directly, lacking the necessary education to do so. Moreover, there are wise laws and unwise laws: the popularity of a law does not make it wise—indeed, a widely popular unjust law would be indicative, for Jefferson, of a republic in trouble, and in need of a greater diffusion of knowledge, and perhaps another revolution.

The structure and content of Jefferson’s proposed educational system for Virginia made no mention of religious bodies in school management and no space for religion in the curriculum. Structurally, the bill put mass education in the hands of local government. Elected aldermen from each county would divide their county into “hundreds” (i.e., districts) each with its own elementary school site and maintained by majority vote of electors within the district. All free children of both sexes would be “entitled” to three years of attendance at their local school free of charge, and more if they wished to pay. Regional overseers, selected by the Aldermen, would take charge of inspecting groups of ten schools. Each county would support a grammar (intermediate-level) school, which the top students from the elementary schools could attend for free, alongside paying students. The top graduates of the grammar schools, in turn, would enjoy full scholarships to the College of William and Mary.⁵⁶

Jefferson makes no mention of changing preexisting private schools, nor does he suggest that the plan for Virginia be compulsory. But taken together with the Statute for Religious Freedom, it’s clear that the education plan’s lack of mention of religious bodies is intentional—indeed, it is bound up with the nonsectarian character of the curriculum. The *Statute for Religious Freedom* created strictly separate spheres for religion and the state, conjoining the right of free exercise to the disestablishment of religion, which it understood as any state funding or endorsement of religion. The critical portion of the text read,

No man should be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall enforced, restrained, molested, or burthened in his body or his goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by

55. On the relevance of Jefferson to debates on textual originalism, see the exchange between Jed Rubenfeld and Michael McConnell. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1997); Jed Rubenfeld, *Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085 (1997). On supermajorities and the populist ethos of textual originalism, see MCGINNIS & RAPPAPORT, *supra* note 10; and RALPH A. ROSSUM, *ANTONIN SCALIA’S JURISPRUDENCE: TEXT AND TRADITION* (2006).

56. JEFFERSON, *supra* note 48, at 365.

argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.⁵⁷

The reasons were several, and were repeated and elaborated in *A Memorial and Remonstrance* (1785), Madison's spirited defense of Jefferson's bill against a general assessment proposal that would, similarly to a voucher program, levy a general tax and distribute it neutrally among multiple religious bodies to support their ministers.⁵⁸ Religious freedom, both documents argued, rested on the proposition that religious action sprang from convictions born in human reason. Compulsion to support another man's religion was tyranny; compulsion to support one's own faith was a usurpation of own liberty to favor or disfavor particular pastors.⁵⁹ Religious education would occur—indeed it had to occur—in a private sphere. The plan for education, then, focused on that knowledge appropriate to the public sphere shared neutrally and equally by all citizens.

It was logical, then, that Jefferson's proposed curriculum for district schools for the mass of citizens, and grammar schools for college preparation, made no mention of religion and purposefully excluded the Bible. To do otherwise would be to invite religious favoritism or tyranny in the classroom. Religious minorities or majorities could equally participate (in theory) in this secular classroom in the same way that religious minorities could participate in civic life generally. Importantly, Jefferson and Madison both implicitly rejected the notion that removing religion from public education was itself an establishment of secular humanism. Insofar as the purpose of the public school was to promote republicanism by teaching "truths," the classroom occupied a special place in the religiously neutral public sphere that the Statute for Religious Freedom (and later the First Amendment) imagined—a site that protected the free exercise of all citizens by removing religious opinions altogether.

Nevertheless, Jefferson still hoped to inculcate basic morality in his students. He explained:

Instead therefore of putting the Bible and Testament into the hands of the children, at an age when their judgments are not sufficiently matured for religious enquiries, their memories may here be stored with the most useful facts from Grecian, Roman, European and American history. The first elements of morality too may be instilled into their minds; such as, when further developed as their judgments advance in strength, may teach them how to work out their own greatest happiness . . .⁶⁰

57. *Id.* at 347.

58. LEVY, *supra* note 40, at 102; MADISON, *supra* note 48, at 29.

59. "Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible to restraint . . ." JEFFERSON, *supra* note 48, at 346; MADISON, *supra* note 48, at 30.

60. JEFFERSON, *supra* note 48, at 273.

For Jefferson, including the Bible for its own sake made no sense, since children could not make sense of the Bible. Political morality, on the other hand, could spring from many secular sources without the aid of religion. When repeated attempts at winning a favorable vote on the bill had failed, Madison wrote to Jefferson that it was resistance to the expense of the program, and its impracticability in sparsely populated regions, that killed it (and not, notably, its nonsectarian agenda).⁶¹ Whether Madison was accurate we do not know.

B. *James Madison's Views on Public Education and Religion*

When James Madison wrote his *Memorial and Remonstrance Against Religious Assessments* (1785), in support of Jefferson's *Statute for Religious Freedom*, little did he know that he would catapult himself into the twentieth and twenty-first century canon of foundational authors on the First Amendment. Championing Jefferson's education bill won him no similar accord. Yet while Madison did not do much of his own work on education, what he did write consistently advocated government involvement in the provision of non-sectarian education. While in the Constitutional Convention he moved unsuccessfully that federal government be given the power "to establish an University, in which no preferences or distinctions should be allowed on account of religion."⁶² A glimpse of Madison's views of the content of a public-school education might be glimpsed when in 1822, he was asked by the Lieutenant Governor of Kentucky to advise on the creation of a state-wide system of common schools. In his response he detailed a curriculum that made no mention of religious instruction and sought to demystify the heavens and earth through the telescopic lens of science:

I know not that I can offer on the occasion any suggestions not likely to occur to the Committee. Were I to hazard one, it would be in favour of adding to Reading, Writing, & Arithmetic, to which the instruction of the poor, is commonly limited, some knowledge of Geography; such as can easily be conveyed by a Globe & Maps, and a concise Geographical Grammar. And how easily & quickly might a general idea, even, be conveyed of the Solar System, by the aid of a Planatarium [sic] of the Cheapest construction. No information seems better calculated to expand the mind and gratify curiosity than what would thus be imparted.⁶³

We also see a strong commitment on Madison's part to teaching students to appreciate differences and find common ground with others—reducing prejudice.

This is especially the case, with what relates to the Globe we inhabit, the Nations among which it is divided, and the characters and customs which distinguish them. An acquaintance with foreign Countries in this mode, has a kindred effect with that of seeing them as travellers, which never fails, in

61. WAGONER, *supra* note 50, at 42.

62. MAX FARRAND, 2 RECORDS OF THE FEDERAL CONVENTION 616 (1911).

63. MADISON, *supra* note 48, at 790.

uncorrupted minds, to weaken local prejudices, and enlarge the sphere of benevolent feelings. A knowledge of the Globe & its various inhabitants, however slight, might moreover, create a taste for Books of Travels and Voyages; out of which might grow a general taste for History, an inexhaustible fund of entertainment & instruction. Any reading not of a vicious species must be a good substitute for the amusements too apt to fill up the leisure of the laboring classes.⁶⁴

Reducing prejudice and excluding religion were fundamentally connected. In an 1823 letter to Edward Everett, Madison warned against establishing theological professorships at Harvard. At the University of Virginia, he explained, the public hall was available to all religions, impartially, for their use on special occasions. Theological schools were welcomed near campus, but not as a part of it. The problem he explained, was that “A University with sectarian professorships, becomes, of course, a Sectarian Monopoly: with professorships of rival sects, it would be an Arena of Theological Gladiators.” At the same time, anticipating the “high wall” argument of separationist jurists of the twentieth century, a one-size-fits-all solution would not work either—even finding a common prayer for all sects fails, since “many sects reject all set forms of Worship.” Thus establishment and free exercise were as related in education as they were in the broader civil society. “A legal establishment of religion without toleration could not be thought of, and with a toleration, is no security for public quiet & harmony, but rather a source itself of discord & animosity.”⁶⁵ Finally, in a letter to Jefferson, Madison expressed frustration with the inability of private markets to provide consistent and organized education for youth. He found “nothing being more ruinous to *education* than the frequent interruptions & change of masters & methods incident to the private schools of this Country.”⁶⁶

Thus with Jefferson and with Madison, the two primary intellectual architects of the First Amendment, keeping religion out of the business of mass education, both in substance and in management, was fundamental to averting sectarian bigotry and consistent with their views of establishment and free exercise. In this vision they argued in universal terms, though Jefferson’s plan was Virginia-specific. Their commitment to non-sectarian public education should raise serious questions about Justice Thomas’s claim in *Mitchell* that commitment to nonsectarianism in public education was “born of bigotry.”⁶⁷ On the contrary, the idea of keeping religion out of the education of the masses—both substance and in organization—was born alongside the *Statute for Religious Freedom* and the *Memorial and Remonstrance*, offspring of the desire to avoid bigotry and to promote public reason. Present-day voucher

64. *Id.*

65. MADISON, *supra* note 48, at 796.

66. JAMES MADISON, 2 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS 140 (Gaillard Hunt ed., 1900).

67. *Mitchell v. Helms*, 530 U.S. 793, 829 (2000).

plans, such as those in Cleveland, Milwaukee, and elsewhere, which claim to avoid establishment concerns by positing the existence of neutral and indirect state aid, miss this point entirely.⁶⁸ Madison and Jefferson's idea of a public school contained no mechanism for private choice, for the very same reasons as their effort against the bill for a general religious assessment. Private choices would have run counter to the need for public education to teach common values and avoid the sectarian bigotry and strife that, they argued, often came with organized religion. Religious belief was a private matter for the private sphere, while public education was a public matter for the secular, public sphere. The idea that the government can organize a public-school system and include religious bodies offering sectarian religious instruction within that system would not have made sense.

IV. OTHER COMPREHENSIVE PUBLIC SCHOOL PLANS—HOW HIGH THE WALL?

How indicative were Madison and Jefferson's views of educational theories of the time? Of course the two men were not the only thinkers in the early republic to link the form of government with systems of mass education, nor should their ideas monopolize our understanding of original meanings. A catholic approach to original meaning requires contextual, not merely textual, understanding. It is axiomatic among First Amendment scholars, for example, that at the time of the ratification of the First Amendment, several states still had established religion, though such establishment took different forms.⁶⁹ Although the later incorporation of the First Amendment via the Fourteenth rendered the particular differences among these forms of establishment nugatory (either the Fourteenth Amendment makes the First Amendment federalist or it doesn't), a catholic original understanding of the establishment and public education raises the question of how other writers outside of Virginia thought about solutions to the problem of mass education and religion in the early republic. Surprisingly, for all the talk about the vital importance of mass education for the new system of government, very few authors produced fully-conceived state or national plans. What follows is a brief discussion of the four most complete plans written before or concurrent to the ratification of the First Amendment.

68. On the design of voucher programs attempting to achieve such neutrality, see Jamie Steven Kilberg, *Neutral and Indirect Aid: Designing a Constitutional School Voucher Program Under the Supreme Court's Accommodationist Jurisprudence*, 88 GEO. L.J. 739 (1999).

69. LEVY, *supra* note 40, at xvi.

A. *Benjamin Rush*

The first came from Pennsylvania. During the 1780s and 1790s, Philadelphia physician, public intellectual, and college founder Benjamin Rush wrote a series of essays on the subject of education for republics; for the State of Pennsylvania generally, for the city of Philadelphia specifically, and young ladies particularly that contradicted Jefferson's and Madison's separationist case. His proposals had no concern for establishment in education at the state or federal level, and an unclear theory of the limits on religious education in heterogeneous classrooms to guard against either majoritarian coercion or sectarian strife. With modification to Kathleen Sullivan's formulation of First Amendment jurisprudence, he could be called a plural assimilationist.⁷⁰

Rush's educational theory was at odds with his educational designs, reflecting an internal oscillation between materialism and realism, which led him to both endorse and reject republican political theories.⁷¹ On the one hand, Rush was an early proponent of a federal role in mass education, a admirer of the Ancient Spartan form of education (where allegiance to the state trumped allegiance to any other institution, including the family) and a believer that education might "convert men into republican machines."⁷² Anticipating the Constitutional Convention of 1787, he urged federal compulsory education laws, universal public elementary education, state colleges, and "one federal university under the patronage of Congress, where the youth of all the states may be melted (as it were) together into one mass of citizens."⁷³ On the other hand, Rush's realism led him to emphasize educating the masses to fit into society as it was, not as it could be. He was skeptical that public education would work in the sparsely populated parts of the state, and equally skeptical that people would part with their religious preferences in the education of their children.⁷⁴ The reason for educating the poor was not to enhance their liberty, but to protect the rich. He explained, the "ignorance and "vices" of poor children "contaminate the children of persons in the higher ranks of society. Thus they assist after they arrive at manhood in choosing the rulers who govern the whole community."

70. See Kathleen M. Sullivan, *Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 449 (2000).

71. Hyman Kuritz, *Benjamin Rush: His Theory of Republican Education*, 7 HIST. EDUC. Q. 432-51 (1967).

72. BENJAMIN RUSH, A PLAN FOR THE ESTABLISHMENT OF PUBLIC SCHOOLS AND THE DIFFUSION OF KNOWLEDGE IN PENNSYLVANIA: TO WHICH ARE ADDED THOUGHTS UPON THE MODE OF EDUCATION, PROPER IN A REPUBLIC 27 (1786).

73. BENJAMIN RUSH, LETTERS 388 (1951).

74. *Id.* at 388, 412. Rush wrote "The remote and unconnected state of settlements in the new counties will forbid the establishment of those schools for some years to come by a general law." And "The wisest plan of education that would be offered would be unpopular among 99 out of 100 of the citizens of America if it opposed in any degree the doctrine of the Trinity." And indeed, in Connecticut, opposing the doctrine of the Trinity would be illegal. 1 PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT 295 (1808).

Religious belief was vital to republicanism—the font of all virtue—Rush argued, and thus establishment was a non-issue in his plans for public education. He explained,

[Religion] is the most essential part of education—this will make them dutiful children, teachable scholars, and, afterwards, good apprentices, good husbands, good wives, honest mechanics, industrious farmers, peaceable sailors, and, in everything that relates to this country, good citizens.⁷⁵

In his proposed education law for Philadelphia, he sought a general property tax for the support of free elementary education of all children of both sexes. Religious groups would be paid per pupil to educate the children of their faith, while ministers would cooperate with municipal officers and each other in overseeing the quality of these schools. This was not a voucher system in the modern sense—it had no theory of markets and no conception of “free choice.” Churches were expected to round up their flocks and ask for reimbursement, an arrangement that used public funds to promote church authority and not individual autonomy. A second assumption was that this education was for the poor—middle class and elite parents already educated their children in the private marketplace.⁷⁶ What made Rush’s plan logistically viable was the density and diversity of the city of Philadelphia, the largest English-speaking city in the world outside of London, and host to numerous Christian denominations and a growing population of indigent children. Rush saw no danger of sectarian religious instruction encouraging bigotry in his system of school choice. To the contrary, he wrote, “I believe [sectarianism] prevents [bigotry] by removing young men from those opportunities of controversy which a variety of sects mixed together are apt to create.” In fact, he argued that “Without religion I believe learning does real mischief to the morals and principles of mankind.”⁷⁷

For the rest of the state, Rush proposed a system of free public elementary schools run on a district system like Jefferson’s, with county academies and four state colleges, one to accommodate the state’s large German-speaking population. Unlike Jefferson and Madison, however, Rush saw religious instruction as vital to these schools, and urged that when possible, students should learn together with others of their own faith. How this plan could work when population density could support only one schoolhouse, he did not say.⁷⁸ Moreover, all students should use the Bible extensively in their studies from a very early age.⁷⁹

Rush’s assimilationist views demonstrate that the idea of direct state support of mass education within religious schools was within the realm of

75. RUSH, *supra* note 73, at 414.

76. *Id.* at 412-15.

77. ALYN BRODSKY, BENJAMIN RUSH: PATRIOT AND PHYSICIAN 283 (2004).

78. *See* RUSH, *supra* note 73.

79. BENJAMIN RUSH, ET AL., DEFENCE OF THE USE OF THE BIBLE AS A SCHOOL-BOOK IN A LETTER FROM THE CELEBRATED DOCTOR RUSH (1806).

intellectual possibility at the time of the ratification of the First Amendment, but with the very serious qualification that they did not focus on individual choice or rights, but on soft, state-supported coercion. Yet despite his realism, Rush's proposals were even more unattainable than Jefferson's, because they could not resolve the tension between establishment and free exercise outside of a large city. In a country that was ninety-five percent rural in 1790 (with "urban" being defined as places with 2500 or more people), only a single, shared public school was feasible for most American communities.⁸⁰ In 1806 Rush entered the fray again, demonstrating a strange disregard for the First Amendment on realist or idealist grounds. He proposed a national Peace Office led by a Secretary of the Peace, to oversee the creation of a federal system of free schools. These schools, he proposed, should teach reading, writing, arithmetic, and the doctrines of a religion of some kind (Christianity preferred). Moreover, the federal government should issue a special American Bible to every family in the country, and require it to be used as a textbook in public schools. The Bible provision would, of course, be problematic for faiths attached to their own specific version of the Bible. Moreover Rush offered no realistic mechanism for resolving the fundamental diversity of religious opinion that would erupt in communities that had to share a single common school, which would be most of them.⁸¹

B. Noah Webster

Noah Webster's national plan differed both from the Virginian separationist model and the Pennsylvanian plural assimilationist model, in that it was informed by his considerable experience as a classroom teacher and textbook author. Webster proposed a national system of public schools on the district model—imagining, as did the Virginians, that the nation was one of villages and small towns needing free schools accessible to all children in common. His thoughts on education are unusual in that they changed dramatically over the course of his life. During the 1780s and 1790s, Webster espoused a radical republicanism: equal distribution of property, the strict separation of church and state, complete religious toleration, and the abolition of slavery. These positions changed over time.⁸² What did not change was his view that education in a republic should be unifying force—teaching people a common culture, language, and values, a view exemplified by his work in textbooks and lexicography.

Webster published numerous essays on education, not to mention a substantial body of schoolbooks, which makes it difficult to pin down a single educational theory for him. But with regard to religion he was fairly consistent

80. U.S. DEP'T OF COMMERCE, 2010 CENSUS OF POUPLATION AND HOUSING 15 (2012), available at <http://www.census.gov/prod/cen2010/cph-2-1.pdf>.

81. BENJAMIN RUSH, ESSAYS, LITERARY, MORAL AND PHILOSOPHICAL 183 (1806).

82. See generally ROLLINS, *supra* note 44.

during the 1780s and 1790s. He made no mention of paying churches to run schools for the masses, nor was there ever any indication in his writing that he thought they should. Clearly Webster saw the spread of free, mass education as being consistent with the prevention of religious establishment, which he referred to as “ecclesiastical tyranny.” In *Sketches of American Policy* (1785) he wrote,

The institution of schools, particularly in the New England states, where the poorest children are instructed in reading, writing, and arithmetic at the *public expense*, is a noble regulation calculated to dignify the human species. This institution is the necessary consequence of the genius of our government; at the same time it forms the firmest security of our liberties. It is scarcely possible to reduce an enlightened people to civil or ecclesiastical tyranny.⁸³

The “Ecclesiastical tyranny” he referred to was the antithesis of the First Amendment. Before a conversion to evangelical Protestantism in the early-nineteenth century, Webster was a harsh critic of religious establishment and proponent of free exercise.⁸⁴ Thus while highly critical of high church establishment as an historical phenomenon, he wrote, “All the dangers to which any government can be exposed by sectaries, must arise wholly from intolerance; and the Roman Catholics, when indulged the free exercise of their religion, make as good subjects, as peaceable citizens as any sect of protestants.”⁸⁵

Webster linked this critique linked to the content of his textbooks and in his writings on education. During the 1780s and 1790s he labored to reduce children’s exposure to explicitly religious content by writing textbooks that reduced or eliminated references to God.⁸⁶ He lamented the poor quality of teachers, particularly foreign teachers, and likewise decried the lack of American-oriented textbooks. He implied that these foreign influences corrupted the political education of American youth and hinted that they were responsible importing European anti-Catholicism. Famously, he criticized the use of the Bible as a textbook in schools, sharing Jefferson’s observation that children were too young to learn from them effectively, and developed a callous indifference to what ought to be a sacred text. Instead, he explained (in opposition to Jefferson, whom he came to detest personally), “My wish is not to see the Bible excluded from schools, but to see it used as a system of religion and morality.”⁸⁷ Webster’s school materials made good on his theory, offering Americans inexpensive spellers and readers that made using the family Bible as a textbook unnecessary, and exposing children to a what he believed to be

83. NOAH WEBSTER, *SKETCHES OF AMERICAN POLICY* (1785) 28 (Harry R Warfel ed., 1937).

84. ROLLINS, *supra* note 44, at 31.

85. HARRY R. WARFEL, *NOAH WEBSTER: SCHOOLMASTER TO AMERICA* (1936).

86. See HARLOW G UNGER, *NOAH WEBSTER: THE LIFE AND TIMES OF AN AMERICAN PATRIOT* 69, 80-81 (1998).

87. NOAH WEBSTER, *A COLLECTION OF ESSAYS AND FUGITIVE WRITINGS* 9 (1790).

generic Christian (though we see it today as Protestant) view of morality.⁸⁸ Thus Webster was both deeply opposed to the tyranny of high church establishment, and supportive of free, district-centered schooling with (what he viewed as) suitably non-sectarian curriculum materials. What some today might see today as hypocrisy toward high church Christians (Episcopalians, Catholics, who were few in New England), he viewed as a substantively consistent viewpoint: such variants of Christianity made unreasonable and unsuitable political claims on public reason. The question was how much, and what type of religion was compatible with public reason. This was the paradox the Virginians' high wall of separation in education hoped to avoid.

C. Robert Coram

Robert Coram, a revolutionary-war hero and Wilmington, Delaware schoolmaster wrote a third plan in 1791. Like Madison and Jefferson, Coram was a democrat who advocated remaking society along more economically egalitarian and politically republican lines.⁸⁹ His school plan, *Political Inquiries, to which is Added a Plan for the Establishment of Schools Throughout the United States*, linked his political vision to his educational one.⁹⁰ Drawing on Montesquieu's *Spirit of the Laws*, Coram argued that free schools must serve the interests of a republican form of government—working as an economic and social equalizer, giving common men the opportunity to improve themselves.⁹¹ Instead, he argued (quoting Noah Webster), the American system of government might be republican, but the American educational system was monarchical, supporting an aristocracy of wealth and privilege. Coram viewed the great tension in society as being between the cosmopolitan coastline on the one hand, which possessed excellent private schools (and New England, which he idealized as a model democracy), and the agricultural interior. The latter, he wrote, “whether we consider the buildings,

88. Later in life Webster made his views on religion more plain, though his religious conversion experience in 1808 marked a major transition in his thinking, after which he did not write on the subject of education directly. He continued his textbook business throughout his life, and expanded it to include the publication of an American Bible and an American Dictionary, both of which reflected his Protestant beliefs. He detested high-church establishment, whether among protestants or Catholics, though in the latter case he distinguished between Catholicism as a private belief and as a political system which he referred to disparagingly as “Romanism.” For examples see HARRY R. WARFEL, *LETTERS OF NOAH WEBSTER* (1953), at 138, 452. See also ROLLINS, *supra* note 44.

89. Seth Coltar, “Every Man Should Have Property:” *Robert Coram and the American Revolution's Legacy of Economic Populism*, in *REVOLUTIONARY FOUNDERS: REBELS, RADICALS, AND REFORMERS IN THE MAKING OF THE NATION* 337 (Alfred Fabian Young et al. eds., 2011).

90. 2 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805*, at 756 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

91. CHARLES DE SECONDAT MONTESQUIEU ET AL., *THE SPIRIT OF THE LAWS* (1955).

the teachers, or the regulations, are in every respect completely despicable, wretched, and contemptible.”⁹²

Although Coram made references throughout his essay to God and to his personal religion, he made no place for religion in his proposal. In Coram’s plan, American schools should be open to all children, free, and built on the district plan. These schools must be public because “every citizen has an equal right to subsistence and ought to have an equal opportunity of acquiring knowledge,” and because “public schools are easiest maintained, as the burden falls upon all the citizens.”⁹³ Moreover, “No modes of faith, systems of manners, or foreign or dead languages should be taught in those schools,” he explained. “As none of them are necessary to obtain a knowledge of the obligations of society, the government is not bound to instruct the citizens in any thing of the kind”⁹⁴ This vision for education was purely secularist, denying any role to religion in the development of political and social competence. Importantly, Seth Coltar argues that Coram’s radical plan did nothing to hurt his career—in fact it may well have advanced it, and received favorable reviews in Delaware newspapers.⁹⁵ He became a prominent Democrat in the state, and began his own newspaper, the *Delaware Gazette*, before his untimely death in 1795.

D. *Pierre DuPont de Nemours*

Only one other fully developed school plan appeared before or concurrent with the ratification of the Bill of Rights. In 1787 an anonymous *Plan for the Establishment of Schools in a New Country, Where the Inhabitants Are Thinly Settled* appeared in Philadelphia’s *Columbian Magazine*. The author, now known to be Pierre DuPont de Nemours, described free elementary schools built on a district system where all boys and girls could learn the three Rs, receive instruction in gender-specific farm tasks, and in a least-common denominator, non-sectarian moral instruction, “the plainest and most important principles of religion and morality.” The purpose of these schools was to prevent the collapse of civilization: “In such a scattered settlement, general ignorance will ensue; and the people consequently degenerate into vice, irreligion, and barbarism. To remedy evils of such magnitude will be difficult; perhaps it will be thought impractical: to attempt it, however, will be laudable . . .” Nemours’s belief in a least-common-denominator religious education for civic purposes (and not doctrinal ones), was rooted in the supposition that at their core, all (Christian) religions shared ethical principles that could benefit secular society. His emphasis on the democratic local control

92. AMERICAN POLITICAL WRITING, *supra* note 90, at 803-04.

93. *Id.* at 806.

94. *Id.* at 807.

95. Coltar, *supra* note 89, at 347.

of the district system was practical and not justified by any particular theory of government.⁹⁶

In summary, while there was a marked range of discussion about the role of religion in plans for public schooling, Benjamin Rush was alone in imagining a universal system where religious affiliation provided the basic unit of delivery: with churches providing charity schooling in cities and children segregated themselves by religion in the countryside. Jefferson and Madison clearly articulated a relationship between their political theory of republicanism and the need to keep religion at a distance from public education both in the provision of schooling and its content. Noah Webster had a similar outlook—minimizing (though not eliminating) religious content in public schools in the name of the secular principle of tolerance and separating his favorable view of Catholic citizenship from the political association of Roman Catholicism with church establishment and bigotry. DuPont de Nemours likewise saw a district system as necessitating moral education rooted in universal religious principles, not particularist ones. Robert Coram went furthest, imagining a fully secularist view of public education and civic identity. As a body, these plans further highlight the disjuncture between present-day voucher plans and past meanings of church-state relations in public school plans.

V. THE AMERICAN PHILOSOPHICAL SOCIETY EDUCATION ESSAY CONTEST

The question of the relationship between the Constitution and public education was not lost on the American Philosophical Society (APS), the nation's premier learned society, to which Jefferson, Madison, Rush, Franklin, and other founding leaders and thinkers belonged. In 1795, the APS announced a peer-reviewed essay contest to stimulate thinking on how to develop the best system of public education suited to the "genius" of the government of the United States.⁹⁷ If one seeks a measure of the original meaning of the Constitution and Bill of Rights, certainly the country's first peer-reviewed research into such a question within four years of the ratification of the latter would qualify. Indeed, given the quasi-governmental nature of the APS, its membership, and its relationship to the seat of federal government, this contest constitutes a "public act" of research that should have the attention of all stripes of originalist interpretation in education law.⁹⁸

96. AMERICAN PERIODICALS 356 (citing *The Columbian Magazine* (1786-1790) 1, 8 (Apr 1787)).

97. The question was: "[Write] an essay on a system of liberal education, and literary instruction, adapted to the genius of the government, and best calculated to promote the general welfare of the United States; comprehending, also, a plan for instituting and conducting public schools in this country on principles of the most extensive utility." JUSTICE, *supra* note **Error! Bookmark not defined.**, at 1.

98. The author wishes to thank Tracey Meares for this observation. Formed by Benjamin Franklin in 1743, the society sought to encourage, develop, and disseminate useful

Over the course of the contest, seven entries were received. Three were serious contenders—essays of substantial length, depth, and rigor. The other four varied in quality and were not serious contenders—in fact the peer reviewers heaped scorn on some. In 1797 the APS declared two winners: Reverend Samuel Knox of Maryland and William Harrison Smith of Philadelphia. The victory did not make much of a difference to the life of Knox, a career schoolmaster; but for Smith, the contest led to a personal connection with Jefferson, launching a long career as the editor of America’s leading Democratic-Republican newspaper, the *National Intelligencer*. Through historical analysis, the remaining anonymous authors have been identified as William Smith, former provost of the University of Pennsylvania and founder of Washington College; John Hobson a Unitarian minister from Birmingham, England living in exile in Philadelphia; and a city clerk named Francis Hoskins. The two remaining entries were likely from a medical doctor and a medical student from Philadelphia.⁹⁹

For the purposes of originalist inquiry, what matters most about these essays is what they tell us about the landscape of ideas connecting public education to the “genius” of the federal government. Clearly seven is a small sample, while the APS’s sampling techniques—advertising in newspapers and word of mouth—and generally liberal orientation, would not reach, or motivate, a full spectrum of respondents. Moreover, the APS prize committee expressed disappointment that the essays had not settled the matter. The results are nevertheless provocative when we ask what respondents said about the role of religion in the public school systems they imagined. Three themes emerge. The first is the role of organized religions in operating schools within this system (along the lines that Benjamin Rush had proposed). The second is the place of religion within the content of these schools. The third is the relationship between religious instruction and the political purposes of public education.

What role did organized religions plan in operating public schools in these essays? Among the seven entries, not a single one proposed grouping students

knowledge. The group had become, by the 1790s, the nation’s largest intellectual node in the transatlantic republic of letters, serving as the first library of Congress and sitting on land across the street from Constitutional Hall in Philadelphia on land granted by the State of Pennsylvania in recognition of its mission to disseminate useful knowledge. Most of America’s leading intellectuals, scientists and statesmen were members, such as Washington, Adams, Jefferson, Hamilton, Madison, and John Marshall, as well as international figures like Priestly, Linnaeus, Lafayette, and Tallyrand. In recognition of the public role of the organization, the State of Pennsylvania had granted it land adjacent to Independence Hall in Philadelphia, at the geographic heart of the state and federal government of the early republic.

99. SAMUEL KNOX, AN ESSAY ON THE BEST SYSTEM OF LIBERAL EDUCATION ADAPTED TO THE GENIUS OF THE GOVERNMENT OF THE UNITED STATES (1799); SAMUEL HARRISON SMITH, REMARKS ON EDUCATION ILLUSTRATING THE CLOSE CONNECTION BETWEEN VIRTUE AND WISDOM (1798). Reproductions of the remaining essays and biographies of their authors can be found in JUSTICE, *supra* note **Error! Bookmark not defined.**

by religious faith or contracting with religious authorities. Five of the seven implicitly rejected such ideas, recommending a state-run system rooted in democratically run school districts in coordination with higher levels of government. (The remaining two were the weakest plans, and did not substantively address the organization of schools.) Most of the plans made no mention of disestablishment or the First Amendment as a concern—they merely took for granted that religious bodies would not be involved in the delivery of an American system of public education. Two essays did offer reasons rooted in political theory. Co-winner Samuel Knox offered an explanation for his choice.

It is true that, agreeably to the spirit or genius of our government, every particular religious denomination has a well-founded right to erect such particular, private seminaries as they may consider most consonant with the spirit of that particular religious system they profess. It should, however, become a free and enlightened people, as much as possible to separate the pursuits of science and literary knowledge from that narrow restriction and contracted influence of peculiar religious opinions; or ecclesiastical policies, by which they have been, too long, and too generally obstructed.¹⁰⁰

Knox perceived an inherent conflict between his secular, political aims of creating an enlightened and tolerant citizenry and the particularist interests of religious groups. Religion and public education thus occupied separate spheres—religious expression was a right, but it was in tension (not harmony) with the interests of the whole. Overtly religious education conducted by doctrinally distinctive would encourage “those civil broils, national prejudices, and religious feuds and jealousies that, hitherto, have stained the historic page of the otherwise most enlightened nations on earth.”¹⁰¹ William Smith’s essay made a similar argument: “the perpetual practice in all Sects to teach no other morals to their youth than those of their own creed,” he wrote “introduces dangerous effects, foments divisions amongst mankind, and subjects liberal and solid sentiments to religious prejudices.” He concluded that “if the Legislature wish to establish a perfect plan of moral instruction, they should propose a code that will no longer keep alive those religious prejudices among the different Sects.” In short, social stability and morality depended on removing sectarianism from mass education.

Within the second theme, the place of religion in the curriculum of these schools, essayists were consistent with the place they gave religious groups in school organization. No author proposed that children learn the tenets of a particular religion; none mentioned using the Bible for any reason. Yet five of the seven proposed a non-sectarian system of moral instruction rooted in universal values. Some used the word “religion” in their descriptions of this part of the curriculum, others did not. Samuel Smith proposed a “Catechism or Treatise on universal morality.” An anonymous essayist referred to as “Hand”

100. KNOX, *supra* note 99, at 12.

101. *Id.*

proposed visits to the common schools by “moral-politic missionaries from the colleges.”¹⁰²

Unusually, Knox addressed the third theme, the relationship between religion and the political purposes of public schooling, by directly invoking the rights logic we see in the First Amendment. “With regard to impressing youth early with the principles of religion and morality,” he observed, “however important this may be, yet, on account of preserving that liberty of conscience in religious matters which various denominations of [C]hristians in these states justly claim, due regard ought to be paid to this [liberty] in a course of public instruction.” Knox discusses “liberty of conscience” as if it is a natural right, making no reference to his state’s constitution or the federal one. Yet he did qualify this right in the context of schooling: “It would, however, appear to be no infringement of this liberty in its widest extent for the publick teacher to begin and end the business of the day with a short and suitable prayer and address to the great source of all knowledge and instruction.” Moreover, he argued, “It might also be highly advantageous to youth, and in no respect interfere with the different religious sentiments of the community, to make use of a well-digested, concise moral catechism.”¹⁰³ Knox was more ambitious than the other essayists in this regard.

Part of the problem was diversity. William Smith said it succinctly: “[i]f Christianity were uniform, it would be difficult to adopt in Politics a better code of morality than that of an universal Christian Religion.”¹⁰⁴ But of course American Christianity was not uniform. The challenge of religion in mass education was greater than mere diversity, however. All three of the contest contenders—the winning essays by Knox and Samuel Smith and the losing essay by William Smith—expressed deep concern over the negative effects of particular religious involvement in schools. These concerns centered on two issues: the propensity of religious sects to encourage bigotry, and the propensity of some religions to attack human reason. Both threatened a republican form of government. The spectre of Madison’s “theological gladiators” loomed in the minds of these authors. Samuel Smith did not discuss religion directly; but he did mention the attacks of “superstition” on the field of astronomy and the moral perversity of “monastic seclusion,” although the latter may have been a turn of phrase.¹⁰⁵ William Smith claimed to respect “all modes of faith,” and as provost of the University of Pennsylvania had labored famously to do so. Yet he also hoped that “by shedding the general influence of [religious] instruction on the mind, that the gloom of error will soon disperse among those who are guided by reason and a Love of Truth.” Optimistically he added, “On such solid Foundations we shall establish with Security the principles of eternal and universal morality, which should be the private rule of

102. JUSTICE, *supra* note **Error! Bookmark not defined.**

103. *Id.* at 226-27.

104. *Id.* at 234.

105. SMITH, *supra* note 99, at 23, 26.

the actions of men, as Justice, which determines the Rights of Nations, is the basis of their Laws, their Dignity and their prosperity.”¹⁰⁶ Samuel Knox wrote, “It is a happy circumstance . . . that this country hath excluded ecclesiastical from civil policy, and emancipated the human mind from the tyranny of church authority; and church establishments. Theology should be entirely excluded from public schools.”¹⁰⁷

In summary, the essays of the APS contest demonstrate consensus around three key points with regard to religion’s role in education. The first was that a district system of school management and finance was best suited to the “genius” of the American government, both for logistical reasons and for intellectual ones. Benjamin Rush’s view that a statewide or nationwide system of public schools could cluster children by faith under the tutelage of religious leaders at public expense had been an outlier. Second, there was a similar consensus that non-sectarian religious or moral instruction was both possible and necessary to inculcate prosocial behavior. On the other hand, instruction in any particular religious doctrine or, for that matter, religious claims that inspired controversy in the school or encouraged bigotry, should be shunned. Religious particularism was viewed as a threat to reason and an incitement to bigotry. The authors who proposed non-sectarian moral instruction presupposed that there were ethical principles that cut across all religions, even as they rejected the notion that particular religious sects had an a priori claim on a child’s education. Madison and Jefferson had offered the most robust explanation for why no such common ground was possible, while Robert Coram dismissed the question out of hand. Based on what they wrote about the subject, would be astonishing—even alarming—to the men of the early republic who imagined public schools, that churches should be put in charge of them, or that sect-specific religious instruction should have a place within them. What remains to be seen is the degree to which ideas about religious establishment in education were instantiated into law.

VI. ESTABLISHMENT AND EDUCATION LAWS OF THE EARLY REPUBLIC.

An inquiry into the original meaning of the First Amendment’s establishment clause with respect to public education must include a discussion of actual law. Some might argue that it’s all such an inquiry should include. The critical originalist problem in education law of the early republic is not merely that public schooling in the modern sense did not exist at the time. The problem is in the nature of the laws themselves. During the foundational period in American history, educational laws were fundamentally aspirational—an appropriate characteristic of a confederation of settler societies organizing, as they saw it, future societies out of wilderness. Viewing these laws as temporally static runs contrary to their nature—indeed, some viewed the

106. JUSTICE, *supra* note **Error! Bookmark not defined.**, at 235.

107. *Id.* at 223.

legislative process as they viewed the history of civilization: stadial and progressive. Laws were intended, explicitly, to lay the groundwork for future laws (creating school funds to be harvested decades later, for example). Second, as statements of aspiration, education laws identified state-sponsored education as being fundamentally political in nature, and sought consistency between a republican form of government and a republican form of education. As such they invite inquiry into principles of government when they were forged in their material and political context. The most relevant sources are the various ordinances organizing the sale of the Northwest Territory, state constitutions, and statutory law.

A. *Northwest Ordinances*

The land ordinances of 1785 and 1787, which organized the surveying, governance, and sale of the Northwest Territory in what are now Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota, are the first instance of federal education policy and law. Written before the ratification of the U.S. Constitution, the text of the Ordinances tell us nothing about the meaning of the First Amendment directly. But they do provide contextual evidence in two ways: First, the 1785 Ordinance set aside land in each township “for the maintenance of public schools within the said township.” Second, the language of the 1787 Ordinance included the famous phrase from Section 14, Article 3, “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” This text has been enlisted in originalist jurisprudence of the meaning of the First Amendment with regard to religion in public education.¹⁰⁸

Written before the ratification of the U.S. Constitution, the Northwest Ordinances reinforce what we already know about the importance of mass, public education to the founding fathers based on their school plans and the APS Contest of 1795. They provided a framework for school law oriented around a particular model of schooling—the New England district school—while providing ambiguous, hortatory language about the importance of public education that is sometimes misinterpreted as an endorsement of religious education. There is nothing in the Ordinances to support the notion of a voucher system for religious schools, granting parents the right to choose any school they want from a share of the public school fund. Such a concept would have been, literally, unheard of.

108. See, e.g., *Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 510 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). For discussion, see Ben Brown, *Jeffersonian Nightmare: The Supreme Court Launches a Confused Attack on the Establishment Clause—Rosenberger v. Rector and Visitors of University of Virginia*, 115 *S. Ct.* 2510 (1995), 31 *HARV. C.R.-C.L. REV.* 257 (1996); and John E. Burgess, *Lamb's Chapel v. Center Moriches Union Free School District*, 113 *S. Ct.* 2141 (1993): *A Critical Analysis of the Supreme Court's First Amendment Jurisprudence in the Context of Public Schools*, 47 *VAND. L. REV.* 1939 (1994).

The Ordinance of 1785 reflected, for the most part, the New England legal traditions of settlement: survey first, then sell by section, setting aside land for public use in the center of each township. Southerners struck a proposed provision for setting aside land to support a church as well—clearly an expression of concern over religious establishment.¹⁰⁹ In a township of thirty-six square miles, a centrally located school would be more than three miles from the edges, and multiple district schools would often be necessary to accommodate the population. Setting aside land for public schools did not necessarily mean the schools would sited on that land—rather, that land was for renting to generate revenue to support a school, or schools.

The use of the word “religion” in Section 4 Article 3 tells us much less than proponents of religion in public education today might wish. It also tells us more than secularists might be willing to admit. As we have seen from contemporary school plans and the APS contest of 1795, most objections to religion in national or statewide education plans were not rooted in hostility to the social and cultural functions of religion. The moderate position was to offer a non-sectarian moral instruction that was religious enough but not too religious as to be contentious. On the other hand, most writers worried about religion’s political function—both as a source of bitter conflict and as a source of anti-republican ideas. A third, related political concern was the threat that some forms of religious teaching posed for public reason (encouraging superstition), a view echoed in the language of some state constitutions and statutes as well.¹¹⁰ Thus leaders in all three branches of the early federal government practiced cultural religious practices in private and in public, and Congress deployed religious symbol and ceremony in its actions as expressions of common culture.¹¹¹

It is not at all clear that the text of the Ordinance of 1787 endorses religious instruction within schools. An earlier version of the text simply read, “Religion, Morality, Schools, and the means of education shall forever be encouraged,” which separated religion cleanly from the schools. The final version brought them together, but why? It is not clear whether “religion” is meant in a general, societal sense, as a synonym for “civilization,” or whether it means private belief. If private, does religion result in a general sense *after* a child’s common school education? (This was Jefferson’s argument in his Virginia plan, and thus entirely plausible.) Or does religion result from generic moral instruction that offends no particular religion (as several APS essay contest writers argued)? Or was religion in this sense the “true religion” of the Deists, or Unitarians, which was certainly not the religion of the Anglicans and

109. PAYSON J. TREAT, ORIGIN OF THE NATIONAL LAND SYSTEM UNDER THE CONFEDERATION (1906).

110. See, e.g., N.Y. CONST., in 1 LAWS OF THE STATE OF NEW-YORK COMPRISING THE AND THE ACTS OF THE LEGISLATURE SINCE THE REVOLUTION THE FIRST TO THE FIFTEENTH SESSION 14 (1792); see also the preamble to the South Carolina State Constitution of 1776. S.C. CONST. OF 1776, available at http://avalon.law.yale.edu/18th_century/sc01.asp.

111. See BUTLER ET AL., *supra* note 39, 155-70.

Roman Catholics? Or does the word mean Benjamin Rush's model of specific religious doctrinal teaching at public expense? The latter is least supported by the text because of the district structure. We also know that the very first of the specific rights guaranteed in the Ordinance of 1787 was freedom of religious expression, and that a provision for land grants to support religion had been struck.¹¹²

The Northwest Ordinances were not the direct precursors to the development of public education in the Midwest. As a matter of social history and ground level fact, Carl Kaestle has shown that the provisions were uneven producers of schools—in many cases the rent derived from the school land grants was too little, or the land went unrented, or the land was sold or squandered. In many places, public schools in their modern form did not emerge for a half century or more after the ordinances.¹¹³ Nevertheless, as blueprints for the development of future republics, the ordinances reflected the centrality of the idea of public education, designed on a district system, with an unspecified relationship to religion, morality, and knowledge. Outside of their historical context, the bare text of the ordinances do not provide much insight into establishment questions with regard to public schools.

B. *State Constitutions*

The rise of formalist originalism has brought with it a welcomed renaissance in the historical study of language state constitutions as a discrete body of law, which, as Donald Lutz observed in 1979, was previously a much neglected field in legal studies.¹¹⁴ Not only does the study of state constitutional texts and the political battles over them yield more robust understandings of the original meaning of federal constitutional text, but state constitutions themselves are increasingly the object of originalist analysis in areas where federal law does not obtain. On the issue of school vouchers in particular, a number of scholars have plumbed the language of state constitutional provisions regarding religious establishment and education and (in a related vein) school finance, though these tend to focus on post Civil War constitutions.¹¹⁵ As with other early national documents, however, state

112. Text of the 1787 Ordinance, with earlier draft version, can be found in: FREDERICK D. WILLIAMS, *THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY* 125 (1989).

113. Carl F. Kaestle, *Public Education in the Old Northwest: "Necessary to Good Government and the Happiness of Mankind"*, 84 *IND. MAG. HIST.* 60-74 (1988).

114. Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 *GEO. MASON L. REV.* 301 (2010); Marvin Krislov & Daniel M. Katz, *Taking State Constitution Seriously*, 17 *CORNELL J.L. PUB. POL'Y* 295 (2007); Lutz, *supra* note 31.

115. RICHARD D KOMER ET AL., *SCHOOL CHOICE AND STATE CONSTITUTIONS: A GUIDE TO DESIGNING SCHOOL CHOICE PROGRAMS* (2007); Steven K. Green, *The Constitutionality of Vouchers after Mitchell v. Helms*, 57 *NYU ANN. SURV. AM. L.* 57 (2000); Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, *BYU EDUC. L.J.* 1

constitutions in themselves do not offer clear-cut answers to the original meaning of the First Amendment in education.

One complication for using state constitutions for originalist inquiry is the highly variable relationship between constitutional and statutory education law. In the case of Massachusetts and New Hampshire, new state constitutional pronouncements about promotion of learning were placed on top of existing bodies of colonial-era education and school laws; in Connecticut, colonial-era education and school laws continued to exist into the 19th century with no state constitution; while in Rhode Island there were neither colonial education laws nor a constitution, though the state passed a spectacularly unsuccessful state common school law in 1800. In other cases, legislatures failed to make good on constitutional guarantees. In 1776 the Pennsylvania Constitution promised that each county would establish a school “for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices.” It didn’t. The state’s revised constitution of 1790 promised that the Legislature would “provide, by law, for the establishment of schools throughout the State, in such manner that the poor may be taught gratis,” but wisely added “as soon as possible,” which turned out to be over four decades.¹¹⁶ Virginia and Kentucky, on the other hand, said nothing in their constitutions of 1776 and 1799 about a state role in educating the public, but both made grand pronouncements of such a role in early republican statutes encouraging the formation of schools.

While they are problematic as a special body of law, however, state constitutions are useful as one of many textual expressions of broad principles of government. Statutory law, for example, both fills in the meaning of such pronouncements and, at times, mimics the function of constitutional language. For the purposes of this study, I will identify these broad principles using state constitutions in effect with the admission of Ohio in 1803. There were seventeen states in the Union at that time. Fifteen had constitutions, with Connecticut and Rhode Island maintaining their colonial charters.¹¹⁷ I will

(1997); Allen W. Hubsch, *Education and Self-government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93 (1989); DeForrest, *supra* note 20; TYAC ET AL., *supra* note 43, at 26-31; 54-107.

116. For an overview of the legislative history, see JAMES PYLE WICKERSHAM, A HISTORY OF EDUCATION IN PENNSYLVANIA, PRIVATE AND PUBLIC, ELEMENTARY AND HIGHER: FROM THE TIME THE SWEDES SETTLED ON THE DELAWARE TO THE PRESENT DAY 262-263 (1886). See also PENN. CONST. of 1776, § 44 (containing the constitutional provision in question); PENN. CONST. of 1790, art. VII, §§ 1-2 (same).

117. Readers will note that by including Ohio I have extended the dates of my originalist analysis of school plans by three years. I do so because Ohio was the first of the Northwest Ordinance states, and thus serves as a useful tool for examining any connection between the educational provisions of the ordinances and provisions of education under the original legal framework of the state. The choice is also congenial to my analysis of statutory law, which extends several years beyond 1800 as well. The list of states includes: Connecticut, Delaware, Georgia, Kentucky, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and Virginia.

begin by providing an overview of these provisions and their relevance to an originalist inquiry into school voucher programs. In a subsequent section I will consider statutory law during the same period to flesh out the meaning of constitutional provisions.

Among these fifteen constitutions, eight included provisions for the encouragement of learning of some kind.¹¹⁸ These varied in length and stated intent, and borrowed heavily from each other. The first generation of such provisions: Pennsylvania (1776), North Carolina (1776), and Georgia (1777), made simple statements of intended action without qualification or theory, e.g. (from Georgia) “Schools shall be erected in each county, and supported at the general expense of the State”¹¹⁹ These statements offer nothing of substance in themselves, and by schools they meant colleges and academies, not schools for the masses.

The next set of provisions grew out of the Massachusetts State Constitution of 1780, written by John Adams. The specific language is instructive:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates . . . to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools, and grammar-schools in the towns¹²⁰

The provision lists other duties too, including the support of private societies and public institutions and, incredibly, the state’s own pedagogical duty to, “countenance and inculcate” a list of principles, including “humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, and good humor, and all social affections and generous sentiments, among the people.” New Hampshire adopted a slightly modified version for its 1792 constitution, while the education provision of the Northwest Ordinance (1787) offers a severely edited form. The Ohio Constitution of 1803, in turn, used a modified version of the Northwest Ordinance.

The Massachusetts provision is unusual not because it links political freedom to the “knowledge, virtue, and wisdom,” of a people, which was a common belief at the time, but because three other features. First, it clarifies that state sponsored education did not have to be specific to schools, but included a variety of institutions and associations, all of which the proposition cherished as having a role in a healthy republic. Second, the provision contains within it two fundamentally different organizational modes of public education—a public system, described as “public schools and grammar

118. These were Delaware, Georgia, Massachusetts, New Hampshire, North Carolina, Ohio, Pennsylvania, and Vermont.

119. GA. CONST. of 1777, art. LIV.

120. MASS. CONST. of 1780, ch. V § 2.

schools” which were intended to provide opportunity of formal education on a geographic basis, and private modes of education, which existed for a variety of purposes, sponsored by a variety of associations. This distinction matters. As a state with a system of multiple religious establishment, Massachusetts could have (in theory) opted for voucher-like system. Instead, the state’s constitution imagines a world where government and private entities cooperate freely, but the government requires localities to provide a comprehensive system of lower and intermediate schools. This model was most congenial to the centuries-old pattern of settlement, where the state carefully regulated the formation of new towns, often centered (at least initially) around a single church and made provision for a school.

But the provision does more than this. It also takes on a substantive dimension that recasts the traditional school in a newly political mode, giving citizens language by which to judge the actions of government as an educator itself, reflecting Montesquieu’s widely celebrated observation that the spirit of the laws should reflect the type of government the laws represent. This attitude was reinforced in Article XVIII (also copied by New Hampshire) which urged citizens to make “A frequent recurrence to the fundamental principles of the constitution... to preserve the advantages of liberty and to maintain a free government.” Insofar as education is a function of government, the Massachusetts provision insists that it be consistent with the fundamental principles of a *republican* form of government. This invites an inquiry into the purposes of a system (such as vouchers), and its ability to maximize republican virtues. This process of inquiry is virtually absent in voucher plans of our own day, which emphasize consumer rights and procedural neutrality.

The remaining constitutions of the period did not offer anything as elaborate as the Massachusetts-inspired pieces. Pennsylvania revised its constitution in 1790, changing the language and stating the ambition to establish charity schools “throughout the State, in such manner that the poor may be taught gratis.” It also added, in second section, that “the arts and sciences shall be promoted in one or more seminaries of learning.” But it included no reasoning.¹²¹ Delaware modified Pennsylvania’s new language in its 1792 constitution, as did Georgia in 1798.¹²² Vermont’s 1793 constitution borrowed the language from Pennsylvania’s original constitution, but added the intent that “a competent number of schools ought to be maintained in each town,” reflecting the township settlement pattern of New England.¹²³ No strict separation of public and private spheres of educational influence is detectable in these provisions, though they clearly, by their structure, assume a “public” model whereby state-provided education will be widely available, at the academy level, to all qualified children of a county, and at the college level, to

121. PA. CONST. of 1790, art. VII, § I-II.

122. DEL. CONST. of 1792, art VIII, § 12; GA. CONST. of 1798, art. IV, § 13.

123. VT. CONST., ch. II, § XLI.

all qualified students of the state. This is implied by expressions of convenience and widespread dissemination of knowledge.

As a body, then, constitutional provisions show us little more than a widespread belief that education was, somehow, a responsibility of government. They do not establish education as a fundamental right, nor do they guarantee the provision of education to Adams's "different orders of the people," meaning the poor, although Pennsylvania and Massachusetts aspired to. And insofar as all laws are aspirational, educational pronouncements guaranteeing widespread schooling (particularly outside of Massachusetts, which at least had favorable demography, laws, and traditions for doing so) demonstrate a remarkable degree of ambition. Massachusetts and New Hampshire, and to a degree their distant cousin Ohio, are outliers in asking us explicitly to think about the qualities of the education that the state provides. In short, state constitutional provisions for education, as a body, do not shed much light on the question of establishment in public education.

C. *Statutory Law*

The line between statute and constitution was not always clear in education law. In some cases, the language of statutes mimicked that of constitutions. Neither Kentucky nor Virginia mentioned support of educational activities in their state constitutions, but by the turn of the 19th century, both had statutory education law that invoked republican political theory. Kentucky's 1780 "Act to Vest Certain Escheated Lands in the County of Kentucky in Trustees for a Public School," which set aside loyalist lands for future education of youth, declared:

... it being the interest of this commonwealth always to promote and encourage every design which may tend to the improvement of the mind & the diffusion of useful knowledge, even among its most remote citizens, whose situation a barbarous neighborhood and savage intercourse might otherwise render unfriendly to science.¹²⁴

Likewise, the thundering prose of Thomas Jefferson's failed 1778 "Bill for the More General Diffusion of Knowledge" echoed in Virginia's characteristically secular justification for the 1796 "Act to Establish Public School," which enumerated the "great advantages, which polished and civilized nations enjoy, beyond the savage and barbarous nations of the world."¹²⁵ Rhode Island, which had no constitution, made a similar declaration in its 1800 Act to Establish Free Schools, while Maryland recognized the "interest and duty" of the state to "assist with legislative countenance, every attempt to

124. HARRY TOULMIN, I A COLLECTION OF ALL THE PUBLIC AND PERMINENT ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY WHICH ARE NOW FORCE ARRANGED AND DIGESTED ACCORDING TO THEIR SUBJECT WITH ACTS OF VIRGINIA 462 (1802).

125. I A COLLECTION OF ALL SUCH ACTS OF THE GENERAL OF VIRGINIA OF A PUBLIC AND PERMANENT NATURE AS ARE IN FORCE 354 (1803).

disseminate and promote the growth of useful knowledge.¹²⁶ In fact, when statutory pronouncements on the duties of government are added to the list of constitutional provisions, every state government in the Union save New Jersey had, by 1803, affirmed its role in the promotion of public knowledge.¹²⁷

But unlike constitutions, statutory law reveals the details of educational law as practiced in the states, and the degree to which early republican education law was, as Robert Coram and Noah Webster observed, far from republican, and certainly not public in any modern sense. Most states outside of New England focused their efforts, if they made any, on higher education—regional academies and colleges—as their manner of spreading knowledge to the people, granting land when it was available (Georgia and Kentucky used confiscated loyalist lands).¹²⁸ New Jersey permitted lotteries for a handful of academies in 1794.¹²⁹ After initially focusing on the formation of academies and colleges, Pennsylvania turned to providing education to the poor as part of a broader effort to address poverty in the state, but with little effect.¹³⁰ Delaware passed a common school law in 1796, but the fund it created to pay for the schools failed to accrue enough funds for even a limited system of schools for the poor until the late 1820s.¹³¹ New York State did the same, adding land grants, and the system began to bear fruit in the 1810s.¹³² As we have already seen, Virginia’s voluntary common school law of 1796 failed because of the expense.¹³³

The only substantial success south of the Mason-Dixon line in the early republican period approaching a republican model of education happened just after the period of this study, in South Carolina, where the legislature created a state-wide system of free schools, one per state congressional member, to be run centrally by state-appointed district commissioners. Essentially a poorly funded charity system, it was nevertheless secular in nature, teaching the three Rs plus whatever subject the commissioner “may time to time direct.” Every citizen was entitled to send their children to these for free, though when space ran out, preference was to be given to orphans and children of the poor.

126. 1 PUBLIC LAWS OF THE STATE OF RHODE-ISLAND AND PLANTATIONS PASSED SINCE THE SESSION OF THE GENERAL IN JANUARY A.D. 1798, at 29 (1813); General Assembly of Maryland, November Session 25 (1798).

127. I can find no evidence of such a pronouncement in the session books of New Jersey through 1810. In practice, New Jersey behaved as many states did, encouraging academies and colleges through legislation.

128. 1 HORATIO MARBURY & WILLIAM H. CRAWFORD DIGEST OF THE OF THE STATE OF GEORGIA FROM ITS SETTLEMENT AS A PROVINCE IN 1755 TO THE SESSION OF THE GENERAL IN 1800, at 90 (1802); TOULMIN, *supra* note 124.

129. ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY, Chapter CCCCLXI, (1794).

130. WICKERSHAM, *supra* note 116, at 259.

131. LYMAN PIERSON POWELL, THE HISTORY OF EDUCATION IN DELAWARE 139 (1893).

132. BENJAMIN JUSTICE, THE WAR THAT WASN’T RELIGIOUS CONFLICT AND COMPROMISE IN THE COMMON SCHOOLS OF NEW YORK STATE, 1865-1900, at 27 (2005).

133. WAGONER, *supra* note 50, at 42.

Commissioners were allowed to partner with private schools in this endeavor.¹³⁴ In 1812, the state reported 4300 children in attendance in such schools statewide—hardly a state system of mass education for an enlightened citizenry, but a significant development nevertheless, and a notably secular one.¹³⁵

The reasons behind the failure of republican educational ideals were actually consistent across states: public school systems were expensive; required a modicum of population density; and depended on a curriculum that was common enough to satisfy diverse community members and communities but also republican enough to satisfy the substantive political concerns. The idea that local property owners would pay for the education of other people's children was as unpopular in Rhode Island as it was in Virginia. States with available land used it to encourage schools—others resorted to the slow accretion of school funds through taxes, or to lotteries. Public school systems also required demand. Without compulsory education laws (and no good way to enforce them), parents and children needed reasons to patronize a local school. Receiving a proper republican education could not, in itself, be much incentive. In short, the ideal form of republican education required conditions that did not exist, in total, in any place in early republican America, though they came closest in the Northeast, which had the greatest combination of these factors—particularly in the decades following this study. These same factors also made a voucher system not only impossible, but inconceivable in most of the country, and politically improbable in the handful of places—particularly Philadelphia and New York—where demographics were otherwise favorable.¹³⁶

As a matter of statutory law, the transition to early republican education in Connecticut and Massachusetts is more suggestive of the meanings of establishment and public education, since both states maintained systems of multiple establishment during the period even as they attempted to refashion their district school system into a more republican model. In each case, the transition was not toward a voucher system, whereby varying religious groups could educate children at public expense, but in the other direction, separating religious bodies and personnel from formal involvement in district schooling, even as, in the case of Connecticut in particular, the legislature maintained a strict code of civic conduct that severely curtailed the range of acceptable religious identities. The overall model in both states was toward a common education for all children, instilling a common sociopolitical identity not rooted in any particular denomination, but toward something presumed to be held in common.

134. Regular Session, S. C. - REGUL. SESS. 3 (1811).

135. Regular Session, S. C. - REGUL. SESS. 3, 97 (1812).

136. For a close analysis of the relationship between all these factors, particularly the market revolution, see KAESTLE, *supra* note 37, at 20-29.

In Massachusetts, colonial laws had organized settlement into townships, and required that residents of each township levy taxes to maintain a Congregational minister.¹³⁷ In cases where rival sects arose, the state occasionally granted exceptions for these groups to support their own church instead. Requirements for the maintenance of public and grammar schools for towns of a certain size existed in conjunction with laws requiring every parent to teach, or cause to be taught, reading to their children. The 1780 constitution formally broke the monopoly of the Congregational Church on tax support, empowering town-level majorities to decide whether to levy a religious tax, and to approve alternative churches if those churches were large enough and deemed legitimate. In practice the new law was less liberal to minority religions than the old form of exemptions had been. Nevertheless, the law guaranteed the freedom of private religious views, even if it still compelled tax support for majoritarian religion.¹³⁸

In 1789 the state legislature passed a comprehensive education law that formally terminated any legal connection between church and state. The law created a secular framework for managing town schools, dictating a minimum number of months they must be operated free of charge, stipulating qualifications for teachers, and organizing governance, taxation, and penalties for non-compliance. Ministers were encouraged to promote school attendance in their pastoral capacity, but “no settled minister shall be deemed, held, or accepted to be a School-Master within the intent of this act.” The town school became a secular instrument of government, legally speaking, a movement toward secularism in public education consistent with dominant theories of republicanism and away from the state’s unique form of multiple establishment for churches. The content of these schools, on the other hand, would continue to be an amalgamation of the religious character of the people who attended them, and a source of controversy and change.¹³⁹

137. The following discussion of Massachusetts and Connecticut draws from my earlier work. See JUSTICE, *supra* note **Error! Bookmark not defined.**, at 161.

138. John Witte, ‘A Most Mild and Equitable Establishment of Religion’: John Adams and the Massachusetts Experiment, in RELIGION AND THE NEW REPUBLIC: FAITH IN THE FOUNDING OF AMERICA 1-40 (James H. Hutson ed., 2000).

139. *An Act to Provide for the Instruction of Youth, and for the Promotion of Good Education* (passed June 25th, 1789), reprinted in 1 THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, PASSED FROM THE YEAR 1780, TO THE END OF THE YEAR 1800, WITH THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA, AND OF THE COMMONWEALTH, PREFIXED 469-73 (1801); *An Act in Addition to an Act to Provide for the Instruction of Youth, and for the Promotion of Good Education*, (passed March 4, 1800), reprinted in 2 THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, PASSED FROM THE YEAR 1780, TO THE END OF THE YEAR 1800, WITH THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA, AND OF THE COMMONWEALTH, PREFIXED 906-08 (1801). Sources are available for download at <https://play.google.com/books/reader?id=IRkwAAAAYAAJ&printsec=frontcover&output=reader&authuser=0&hl=en&pg=GBS.PA469>. William T. Harris speculated that the scaling back of educational requirements was a political response to the unpopularity of entrenched “ecclesiastical control.” See *Editor’s Preface*, in GEORGE H. MARTIN, THE EVOLUTION OF THE MASSACHUSETTS PUBLIC SCHOOL SYSTEM: A HISTORICAL SKETCH, at xi (1894). Carl Kaestle

Connecticut moved in a similar direction, despite having a deserved reputation as having the strictest form of religious establishment in the country, which Adams and Jefferson in later years derisively referred to as a “protestant popedom.”¹⁴⁰ For example, colonial-era religious orthodoxy laws against “deism” or atheism, threatened a civic death for any Christian who denied the existence of God, the divinity of the holy trinity, or the divine authority of scripture (among other things), with penalties ranging from exclusion from any public office or employment to loss of rights to “sue, prosecute, plead . . . , be guardian of any child, executor of any will,” et cetera.¹⁴¹ Nevertheless, Connecticut, too, moved toward a more secular model of education. Where town schools were once run by ecclesiastical societies during the colonial period, the state now enabled the creation of local, secular school societies to take charge of common schools. Schools were now common to all children of a geographic area, with school society members subject to the all the voters of that area regardless of their religious affiliation. These democratically elected societies could levy taxes, set standards, create school districts, hire teachers, and appoint “civil authorities” to inspect and oversee schools. The law declared explicitly that ecclesiastical societies, “shall have no power to Act on the Subject of Schooling; and Law, Usage, or Custom, to the contrary.” To offer positive inducement to townships, state assembly sold off its Western Reserve lands to create a statewide fund for supporting local schools or, if two thirds of a township elected to do so, “the Christian Ministry or the Public Worship of God.” Thus while establishment survived, the schools themselves moved in a different direction—toward a model of secular control and spatial constituency.¹⁴²

In summary, school law turns out to be a less useful source of original meaning than writings that directly addressed the question of the applicability of the federal constitutional framework to mass, public education. What school law does point to, however, are general understandings and trends. There was nearly universal acceptance of the government’s role in spreading knowledge to “the people,” including significant attempts both constitutional and statutory, to create state-wide systems of schooling. Second, states diverged widely in how to accomplish this task, with the majority focusing on elite education. States

and Maris Vinovskis have argued that in its first few decades of existence, a significant private market in education existed alongside this public system, the latter of which had uneven effects depending on the size of a community. See CARL F. KAESTLE & MARIS VINOVSIS, *EDUCATION AND SOCIAL CHANGE IN NINETEENTH-CENTURY MASSACHUSETTS* (1980).

140. *THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS* 512, 515 (Stanley B. Cappon, ed., 1959).

141. 1 *THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT* 296 (1808).

142. **An Act appropriating** the Monies which shall arise on the Sale of Western Lands, belonging to this State[enacted in May, 1795], part 6, in *Acts and Laws of the State of Connecticut in America* (Hartford: Hudson and Goodwin, 1796), pp. 31-33; Title CXLI, Chapter I. “An Act for appointing, regulating and encouraging Schools [compiled in May, 1799], in *THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT*, 581-86 (1808).

that attempted to create systems of education for the mass of citizens from scratch either played the long game—creating school funds that took decades to accrue—or tried but failed to create wholly secular systems (Rhode Island and Virginia). The two most extensive existing systems, Massachusetts and Connecticut, became more secular, not less. Underlying this process were basic demographic, economic, and ideological realities that affected different regions in different ways, but continued to point toward the basic theoretical blueprint laid out by founding fathers: a district system of schools, secularly controlled, spatially constituent and ideologically neutral. It was in this latter area that the concept, when it did come to fruition, would face its most significant challenge.

VII. TOWARD AN ORIGINAL MEANING OF RELIGIOUS ESTABLISHMENT IN PUBLIC EDUCATION

Part I of this essay identified four questions at the heart of originalist inquiry into the First Amendment implications of school voucher programs. The first asked how Jefferson and Madison understood the relationship between religion and mass, public education, noting a surprising lacuna in legal scholarship and jurisprudence: what both men actually said about the matter. Evidence may be found in Jefferson's *Bill for the More General Diffusion of Knowledge*, which they both advocated and, more broadly, in what both men said and did with regard to public education as a general matter. Not surprisingly, their views on public education were well integrated into their views of government. Sectarian religion should be kept far from public education, from the elementary level through the college level, for several reasons: that religious orthodoxy could be coercive and tyrannical, that it impeded reason, encouraged bigotry, and threatened to turn the educational sphere into an arena of theological gladiators. Neither expressed concern over cultural expressions of religion, though neither mentioned including such in their recommended curricula, and Madison did not believe there could be least-common-denominator religious exercises that would be inoffensive to all. For these men, the principles embedded in the First Amendment would be deeply at odds with a voucher system paying religious sects to run a state system of education for the good of the republic.

The second question asked whether Jefferson and Madison's views were outliers, or consistent with the broader intellectual landscape. In a world where there were no modern public schools, we turn instead to plans to create them—ones written singly and a set of plans written for the American Philosophical Society education prize contest between 1795 and 1797. While not definitive, these sources strongly suggest that the Virginians were indeed in the mainstream of thought about the role of religion in republican education—neither as radical as Robert Coram nor as conservative as Benjamin Rush, but somewhere in between. With one exception (Rush), writers imagined a district system of schools that was geographically constitutive, uniform, and primarily political in purpose. Sectarian religion was considered a threat to the system,

both for substantive concerns about the historical role of high church Christianity in political tyranny, superstition, and bigotry, and for practical concerns about inter-sect rivalry. Several writers expressed confidence that public schools could teach a common morality based on universal principles shared by all religions, and did not share Madison's (or Rush's view) that common ground was impossible.

Third, absent public schools (which did not emerge in a modern sense for several decades after this period), what clues do constitutional and statutory state law give us about the original meanings of establishment for mass, public education? Here the text of law is not very helpful. While constitutions and statutes reflected a nearly universal commitment to state support of public knowledge, most did not, and could not, create actual systems of schools that would enable all citizens to acquire a basic education to better fit them for the rights and responsibilities of republican civic life. What the trajectory of the laws suggests, however, is twofold: that demographics and economics played a significant role in dictating what legislators could and could not do, giving shape to their republican commitments to the dissemination of knowledge. A system where state or local governments gave vouchers to parents to spend at the school of their choice would have made no sense to most Americans, while even tax-supported charity schemes for the urban poor focused on supply, not demand. A free, common school system based on the district system did make sense, even if paying for it with taxes was not popular. In Connecticut and Massachusetts, where multiple establishment could have led to a system of multiple state funded religious schools, the legislatures blocked religious involvement and created systems of district schools overseen by secular authorities for civic ends.

The fourth historical question at stake in the field of originalist inquiry concerns the meaning of church-state relations as public schools in more fully modern sense did develop between the 1830s and 1850s across much of the North and Midwest. This question is beyond the scope of this paper, but the analysis herein suggests that some of the existing scholarship and jurisprudence on the issue is fundamentally mistaken.

The largest mistake, repeated by Justice Thomas but made by others as well, is that judicial doctrine of preventing sectarian participation in state-funded education was "born of bigotry."¹⁴³ This claim is astonishing, given the clear record the founding generation left of their attempts to *prevent* bigotry by keeping religious sects out of the business of educating citizens. Indeed the primary authors of the Declaration of Independence and the Constitution of the United States, who were also the foremost champions of religious liberty in the founding period, were explicitly critical of a role for religious bodies in public education within a republic, with bigotry being among their top concerns. While we should rightly be alerted to hypocrisy on the part of the founders (and examples abound), their criticisms of religious orthodoxies which rejected free

143. See *supra* notes 4-6.

speech, freedom of worship, and separation of church and state, among other pillars of American government, were well articulated and well founded in their history, ideology, and geopolitics.¹⁴⁴

A less serious, and more general error is to reduce the common school movement to a vast anti-Catholic conspiracy. There is no question that anti-Catholicism was a powerful presence in nineteenth-century American life, just as it was all over the Protestant world, and just as Anti-Protestantism was in the Catholic world. As a matter of law and policy, however, the two problems with placing anti-Catholicism at the heart of public education law are timing and ideology—both of which become clear from the analysis herein. In terms of timing, the impulse to use government to spread knowledge, including a commitment to common schooling with a district model and a common political identity, was nearly universal in early republican thought, but unrealizable due to the structure of a vast, rural, settler society that had just won a war over taxes and big government. By the 1830s, well before massive waves of Catholic immigration to the United States, several states had developed significant systems of rudimentary, schools open (and accessible) to most citizens at reduced expense. (The number of school districts in New York State, for example grew from 2600 in 1816 to nearly 9000 by 1830).¹⁴⁵ This trend continued as Irish refugees from the great famine and other Catholics arrived in explosive numbers in the 1840s. Moreover, demand for and enrollment in common schooling in the countryside consistently outpaced demand in the cities, where most Catholics settled.¹⁴⁶

In terms of ideology, the same substantive fears about high-church involvement in public education during the founding period came to a head after the Civil War, but they had never faded. This was true across the Western world, not just in the United States, and the movement to create liberal nation states conflicted with high-church claims—most especially Roman Catholic Church claims—to secular authority. The Roman Catholic Church, in particular, attacked fundamental republican political principles (including the First Amendment) and public education itself.¹⁴⁷ In the politics of the Reconstruction era of the United States, the church's position (whether or not it was shared by lay Catholics) became a political hot potato, fuelling anti-Catholicism and also raising legitimate concerns about the future of public education and its role in a republican form of government.¹⁴⁸

144. LORRAINE SMITH PANGLE, *THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS* 15-21 (1993).

145. JUSTICE, *supra* note 132, at 29.

146. KAESTLE, *supra* note 37, at 24-25.

147. The Church's reluctance to condemn slavery and hostility toward abolitionism in the United States also contributed to this hostility. *See generally* JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM: A HISTORY* 7-42 (2003).

148. PANGLE, *supra* note 144, at 15; Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL. 65 (2002).

A more vexing question is whether the content of these emerging public schools violated the First Amendment (in spirit, since it could not be violated literally until after the ratification of the Fourteenth, and even then, not until the Supreme Court explicitly incorporated it nearly a century later) when they developed a pan-Protestant or even pan-Christian curriculum as a means of building and expressing a common culture and civic identity. One-size-fits-all religion was certainly grossly unfair to those whom it did not fit. It was also, from a legal theory standpoint, unnecessary. This problem was anticipated by writers of the early republic, who fretted about how to create civic virtue without religion and with religion. Those who imagined a one-size-fits-all “moral catechism” did not anticipate the growth of a vibrant and assertive Roman Catholic Church presence in American politics that would explicitly reject the idea of a formal education in common with heretic children, never mind participating in watered-down religious ceremonies with them. James Madison, on the other hand, did predict this phenomenon, which he saw as endemic to all religion, not just Catholicism. Jefferson’s plan for public education in Virginia, which Madison endorsed, saw public education as a special sphere of government where people laid aside their particular religious practices and learned to become citizens of a republic. How we interpret the state-level constitutional movement after the Civil War to prevent churches from operating schools at public expense rests, to a large degree, on how we view the substantive political dimensions of public education’s role in a republic, and whether we believe that those were as powerful political principles in nation building after the Civil War as they were in nation building after the Revolution.

CONCLUSION

Today, providing families with vouchers to spend at any school of their choosing, including religious schools, as a matter of general policy, is a radical change in American public education. It runs contrary to over a century and a half of public school policy and, as I argue here, the original meanings of separation of church and state articulated in the First Amendment by most (but not by all) measures of original meaning. The bare text of the First Amendment cannot answer whether the Constitution requires, permits, or forbids vouchers for religious groups to operate public schools because it does not contemplate public schools at all. But the generation who wrote the words of the text *did* contemplate the place of religion in public schools and left an unambiguous body of writing about it.

There is a curious irony, then, in the rise of “original meanings” jurisprudence as a pillar of pro-voucher jurisprudence in public education. All other things being equal, voucher proponents would be best served by highlighting the radicalism of their programs, adopting a pragmatic view that recognizes the necessity of breaking with the legal foundations and longstanding traditions of our form of government. Proponents should highlight

the failures of cherished American political principles and institutions. We no longer live in a sparsely populated rural nation. Most major religious groups in the United States, including the Roman Catholic Church, have reconciled themselves to religious tolerance and democracy. The Framers, voucher advocates should argue, are strangers to us.

Opponents of voucher plans, on the other hand, need look no further than the Framers and their ideas about the role of public education free from sectarian influence to bolster their claims. They should abandon laissez-faire multiculturalism and amoral consumerism and ask tough, substantive questions about the compatibility of particular religious teachings—attacks on science, attacks on democracy, and attacks on other faiths—with the health and well being of our republican form of government. They should seek a common curriculum that threads the needle between what values are common to all and what is particular and controversial to some. They should reject privatizing and consumerist civism as ahistorical fads and ask communally-rooted questions about balancing democratic localism with commitments to disseminating accurate information, inculcating reason and tolerance, and promoting the common weal.

As the question of voucher programs shifts to state courts, Reconstruction-era state constitutional provisions that explicitly forbid such arrangements in many states will come under greater scrutiny. Justice Thomas's "born of bigotry" thesis is laying a groundwork for such an assault.¹⁴⁹ As the analysis here suggests, however, there is good reason to question this interpretation. Textualists who consider the educational writings of the founding generation will be hard pressed to make a legitimate case that such prohibitions deserve strict scrutiny as rights violations. Indeed, forbidding state funding of religious public schools is entirely consistent with the original meaning of the First Amendment itself.

In those states where vouchers are not prohibited, however, it will be policy makers who determine whether such programs are desirable. A catholic (as opposed to a strictly textualist or living-originalist) analysis allows us to see what the authors of the Constitution and First Amendment understood to be the optimal relationship between church and state in public education—even as we can also see that this meaning was not explicitly written into text at the time. Policy makers considering the desirability of voucher programs are, of course, less bound by history than are judges, and less bound still by historical text plucked out of the stream of broad historical analysis. But for those who seek to reconcile the First Amendment with public education, history is not a bad place to start.

149. See Lantta, *supra* note 4.

