THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT IN PUBLIC SCHOOLS

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Three times in the past five years, the U.S. Supreme Court has confronted the question of how to apply the First Amendment in the context of public schools. In *Mahanoy Area School District v. B.L.*, the Court held that a public school violated a student's free speech rights when it suspended her from the cheerleading team for posting messages on social media that contained profanity and criticized her team and coach.[1] In *Kennedy v. Bremerton School District*, the Court held that a school district violated a high school football coach's free exercise and free speech rights when it terminated him for praying at the fifty-yard line after games.[2] And, most recently, in *Mahmoud v. Taylor*, the Court held that the Montgomery County, Maryland, public schools violated the free exercise rights of public-school parents by refusing to accommodate their requests that their children be excused from participating in the district's LGBT curriculum for young children.[3]

Of these cases, only *Kennedy* engaged in serious originalist (or, for that matter, historical) analysis, and that analysis focused on the question of whether the Establishment Clause required the district to suppress Coach Kennedy's prayers.[4] The Court concluded, in my view correctly, that past Establishment Clause doctrine had been unhinged from the nation's history and tradition.[5] Writing for the majority, Justice Gorsuch concluded, "[T]he Establishment Clause must be

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1 Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2049 (2021).

2 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415–16 (2022).

3 Mahmoud v. Taylor, 145 S. Ct. 2332, 2353 (2025).

4 *See Kennedy*, 142 S. Ct. at 2426–28.

5 *See id.* at 2427–28.

interpreted by 'reference to historical practices and understandings,'"[6] and "coercion . . . was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[7]

The fact that the Court eschewed history and tradition in resolving the free exercise and free speech claims in these cases is understandable. Public schools are inherently coercive institutions. Their goals include, to borrow from Justice McReynolds in *Pierce v. Society of Sisters*, to "standardize" children by exposing them to the ideas and ideals that public educators deem necessary to form good citizens.[8] It is an unavoidable reality that education is not a values-neutral endeavor. And because it is unavoidable, the nature and mission of state schooling, on the one hand, and our constitutional commitment to religious liberty and free expression, on the other, will therefore inevitably conflict. Not all expression must (or can) be permitted in public schools. Calculus class is not the place to engage in a debate about immigration policy. And, not all requests for curricular accommodation must (or can) be granted. On the contrary, given the complexities of administering individualized opt-outs, and the significant risks of disruption that they entail, as Justice Alito acknowledged in *Mahmoud*, "as a general matter, schools have a 'compelling interest in having an undisrupted school session conducive to the students' learning.'"[9]

The Supreme Court ideally (in my view, at least) would—à la *Kennedy*—seek to resolve questions about the First Amendment's application in the public-school setting by seeking to understand the original meaning of the First Amendment in that setting. But that is much easier said than done. Any originalist (or "history and tradition") analysis is challenging, and the public-school context poses particular challenges of undertaking because historical analogues (or at least analogies) are scarce (or nonexistent). There were no public schools at the time of the Founding.[10] The Common School movement, which was the progenitor to the modern public schools, was a mid-nineteenth-century phenomenon.[11] True, as early as 1647, Massachusetts's "Old Deluder Satan Act" required towns with more than 100 families to set

6 *Id.* at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

7 *Id.* at 2429.

8 Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

9 Mahmoud v. Taylor, 145 S. Ct. 2332, 2362 (2025) (quoting Grayned v. City of Rockford, 408 U.S. 104, 119 (1972)).

10 *Cf.* Jane Shaw Stroup, *The Years Before Common Schooling*, *in* FIGHTING FOR THE FREEDOM TO LEARN: EXAMINING AMERICA'S CENTURIES-OLD SCHOOL CHOICE MOVEMENT 11, 13–22 (James V. Shuls & Neal P. McCluskey eds., 2025).

11 *See* Charles L. Glenn, *Emergence of the Common School Ideology*, *in* FIGHTING FOR THE FREEDOM TO LEARN: EXAMINING AMERICA'S CENTURIES-OLD SCHOOL CHOICE MOVEMENT, *supra* note 10, at 57.

up a grammar school,[12] but for reasons discussed below, it's not clear whether these schools were analogous to modern public schools. And, the Land Ordinance of 1785, which established the rectangular survey system that would be employed in the Northwest Ordinance, required that every township reserve a section of land to public schools, but it did not mandate their creation.[13] It was not until after the Civil War that public education mandates began to appear in state constitutions on a wide scale.[14]

The lack of historical analogues dramatically complicates efforts to understand, as an original matter, the extent to which the First Amendment constrains the actions of public schools vis-à-vis the private individuals that interact with them as students, parents, teachers, and administrators.[15] It also complicates the question of when public-school policies "coerce" private individuals in violation of the Establishment Clause.[16] This short Essay makes no pretense of resolving these important questions. Instead, it raises two additional questions that might be relevant to (and further complicate) the historical analysis of the First Amendment's application in the public-school setting. From an originalist perspective, it is frustrating but not surprising, for example, that in *Mahanoy*, Justice Thomas—the Court's strongest originalist—relied on a Vermont Supreme Court decision from *1859*—presumably decided long after the period that an originalist should consider when determining the meaning of the First Amendment[17]—

12 Stroup, *supra* note 10, at 13; *see* THE COLONIAL LAWS OF MASSACHUSETTS 95–96 (William H. Whitmore ed., Boston, Rockwell & Churchill 1890) (1672).

13 *See* 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 293, 375, 378 (John C. Fitzpatrick ed., 1933); DOCUMENTS OF AMERICAN HISTORY, vol. 1, at 123–24 (Henry Steele Commager ed., 9th ed. 1973).

14 *See* Nicole Stelle Garnett & John A. Meiser, *Preserving the Exit Option: State Public Education Mandates and Parental Rights in Education*, 100 NOTRE DAME L. REV. 1709, 1738–39 (2026).

15 This may be one reason why there is more extensive originalist scholarship on the question of whether the Establishment Clause permits government funding of religious schools. There was an extensive historical practice of doing so from the time of the Founding. *See generally, e.g.*, Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 NOTRE DAME L. REV. 677 (2020); Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. 111 (2020); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2171–74 (2003).

16 *Cf.* Mark Storslee, *History and the School Prayer Cases*, 110 VA. L. REV. 1619, 1698 (2024).

17 *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2059–61 (2021) (Thomas, J., dissenting) (citing Lander v. Seaver, 32 Vt. 114 (1859)); *cf.* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 59–63 (2019) (arguing that the early practices should not be privileged in efforts to understand the meaning of constitutional provisions, which can be "liquidated," *id.* at 59, long after the Founding Era).

for the proposition that public schools can regulate the off-campus conduct and speech of their students.[18]

The first question is *which history*? Specifically, given the fact that public schools did not exist at the time of the Founding—but did exist at the time of the ratification of the Fourteenth Amendment—is post-Founding, pre-Reconstruction history more probative of the First Amendment's meaning as applied to public schools, than Founding-era history? There are benefits to this approach—including, importantly, the fact that public schooling was widespread by the Civil War. But the history of public education policies during the nineteenth century poses its own challenges for originalists. The second is whether it might be a category error to treat public schools in the nineteenth century, and certainly at the time of the Founding, as sufficiently "governmental" to make their practices relevant to First Amendment analysis of modern public schools.

Two (related) caveats are in order: First, this Essay is, by design, brief and therefore makes no pretense at being comprehensive. It does not and cannot address the extensive scholarship on the original meaning of the First Amendment's Religion Clauses,[19] or originalism more broadly,[20] let alone the growing body of scholarship on "traditionalism" and "tradition and history,"[21] nor the question of whether and to what extent the current Supreme Court understands whether "originalism" and "history and tradition" are distinct interpretive methodologies.[22] Second, as I have previously acknowledged, while I

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18 *See Mahanoy*, 141 S. Ct. at 2059–60 (Thomas, J., dissenting) (citing *Lander*, 32 Vt. at 115, 120). *Lander* held that a school appropriately punished a student for calling his teacher "Old Jack Seaver," *id.* at 115, because the insult had a "direct and immediate tendency to injure the school, to subvert the master's authority, and to beget disorder and insubordination," *id.* at 120.

19 *See, e.g.*, VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES (2022); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); McConnell, *supra* note 15; PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002).

20 *See, e.g.*, Jud Campbell, *Determining Rights*, 138 HARV. L. REV. 921 (2025); Stephanie Hall Barclay, *Constitutional Rights as Protected Reasons*, 92 U. CHI. L. REV. 1179 (2025); Sherif Girgis, *Originalism's Age of Ironies*, 138 HARV. L. REV. F. 1, 3–5 (2024).

21 *See, e.g.*, Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023); Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9 (2023); Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, 112 GEO. L.J. 699 (2024); Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67 (2023).

22 *See, e.g.*, Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023); Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 563 (2024); Richard M. Re, *Permissive Interpretation*, 171 U. PA. L. REV. 1651, 1693–97 (2023); Bradley Rebeiro, *History, Tradition, and Natural Rights*, 47 HARV. J.L. & PUB. POL'Y

consider myself an originalist, my scholarship has not focused on originalism, let alone history and tradition, so this Essay is best taken as the musings of an armchair originalist.[23] Hopefully, these musings will at least prove thought-provoking.

I. WHICH HISTORY?

Among originalists, there is an ongoing debate on whether courts assessing claims about the scope of federal constitutional rights as applied to state government institutions should primarily rely on the prevailing understanding of an individual right when the First Amendment was ratified or at the time of the ratification of the Fourteenth Amendment in 1868.[24] As Justice Barrett observed in *New York State Rifle & Pistol Ass'n v. Bruen*, the Court has largely avoided weighing in on that debate.[25] If the relevant time period is 1791, then "freewheeling reliance on historical practice from the mid-to-late 19th century" cannot be used "to establish the original meaning of the Bill of Rights"[26] because "a practice that 'arose in the second half of the 19th century . . . cannot by itself establish an early American tradition' informing our understanding of the First Amendment."[27] Later history might, of course, be probative of "history and tradition," to the extent that these things inform the Court's understanding of the scope of individual rights—rather than supplement originalist analysis—but I leave those questions to one side here.[28]

A significant benefit of relying on 1868, as opposed to 1789, as the focal point for originalist analysis is that public schools—or at least their "common school" progenitors—were widespread by the time of the Civil War.[29] Indeed, Congress required Confederate states to include a provision in their Reconstruction constitutions as a condition

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713 (2024); Jud Campbell, *Tradition, Originalism, and General Fundamental Law*, 47 HARV. J.L. & PUB. POL'Y 635 (2024); *see also, e.g.*, Vidal v. Elster, 144 S. Ct. 1507, 1531–32 (2024) (Barrett, J., concurring in part).

23 *Cf.* Nicole Stelle Garnett, *"No Taking Without a Touching?" Questions from an Armchair Originalist*, 45 SAN DIEGO L. REV. 761 (2008).

24 *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2138 (2022) (noting debate); *see also, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, at xiv, 223, 243 (1998); Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1441 (2022) ("When the people adopted the Fourteenth Amendment, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings.").

25 *See Bruen*, 142 S. Ct. at 2163 (Barrett, J., concurring).

26 *Id.*

27 *Id.* (alteration in original) (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2258–59 (2020)).

28 *See supra* note 21.

29 *See* Glenn, *supra* note 11, at 60–66.

of reentering the Union, and—it appears likely—also subsequently required these mandates when western territories sought statehood as well.[30] The remainder of states voluntarily adopted a public-education mandate after the Civil War.[31] Their historical practices (and state court decisions reviewing their practices) can inform First Amendment analysis.

Those practices and judicial decisions would warm the hearts of proponents of school prayer—certainly prayer was a cornerstone of the day in nineteenth century public schools, but—taken at face value—they would not support the conclusion that those who ratified the Fourteenth Amendment understood it to protect robust religious liberty rights for students and teachers within public schools. Indeed, disputes over the curricular and religious practices of nineteenth century common schools—and demands for exemptions or accommodations for them—were a pervasive feature of debates over education policy during the years leading to the Civil War. Catholic students' requests, on religious liberty grounds, for accommodations exempting them from mandatory recitations of the *King James Bible*—a ubiquitous feature of the common-school curriculum—were a particular flashpoint. While undoubtedly some requests for accommodations were granted without incident—and a more fulsome attempt to understand the extent of these accommodations would be needed for a full originalist analysis of whether the First Amendment required them, it is clear that accommodation requests were often denied. Indeed, the requests themselves sometimes provoked mob violence.[32]

Consider, for example, the dramatic backstory behind the Maine Supreme Court's 1854 decision in *Donahoe v. Richards*.[33] One Sunday in 1853, a Jesuit Priest named Father John Bapst, the pastor of a parish in Ellsworth, Maine, directed the children in his congregation to stop reciting from the *King James Bible* at their public school.[34] Father Bapst had previously sought to secure an accommodation for Catholic students, asking that they be permitted to recite from the *Douay-Rheims*

30 *See* Garnett & Meiser, *supra* note 14, at 1728.

31 *See id.*

32 *See* MARGARET F. BRINIG & NICOLE STELLE GARNETT, LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS' IMPORTANCE IN URBAN AMERICA 13–15 (2014); *see also* Garnett & Meiser, *supra* note 14, at 125–26 (summarizing history).

33 Donahoe v. Richards, 38 Me. 379 (1854). The following discussion of *Donahoe* is reproduced from Garnett & Meiser, *supra* note 14, at 1736–37; Nicole Stelle Garnett, *Parental Rights, Parental Choice, and State Public Education Mandates*, 26 J. CONTEMP. LEGAL ISSUES 73, 85–86 (2025) [hereinafter Garnett, *Parental Rights*]; and Nicole Stelle Garnett, *Another Chink in the Armor of Legal Discrimination Against Religious Schools*, PUB. DISCOURSE (July 5, 2022), https://www.thepublicdiscourse.com/2022/07/83157 [https://perma.cc/V2RT-SGSF].

34 *See Donahoe*, 38 Me. at 380.

Bible instead.[35] His request was, not surprisingly, rebuked. The following day, sixteen students were expelled for following Father Bapst's instructions. In response, nativists burned both of the town's Catholic churches to the ground, along with the small Catholic school that Father Bapst had recently founded. Father Bapst, on orders from his bishop, fled the town. When Father Bapst surreptitiously returned to visit his flock, the nativists apprehended him. They ran him out of town on a rail, stripped him naked, tied him to a tree, tarred and feathered him, and attempted to burn him alive. He survived, but barely—apparently, their matches failed.[36]

The Maine Supreme Court's 1854 decision in *Donahoe v. Richards* is also reflective of the moment.[37] The case concerned the religious liberty claims of Bridget Donahoe, one of the children disciplined for following Father Bapst's instructions.[38] The Court rejected her claim that her suspension was unlawful as well as her request for an accommodation allowing her to read from the Catholic *Douay-Rheims Bible* instead of the *King James Bible*.[39] The court's opinion stressed the importance of a uniform public education to assimilate immigrant children:

> Large masses of foreign population are among us, weak in the midst of our strength. Mere citizenship is of no avail, unless they imbibe the liberal spirit of our laws and institutions, unless they become citizens in fact as well as in name. In no other way can the process of assimilation be so readily and thoroughly accomplished as through the medium of the public schools . . . .[40]

The outcome of *Donahoe v. Richards* was not an outlier (although the discomfiting language might have been). During the nineteenth century, state courts also commonly rejected challenges, rooted in both state free exercise and establishment clauses, to the inclusion of the *King James Bible* and other Protestant texts and practices in the public-school curriculum. Often, these decisions simply summarily rejected the claims out of deference to public-school administrators, holding that the reading of the *King James Bible* was not "sectarian" instruction and deferring to school authorities. Some courts praised the practice as supporting the development of morals and good discipline, taking care to emphasize the foundational role of "non-sectarian"

35 *See id.* at 399–400.

36 "[Father] Bapst, who later became the first president of Boston College, was tormented by memories of this ordeal throughout his life." Garnett, *Parental Rights*, *supra* note 33, at 86.

37 *Donahoe*, 38 Me. 379.

38 *See id.* at 386.

39 *See id.* at 409–13.

40 *Id.* at 413.

Christianity in American society.[41] One court characterized the argument that the *King James Bible* could not be constitutionally included in the public-school curriculum as "absurd."[42]

At least insofar as later history is relevant to the question of the meaning of the First Amendment's Religion Clauses in the public-school setting, the practices of common schools in the nineteenth century (and judicial opinions ratifying, and rejecting, religious liberty challenges to them) would (a) seem to support prayer in public schools and (b) not seem to support a fulsome regime of curricular accommodations. But these practices—tainted as they unquestionably were with anti-Catholic bias—would raise other questions.[43] At least under current doctrine, such discriminatory motives would complicate use of this history in informing the understanding of the First Amendment, both in the school prayer and student rights contexts.[44] I leave the task of working through these complications to one side here.

II. THE "GOVERNMENTAL" NATURE OF NINETEENTH CENTURY "PUBLIC SCHOOLS"

Modern school districts—and the schools that they operate—are unquestionably "governmental."[45] School districts are among the most important "special purpose local government[s]" in the United States, endowed by state laws with limited, but independent, governmental authority to operate schools and conduct related activities.[46] But, in an unrelated context, I have previously cautioned against equating the actions of what appear to be early "local governments"—including

41 *See* Garnett, *Parental Rights*, *supra* note 33, at 85 & n.52; *see, e.g.*, Pfeiffer v. Bd. of Educ., 77 N.W. 250, 252–53 (Mich. 1898); Nessle v. Hum, 2 Ohio Dec. 60 (Ct. C.P. 1894); *see also, e.g.*, Moore v. Monroe, 20 N.W. 475 (Iowa 1884) (holding that Biblical instruction in public schools did not violate Iowa's First Amendment analogue so long as children had the opportunity to opt out of mandatory readings).

42 Stevenson v. Hanyon, 7 Pa. D. 585, 590 (Ct. C.P. 1898) (rejecting a request for an injunction preventing the reading of the *King James Bible* in public schools as "absurd[]," *id.* at 591, because Christianity was part of the law of Pennsylvania and "[w]e do not understand how the reading of the Bible in the public schools can be termed sectarian instruction," *id.* at 590).

43 *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2268–73 (2020) (Alito, J., concurring); Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMEND. L. REV. 45, 60–71 (2003).

44 *Cf.* Ramos v. Louisiana, 140 S. Ct. 1390, 1401 n.44 (2020).

45 I leave to one side the question whether privately operated charter schools are "governmental." In many cases, I do not believe that they are.

46 Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 NW. U. L. REV. 945, 958 (2017); *see id.* at 955–58; Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 23–24 (1990).

municipalities—with the actions of modern local governments.[47] This is because the actions of the former were not necessarily "governmental," as we understand the term today.[48] Prior to the early nineteenth century, American law made no distinction between public and private corporations.[49] It was during the early years of the nineteenth century that American law began to conceptually sever the private and public generally, and private and public corporations in particular.[50] Business corporations became independent rightsholders, constitutionally protected from unreasonable state interference.[51] Moreover, the gradual erosion of the ultra vires doctrine and the passage of general incorporation laws guaranteed the proliferation of private corporations with broad authority to engage in a wide range of activities.[52] In contrast, municipal corporations came to be viewed as subordinate to, and carrying out the purposes of, the states.[53] By the late nineteenth century, private corporations were well on their way toward autonomy, while municipal corporations had become local governments subject to state domination.[54]

Although a full treatment of the question is beyond the scope of this short Essay, there may be a risk in assuming that the actions of early common schools—and indeed common schools well into the twentieth century—were sufficiently "governmental" to be analogous to the actions of public schools operated by modern school districts. Certainly, at their inception, there is a case to be made that the earliest common schools were not governmental. The earliest common schools were often operated by ministers or, for example in the case of

47 *See* Garnett, *supra* note 23, at 762–63, 770–72.

48 *See id.* at 763.

49 *See id.*

50 *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1101–02 (1980); Joan Williams, *The Development of the Public/Private Distinction in American Law*, 64 TEX. L. REV. 225, 228 (1985) (reviewing HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870 (1983)).

51 *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 111–14 (1977).

52 This discussion is reproduced from Garnett, *supra* note 23, at 770–71.

53 *See* Frug, *supra* note 50, at 1100–04 (discussing the separation of public and municipal corporations).

54 *Cf.* William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1485–91 (1989) (describing "[t]he Middle Period [of corporate development]—the 1850s to the 1880s," when "[t]he states enacted 'general corporation laws' to assure equal access to the corporate form," *id.* at 1485); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 205–11 (noting that "[t]he pervasive adoption of general incorporation statutes by many states during the latter half of the 19th century did not [signal] abdication of the regulatory notion of corporate law," *id.* at 208).

New York City, Sunday school societies.[55] The question of when these early public schools became governmental is beyond the scope of this Essay. I merely point out that an understanding of when public schools (and, perhaps most importantly, the school districts that operate them) transitioned from private to "governmental entities" is critical to an understanding of when their history and tradition becomes probative of the meaning of how the First Amendment applies to the actions of modern, unquestionably governmental public schools. William Fischel dates the creation of modern school districts to the consolidation of one-room-schoolhouse "districts" in the early decades of the twentieth century.[56] On the other hand, Terry Moe has asserted that "[f]rom its modern origins in the early decades of the 1900s, America's public education system was designed to be a purely governmental system in which markets play[ed] no role at all."[57]

The actual history appears to be more complex. Nadav Shoked traces the emergence of the school district as a separate governance (but not necessarily governmental) entity to colonial Massachusetts, and argues that several states began to emulate this model in the first half of the nineteenth century.[58] He characterizes nineteenth-century school districts as "the smallest, and most voluntary, unit of self-government in the political system," which "empower[ed] individual neighborhoods to decide whether to sustain schools"[59] and asserts that "the district system emerged, therefore, as a powerful tool for small-scale communities to design their own public institutions and services and to manage their affairs."[60] Similarly, David Tyack has traced the evolution of the school district from loose community committees to formal local governments with the power to tax as well as manage property and personnel.[61] Throughout the nineteenth century, courts typically referred to school districts as "quasi-corporations" with extremely limited powers.[62] In 1853, for example, the New Hampshire Supreme Court observed, "School districts are quasi corporations of the most

55 *See* LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825–1925, at 11–14 (1987).

56 William A. Fischel, *Neither "Creatures of the State" nor "Accidents of Geography": The Creation of American Public School Districts in the Twentieth Century*, 77 U. CHI. L. REV. 177, 178 (2010); *see id.* at 178–79.

57 Terry M. Moe, *The Structure of School Choice*, *in* CHOICE WITH EQUITY 179, 184 (Paul T. Hill ed., 2002).

58 *See* Shoked, *supra* note 46, at 979–80.

59 *Id.* at 981.

60 *Id.* at 982.

61 *See* DAVID B. TYACK, THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION 28–29 (1974).

62 *See, e.g.*, Trs. of Schs. v. Tatman, 13 Ill. 27, 30–31 (1851); Clark v. Bd. of Dirs., 24 Iowa 266, 273–74 (1868); Ford v. Sch.-Dist., 15 A. 812 (Pa. 1888).

limited powers known to the laws. They have no powers derived from usage; their existence extending back but a few years."[63] On the other hand, many states began to adopt laws governing the creation and powers of school districts, which referred to them as "corporation[s]" for "public purposes," in the later decades of the century.[64]

My purpose in raising these questions is not to suggest that modern school districts are not "governmental"—they unquestionably are. Nor do I mean to suggest that the actions of nineteenth-century public/common schools are *irrelevant* to the application of the Religion Clauses in modern district public schools. They may well be, but interrogating the evolution of their status to "governmental" (when, and where) should be a part of understanding how their unique history informs the original understanding of the First Amendment in the context of public education.[65]

CONCLUSION

The absence of public schools at the time of the Founding, and for decades thereafter, poses a unique challenge to understanding how the First Amendment should constrain their actions. This short Essay raises two questions about their subsequent history that may shed light on efforts to better answer that question.

63 Harris v. Sch. Dist. No. 10, 28 N.H. 58, 62 (1853) (emphasis omitted).

64 *See* Sch. Dist. v. Ins. Co., 103 U.S. 707, 708 (1880) (quoting An Act to Establish a System of Public Instruction, ch. 79, § 2, 1869 Neb. Laws 115, 115); *id.* at 708–09 (discussing Nebraska and Ohio laws).

65 When the actions of "quasi-governments" become sufficiently governmental as to be controlled by the Constitution remains an important question in local government law. *See, e.g.*, Kessler v. Grand Cent. Dist. Mgmt. Ass'n, 158 F.3d 92, 103–08 (2d Cir. 1998) (finding that New York City's business improvement districts were insufficiently governmental to be governed by the Equal Protection Clause's one-person-one-vote principle).