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FORUM

SCOTUS, Schools, and History

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Abstract

In recent years, justices on the US Supreme Court have made explicit historical arguments about US schools in order to promote a broader role for religion in US public schools. For example, in *Espinoza v. Montana* (2020), Chief Justice Roberts cited the late historian Carl F. Kaestle to buttress his arguments, but did so in a way that misrepresented Kaestle's nuanced account. This article compares the justices' historical arguments to the best evidence from the historical record. The essay argues that historians of education—whatever their political beliefs—can and should guide policy by providing reliable, accurate historical information.

Keywords: religion; public education; United States Supreme Court; school prayer; originalism

The United States Supreme Court has a long record of using history as a rhetorical weapon to shape public school policy. When it comes to the proper relationship between religion and public education, justices on the court have bandied historical definitions back and forth for decades. In 1963, for instance, William J. Brennan created a new framework for public education in the United States with a claim about the nation's history.[1] In 2022, Justice Neil Gorsuch resurrected Brennan's words, but used them to reverse Brennan's opinion.[2]

When it came to defining the role of religion in public schools, Brennan argued, "The line we must draw … is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[3] Both Brennan and Gorsuch agreed that history must guide their decisions, but they disagreed utterly on the proper lessons to draw from the past. The turbulent history of the Supreme Court's historical arguments makes one thing very clear: in order to play a meaningful role in research, policy, and practice, education historians are forced not only to dig into archives, but also to wade into debates between contending visions of what those archives mean.

[1] Abington School District v. Schempp, 374 U.S. 203 (1963).
[2] Kennedy v. Bremerton School District, 597 U.S. ___ (2022).
[3] Abington v. Schempp, 294.

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In 1963, in his *Abington School District v. Schempp* concurring opinion, Brennan argued that history was on the side of separation of religion from public schools.[4] In the *Schempp* decision, the Supreme Court ruled that public schools could not lead children in devotional Christian prayers and Bible reading. Separation, Brennan argued, was the lesson to be gleaned from history; separation was what the Founding Fathers would have wanted.

In 2022, Justice Gorsuch agreed entirely that school policy must be guided by history, but he drew the opposite conclusion. In *Kennedy v. Bremerton School District*, Gorsuch pointedly quoted Brennan, but insisted that the Founding Fathers wanted mainly to protect the right of Americans to pray.[5] That right, Gorsuch argued, included the right of public school employees to lead public school students in prayer.

In this case, as in so many questions of educational policy, the history is so complicated that both justices were able to claim that history was on their side. As Brennan argued, the Founding Fathers worried intensely that government might impose religious ideas on Americans. However, Gorsuch rebutted, the Founding Fathers also insisted on the right of Americans to freely express their religious ideas. And, as Gorsuch contended, early public schools were full of Christian prayers and devotional Bible reading.

In this arena of contending historical interpretations—historical interpretations with direct impact on day-to-day school policy—what role should historians of education play? The task would be difficult enough if historians merely needed to decide which argument was more convincing. But historians are simultaneously aware that the questions can be multiplied endlessly. For instance, who exactly were the "Founding Fathers" of public education in the United States? As Siobhan Moroney demonstrated in the pages of this journal, the usual contenders for that title, such as Thomas Jefferson and Benjamin Rush, certainly imagined public school systems, but their ideas were never put into practice.[6]

Perhaps, then, the true "Founding Fathers" of public education are the generation of reformers that launched the common school reform movement in the 1840s, leaders such as Horace Mann and Henry Barnard. However, as Carl Kaestle argued back in the 1970s, and Benjamin Justice, David Komline, and I have shown more recently, those leaders actually inherited a public school system created a generation earlier.[7]

Even if we could decide definitively on the roster of true "Founding Fathers" for public education in the United States, there has never been one clear, definitive definition for the proper role of religion in public schools. Founding Fathers had many different

[4] Abington v. Schempp, 230–306.

[5] Kennedy v. Bremerton, 1–32.

[6] Siobhan Moroney, "Birth of a Canon: The Historiography of Early Republican Educational Thought," *History of Education Quarterly* 39, no. 4 (Winter 1999), 476–91.

[7] Carl F. Kaestle, "Common Schools before the 'Common School Revival': New York Schooling in the 1790s," *History of Education Quarterly* 12, no. 4 (Winter 1972), 466; Benjamin Justice, *The War That Wasn't: Religious Conflict and Compromise in the Common Schools of New York State, 1865-1900* (Albany: State University of New York Press, 2005), 18, 25; David Komline, *The Common School Awakening: Religion and the Transatlantic Roots of American Public Education* (New York: Oxford University Press, 2020), 3, 13; Adam Laats, "Betsy DeVos Wants to Resurrect an Old—and Failed—Model of Public Education," *Washington Post*, May 16, 2019.

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ideas. Some, such as Thomas Jefferson, famously wanted to take Christian religion out of public schools.[8] Others, such as Benjamin Rush, insisted that schools must actively preach only one type of Christian religion.[9]

As historians are well aware, then, every controversial historical question only leads to more questions. Yet the job of education historians is not complete if we merely point out the ever-expanding complexity of the relevant history. Weighty decisions about the philosophy and function of public education rest on interpretations of that history. Historians have a responsibility not only to note the many issues involved, but also to offer a wider perspective to guide today's policy.

Many historians have done just that. As Benjamin Justice, Robert N. Gross, and Steven K. Green have shown, there was an overarching principle that guided American thinking about religion and public education throughout the long nineteenth century.[10] Generally known as *non-sectarianism*, the principle asserted that public schools must avoid teaching any controversial religious idea, although in the nineteenth century, it was still widely agreed that public schools should include religious teachings. Indeed, for many Americans of the period, it was difficult to imagine an education without basic religious training. But that training needed to stick to universal religious ideas. Any religious idea that was not generally agreed upon, the thinking went, must be carefully barred.

There was never a simple agreement on the nature of "sectarian" thinking, of course. Many Protestant leaders blithely assumed that their particular religious ideas were merely universal truths, and they wielded the language of "non-sectarian" schools like a political club to limit the political power of Catholic leaders.

Moreover, and more relevant to this case, religious controversy has always been a moving target. Ideas that were controversial between various Protestant sects in the early 1800s, such as the proper time and method for baptism, have faded in intensity. Other controversies took their place, such as the propriety of any prayer at all in a public institution.

The complexity of the history, however, does not and cannot mean that historians must abstain from offering guidance on specific policy questions. In the case of religion in public schools, for example, though there was indeed lots of Christian preaching in many early public schools, the overarching lesson of American history is clear: when

[8]"79. A Bill for the More General Diffusion of Knowledge, 18 June 1779," *Founders Online*, National Archives, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0079. Original source: *The Papers of Thomas Jefferson*, vol. 2, *1777 to 18 June 1779*, ed. Julian P. Boyd (Princeton, NJ: Princeton University Press, 1950), 526–35.

[9]"Benjamin Rush, 'Thoughts upon the Mode of Education Proper in a Republic,' 1786," *Explore PAHistory*, https://explorepahistory.com/odocument.php?docId=1-4-218. Original source: Benjamin Rush, "Addressed to the Legislature and Citizens of the State," in *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* (Philadelphia: Thomas Dobson, 1786).

[10]Benjamin Justice, "The Originalist Case against Vouchers: The First Amendment, Religion, and American Public Education," *Stanford Law and Policy Review* 26, no. 2 (2015), 437–84; Robert N. Gross, *Public vs. Private: The Early History of School Choice in America* (New York: Oxford University Press, 2018); Steven K. Green, *The Bible, the School, and the Constitution: The Clash That Shaped Modern Church-State Doctrine* (New York: Oxford University Press, 2012).

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religious ideas were seen as controversial, they were barred from public schools. When religious ideas were seen as divisive and inimical to the creation of new generations of citizens, those ideas were relegated to private institutions, not public ones.

The point is not only that Brennan was right and Gorsuch was wrong, though in this case that is true. More broadly, in all questions of policy and history, there is an important value that only education historians can provide. While justices and journalists can pick and choose from the vast historical record to prove their political points, it rests with education historians to include the fuller context that puts today's policy decisions in proper perspective.

Adam Laats is professor of education and history at Binghamton University (SUNY). He has published several books, including *Fundamentalist U* (Oxford University Press, 2018); *The Other School Reformers* (Harvard University Press, 2015); and *Mr. Lancaster's System: The Failed Reform That Created America's Public Schools* (Johns Hopkins University Press, in press, expected 2024). He has also offered commentary on NPR, CNN, *Slate*, the *Atlantic, Chronicle of Higher Education*, the *New Republic*, and the *Washington Post*.

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