

Not the Mere Creature of Anyone

Parental Control, Public Money, and the Case for Children's Educational Rights

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ABSTRACT

For a century, the U.S. Supreme Court has asked one question about children's schooling, namely how much control parents may exercise, and it has almost never asked the other: what is the child owed? This Article traces four lines of doctrine. The first is exit (*Meyer, Pierce, Yoder*). The second is control inside public schools (*Mahmoud, Mirabelli*). The third is the Establishment Clause limits on aid to religious schools (*Everson* through *Kennedy*). The fourth is the Free Exercise mandate to fund them (*Trinity Lutheran, Espinoza, Carson*). Since 2017, all four lines have converged on a single result: parental authority, underwritten by public money and increasingly insulated from public conditions.

The Article makes three claims. First, the doctrine treats children as objects of their parents' liberty rather than as rights-holders, and the recent funding cases have converted that omission into a fiscal transfer with no accountability running to the child. Second, state constitutional education clauses, which many state high courts read as conferring an individual right on each child, and in several states a fundamental one, are the most promising existing ground for a counterweight. That is because those clauses define the state's duty by outcomes for children, not by the institutions that deliver schooling. Third, comparative practice in peer democracies and the UN Convention on the Rights of the Child show that generous support for religious and private schooling can coexist with enforceable standards and with a voice for the child. The Article proposes a framework, *Children's Recourse*, built on those foundations. It argues that, over the long run, *Pierce v. Society of Sisters* itself may need to be reconsidered.

Keywords: parental rights; school vouchers; education savings accounts; Free Exercise Clause; state constitutional law; children's rights

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Introduction

In January 2013, a three-judge panel of the Shawnee County District Court rejected Kansas’s argument that deep cuts to school funding would cause no lasting harm. “Simply, school opportunities do not repeat themselves,” the panel wrote, “and when the opportunity for a formal education passes, then for most, it is most likely gone.” If the State’s position were accepted, it “is experimenting with our children which have no recourse from a failure of the experiment.”¹ The children in *Gannon* were at least still in schools. They had teachers and curricula, and a court could examine their test results.

Consider a different child. She turns eighteen in Phoenix. Since 2022, Arizona has made every school-age child eligible for an Empowerment Scholarship Account.² Under the governing statute, her parent’s signature on an account agreement “constitutes school attendance required by section 15-802,” the state’s compulsory attendance law.³ The statute obliges the parent to use a portion of the funds for instruction in reading, grammar, mathematics, social studies and science. It imposes no testing requirement and no curricular approval, and it measures no learning.⁴ Florida, which adopted universal eligibility in 2023, requires participants in its home-education account program to take a norm-referenced test and report the result. Funding turns on submitting the test, not on the score.⁵ If either program fails a particular child, she has almost no one to sue.

She cannot sue her parents for an inadequate education, because courts have refused for half

¹*Gannon v. State*, No. 10C1569, slip op. at 188 (Shawnee Cnty. Dist. Ct. Jan. 11, 2013) (three-judge panel); see Bruce D. Baker, “Experimenting with Our Children: Who Answers to the 18-Year-Old the Voucher Failed?,” *School Finance 101* (blog), October 2, 2026, <https://schoolfinance101.com/2026/10/02/experimenting-with-our-children-who-answers-to-the-18-year-old-the-voucher-failed/>.

²Act of July 7, 2022, ch. 388, 2022 Ariz. Sess. Laws (H.B. 2853), <https://www.azleg.gov/legtext/55leg/2R/laws/0388.htm>.

³Ariz. Rev. Stat. Ann. § 15-2402(I), <https://www.azleg.gov/ars/15/02402.htm>.

⁴*Ibid.*, § 15-2402(B); Baker, “Experimenting with Our Children.”

⁵Act of March 27, 2023, ch. 2023-16, Laws of Fla. (CS/CS/CS/CS/HB 1); Florida Department of Education, “Personalized Education Program (PEP) FAQs,” <https://www.fldoe.org/schools/school-choice/k-12-scholarship-programs/ftc/pep-faqs.stml>; Step Up For Students, *PEP Family Handbook*, <https://www.stepupforstudents.org/handbook-web/pep-family-handbook/>.

a century to recognize a duty of care for academic outcomes, even for licensed educators.⁶ She cannot sue the State under the Fourteenth Amendment. Education is not a fundamental right under the federal Constitution.⁷ The Due Process Clause generally imposes no duty on the State to protect a child from harm inflicted by a private actor, including a parent.⁸ The one federal appellate decision recognizing a right to a basic minimum education was vacated when the full court granted rehearing.⁹ And she cannot easily invoke her state's education clause. As Part V shows, state courts reviewing universal voucher and account programs have increasingly asked whether diverting money harms the public system, not whether any individual child is being educated.¹⁰

This Article argues that her predicament is not an accident of two states' statutes. It is the predictable result of a century of federal constitutional doctrine that has asked one question about children's schooling, how much control parents get, and has almost never asked the other: what is the child owed? Part I traces the doctrine of exit from *Meyer v. Nebraska* and *Pierce v. Society of Sisters* through *Wisconsin v. Yoder*. Part II shows how *Mahmoud v. Taylor* and *Mirabelli v. Bonta* converted exit into something closer to a veto over public instruction. Part III follows the money: the collapse of Establishment Clause limits on aid, and the rise of a Free Exercise mandate to fund religious schools once a state funds any private option. Part IV takes up race. It revisits an argument Preston Green and I first made in 2020: the funding cases, combined with an unresolved question in *Runyon v. McCrary*, could allow publicly funded schools to exclude students by race on religious grounds.¹¹ Part V turns to state constitutions, where courts have long described the education right as one held by each child. Part VI compares the approaches of peer democracies

⁶*Peter W. v. San Francisco Unified School District*, 60 Cal. App. 3d 814 (1976).

⁷*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

⁸*DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

⁹*Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir.), reh'g en banc granted, opinion vacated, 958 F.3d 1216 (6th Cir. 2020).

¹⁰See Part V.C, below.

¹¹Bruce D. Baker and Preston C. Green III, "The Post-Espinoza End Game," *School Finance 101* (blog), July 29, 2020, <https://schoolfinance101.com/2020/07/29/the-post-espinoza-end-game/>; Preston C. Green III, Bruce D. Baker, and Suzanne Eckes, "The Potential for Race Discrimination in Voucher Programs in a Post-Carson World," *Peabody Journal of Education* 99, no. 4 (2024): 403–15, <https://doi.org/10.1080/0161956X.2024.2381370>.

and the UN Convention on the Rights of the Child. Part VII proposes a framework I call *Children's Recourse*, and Part VIII addresses objections. The urgency, as I have argued elsewhere, is greater now than at any point since *Zelman*. The Court will hear argument on November 3, 2026, in a case asking whether states may attach neutral conditions to the money at all.¹²

I. Exit: The Parental Liberty Cases

A. Meyer, Pierce, and Farrington

The constitutional law of parental control over schooling begins in the 1920s, in the same era and with the same tools as *Lochner v. New York*. *Lochner* had read the Fourteenth Amendment's liberty guarantee to protect "the general right to make a contract in relation to his business."¹³ In *Meyer v. Nebraska*, decided in 1923, the Court drew on that conception of liberty. It defined liberty to include not only freedom of contract but also the right "to acquire useful knowledge, to marry, establish a home and bring up children."¹⁴ The Court held that Nebraska's ban on teaching modern foreign languages before the eighth grade was "arbitrary and without reasonable relation to any end within the competency of the State."¹⁵

Two years later, *Pierce v. Society of Sisters* struck down Oregon's Compulsory Education Act, which required nearly every child between eight and sixteen to attend a public school.¹⁶ The Act had been adopted by initiative in November 1922, 115,506 votes to 103,685. It was promoted by the Scottish Rite Masons and backed by the Ku Klux Klan, and its target was Catholic parochial schooling.¹⁷ The Court's opinion contains the sentence that has framed the field ever since: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the

¹²*St. Mary Catholic Parish v. Roy*, No. 25-581 (U.S. cert. granted Apr. 20, 2026) (argument scheduled Nov. 3, 2026), <https://www.supremecourt.gov/docket/docketfiles/html/public/25-581.html>.

¹³*Lochner v. New York*, 198 U.S. 45, 53 (1905).

¹⁴*Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

¹⁵*Ibid.*, 403.

¹⁶*Pierce v. Society of Sisters*, 268 U.S. 510, 530–31, 534–35 (1925).

¹⁷Robert Bunting, "Pierce v. Society of Sisters (1925)," *Oregon Encyclopedia* (Oregon Historical Society), updated May 11, 2022, https://www.oregonencyclopedia.org/articles/pierce_vs_society_of_sisters_1925_/; Paula Abrams, *Cross Purposes: Pierce v. Society of Sisters and the Struggle over Compulsory Public Education* (Ann Arbor: University of Michigan Press, 2009).

right, coupled with the high duty, to recognize and prepare him for additional obligations.”¹⁸ In 1927, *Farrington v. Tokushige* extended the principle to the Territory of Hawaii. There, regulations of Japanese-language schools would have deprived parents of “fair opportunity to procure for their children instruction which they think important.”¹⁹

These decisions protected real communities from real bigotry. But it matters who the Court said was protected. *Pierce* vindicated “the liberty of parents and guardians to direct the upbringing and education of children under their control.”²⁰ It also protected the appellee corporations, which had “business and property for which they claim protection.”²¹ The child appears in these opinions only as the object of the parents’ liberty and the schools’ commerce. Barbara Bennett Woodhouse has shown that this framing carried forward an older conception of the child as a form of property, one the decisions dressed in the language of liberty.²²

Just as important is what *Pierce* reserved. The Court was explicit that “[n]o question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils,” and to require “that certain studies plainly essential to good citizenship must be taught.”²³ *Pierce* was a bargain: parents could leave the public schools, but the State kept the power to set and enforce standards for the education every child received. That reservation remains good law, and Part VII builds on it.

The *Lochner* foundation of *Meyer* and *Pierce* is also part of the story. The Court abandoned *Lochner*’s economic-liberty jurisprudence in 1937, when *West Coast Hotel Co. v. Parrish* upheld a minimum-wage law and overruled *Adkins v. Children’s Hospital*.²⁴ *Meyer* and *Pierce* survived the transition. They were recast over time as cornerstones of a distinct tradition of family privacy, in which parents’ interest in “the care, custody, and control of their children” is “perhaps the oldest

¹⁸*Pierce*, 268 U.S. at 535.

¹⁹*Farrington v. Tokushige*, 273 U.S. 284, 298 (1927).

²⁰*Pierce*, 268 U.S. at 534–35.

²¹*Ibid.*, 535.

²²Barbara Bennett Woodhouse, “‘Who Owns the Child?’: *Meyer* and *Pierce* and the Child as Property,” *William and Mary Law Review* 33, no. 4 (1992): 995–1122.

²³*Pierce*, 268 U.S. at 534.

²⁴*West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

of the fundamental liberty interests recognized by this Court.”²⁵ Along with that recasting came a presumption “that natural bonds of affection lead parents to act in the best interests of their children.”²⁶

B. Prince: The One Major Limit

The principal limit on parental authority came in *Prince v. Massachusetts*, decided in 1944. Sarah Prince, “the aunt and custodian” of nine-year-old Betty Simmons, had Betty offer Jehovah’s Witness literature on the streets of Brockton in violation of the state’s child-labor law.²⁷ The Court upheld the conviction. It held that “the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare,” and that “the family itself is not beyond regulation in the public interest.”²⁸ Then it wrote the passage that remains the doctrine’s clearest statement of the child’s independent stake: “Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”²⁹

C. Yoder and the Unasked Question

Wisconsin v. Yoder, decided in 1972, held that “the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16.”³⁰ The exemption allowed Amish parents to end formal schooling after the eighth grade. The Court cautioned that the Amish had made “a convincing showing, one that probably few other religious groups or sects could make.”³¹

Justice Douglas, dissenting in part, identified what the majority had skipped. The children’s own views had not been canvassed, and “it would be an invasion of the child’s rights to permit such

²⁵*Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).

²⁶*Parham v. J.R.*, 442 U.S. 584, 602 (1979).

²⁷*Prince v. Massachusetts*, 321 U.S. 158, 159, 161–62 (1944).

²⁸*Ibid.*, 166–67.

²⁹*Ibid.*, 170.

³⁰*Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

³¹*Ibid.*, 235–36.

an imposition without canvassing his views.”³² The children’s views might differ from one another: “Frieda Yoder’s views may not be those of Vernon Yutzy or Barbara Miller.”³³ The stakes for each child were concrete. “He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition.”³⁴ Douglas concluded that “the children should be entitled to be heard.”³⁵ Half a century later, the doctrine still has not answered him.

D. Home Schooling: Statute, Not Doctrine

The Supreme Court has never decided a case on home schooling. Its legality rests on state statutes read against the background of *Pierce*. Those statutes vary widely. Some states require notice, assessment, or portfolio review. Others require almost nothing, and a few, as noted above, now count a signed funding agreement as attendance.³⁶ Elizabeth Bartholet has argued that the resulting regime leaves parents free to home-school “free from any real scrutiny,” and has proposed a presumptive ban.³⁷ Whatever one makes of that remedy, her description of the regulatory baseline is difficult to dispute.

II. From Exit to Veto: Control Inside the Public Schools

A. The Exposure Baseline

For most of the twentieth century, parents who objected to what public schools taught had one principal remedy, which was to leave. The Court’s flag-salute cases set the frame. In 1940, *Minersville School District v. Gobitis* upheld a compulsory flag salute as applied to Jehovah’s Witness children, reasoning that “[n]ational unity is the basis of national security.”³⁸ Three years later, *West Virginia State Board of Education v. Barnette* overruled *Gobitis*. It held that schoolchildren could not be

³²*Ibid.*, 242 (Douglas, J., dissenting in part).

³³*Ibid.*, 243 (Douglas, J., dissenting in part).

³⁴*Ibid.*, 244–45 (Douglas, J., dissenting in part).

³⁵*Ibid.*, 244 (Douglas, J., dissenting in part).

³⁶Ariz. Rev. Stat. Ann. § 15-2402(I).

³⁷Elizabeth Bartholet, “Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection,” *Arizona Law Review* 62, no. 1 (2020): 1–80.

³⁸*Minersville School District v. Gobitis*, 310 U.S. 586, 595 (1940).

compelled to salute the flag: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”³⁹ *Barnette* protected a refusal to *profess*; it did not establish a right to be shielded from instruction. Students, the Court later confirmed, do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴⁰

Lower courts consistently drew the line *Barnette* implied, between compelled affirmation and mere exposure. In *Mozert v. Hawkins County Board of Education*, the Sixth Circuit held that requiring students to read a school-selected basal reader series did not burden free exercise where students were not required to affirm or deny any belief.⁴¹ In *Parker v. Hurley*, the First Circuit held that exposing elementary students to books depicting same-sex families, without notice or an opt-out, violated neither the parents’ free exercise rights nor their due process rights.⁴² *Employment Division v. Smith* reinforced that baseline in 1990. It held that the Free Exercise Clause does not require exemption from “a valid and neutral law of general applicability.”⁴³ It recast *Yoder* as a “hybrid” case combining free exercise and parental rights.⁴⁴

B. Mahmoud v. Taylor

That baseline collapsed in roughly two years. In *Mahmoud v. Taylor*, decided June 27, 2025, the Court held 6–3 that Montgomery County parents were entitled to notice and an opportunity to opt their children out of instruction using LGBTQ-inclusive storybooks.⁴⁵ Writing for the Court, Justice Alito held that parents’ free exercise rights “are violated by government policies that ‘substantially interfer[e] with the religious development’ of children.”⁴⁶ He framed the test as “whether the educational requirement or curriculum at issue would ‘substantially interfer[e] with the religious

³⁹*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

⁴⁰*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).

⁴¹*Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987).

⁴²*Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008).

⁴³*Employment Division v. Smith*, 494 U.S. 872, 878–79 (1990) (internal quotation marks omitted).

⁴⁴*Ibid.*, 881–82.

⁴⁵*Mahmoud v. Taylor*, No. 24-297 (U.S. June 27, 2025), https://www.supremecourt.gov/opinions/24pdf/24-297_4f14.pdf. The decision is reported at 606 U.S. 522 (2025).

⁴⁶*Ibid.*, slip op. at 17 (alteration in original).

development’ of a child.”⁴⁷ Most consequentially, the Court held that “[w]hen a law imposes a burden of the same character as that in *Yoder*, strict scrutiny is appropriate regardless of whether the law is neutral or generally applicable.”⁴⁸ Justice Sotomayor, joined by Justices Kagan and Jackson, dissented.⁴⁹

Mahmoud thus reversed the exposure baseline of *Mozert* and *Parker*. It also revived *Yoder* not as a narrow exemption for a uniquely situated community, but as a general standard applicable to curricular content in any public school.

C. *Mirabelli v. Bonta* and *Foote v. Ludlow*

On March 2, 2026, in *Mirabelli v. Bonta*, the Court granted in part an emergency application. It reinstated an injunction, as to the parent plaintiffs, against California policies that barred schools from informing parents of a student’s gender transition without the student’s consent.⁵⁰ The per curiam opinion concluded that the parents were likely to succeed on two theories. The policies substantially interfered with “the right of parents to guide the religious development of their children,” and they excluded parents from “participation in decisions regarding their children’s mental health.”⁵¹ Justice Barrett, joined by the Chief Justice and Justice Kavanaugh, concurred. Justice Kagan, joined by Justice Jackson, dissented, and Justice Sotomayor would have denied the application in full.⁵² Seven weeks later, the Court denied certiorari in *Foote v. Ludlow School Committee*. In that case the First Circuit had held that parents could not invoke the Due Process Clause to override a school’s handling of a student’s social transition.⁵³

Mirabelli preserves one opening that matters for what follows. The Court noted that its in-

⁴⁷*Ibid.*, slip op. at 21 (alteration in original).

⁴⁸*Ibid.*, slip op. at 37.

⁴⁹*Ibid.* (Sotomayor, J., dissenting).

⁵⁰*Mirabelli v. Bonta*, No. 25A810 (U.S. Mar. 2, 2026) (per curiam), https://www.supremecourt.gov/opinions/25pdf/25a810_b97d.pdf; see Erica Meltzer, “Supreme Court Finds Parents Have a Right to Know about Student Gender Transitions at School,” *Chalkbeat*, March 3, 2026, <https://www.chalkbeat.org/2026/03/03/supreme-court-finds-parents-have-right-to-know-student-gender-transitions/>.

⁵¹*Mirabelli*, slip op..

⁵²*Ibid.* (Barrett, J., concurring); *ibid.* (Kagan, J., dissenting).

⁵³*Foote v. Ludlow School Committee*, 128 F.4th 336 (1st Cir. 2025), cert. denied, No. 25-77 (U.S. Apr. 20, 2026), <https://www.supremecourt.gov/docket/docketfiles/html/public/25-77.html>.

junction “permits the State to shield children from unfit parents by enforcing child-abuse laws and removing children from parental custody in appropriate cases.”⁵⁴ That carve-out is now the principal space the doctrine leaves for child-protective policy within schools.

D. What Is Missing

One can hold any view of the outcomes in *Mahmoud* and *Mirabelli* and still notice what the opinions do not contain. Several interests appear only as interests the parental right overrides: a child’s interest in learning about the world as it is, in confidential access to a school counselor, and in developing views of her own. They are never treated as rights the child holds. Douglas’s question from *Yoder*, whether the child has been heard, is not asked.⁵⁵

III. Following the Money

The exit and control cases determine who decides. The funding cases determine who pays. This is where the doctrine of parental control becomes a problem of school finance.

A. The Rise and Fall of the Establishment Clause Wall

Everson v. Board of Education, decided in 1947, upheld New Jersey’s reimbursement of bus fares for parochial-school students. At the same time it declared that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions” and that the wall between church and state “must be kept high and impregnable.”⁵⁶ *Board of Education v. Allen*, decided in 1968, upheld the loan of secular textbooks because the law “merely makes available to all children the benefits of a general program to lend school books.”⁵⁷ In the 1970s the Court’s posture hardened. *Lemon v. Kurtzman* announced a three-part test: secular purpose, a primary effect that neither advances nor inhibits religion, and no “excessive government entanglement with reli-

⁵⁴*Mirabelli*, slip op. at 6.

⁵⁵*Wisconsin v. Yoder*, 406 U.S. 205, 244 (1972) (Douglas, J., dissenting in part).

⁵⁶*Everson v. Board of Education*, 330 U.S. 1, 16, 18 (1947).

⁵⁷*Board of Education v. Allen*, 392 U.S. 236, 243 (1968).

gion.”⁵⁸ Under that test it struck down salary supplements for parochial-school teachers. *Committee for Public Education & Religious Liberty v. Nyquist* invalidated New York’s maintenance grants, tuition reimbursements and tax benefits for parochial-school families, because “the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.”⁵⁹

The wall then came down in stages. *Mueller v. Allen*, decided in 1983, upheld a Minnesota tax deduction for school expenses, emphasizing that the benefit was “ultimately controlled by the private choices of individual parents.”⁶⁰ *Aguilar v. Felton*, decided in 1985, had barred public Title I teachers from providing instruction inside parochial schools. *Agostini v. Felton*, decided in 1997, overruled it.⁶¹ In *Mitchell v. Helms*, a plurality upheld the loan of instructional materials to religious schools and declared earlier contrary precedents “no longer good law.”⁶² *Zelman v. Simmons-Harris*, decided in 2002, upheld Cleveland’s voucher program, even though 96 percent of participating students enrolled in religiously affiliated schools. The Court reasoned that “we have never found a program of true private choice to offend the Establishment Clause.”⁶³ *Arizona Christian School Tuition Organization v. Winn* held that taxpayers lacked standing even to challenge Arizona’s tuition tax credit.⁶⁴ And in *Kennedy v. Bremerton School District*, decided in 2022, the Court announced that it had “long ago abandoned *Lemon* and its endorsement test offshoot.”⁶⁵

The one Establishment Clause question still open concerns religious charter schools. In *Oklahoma Statewide Charter School Board v. Drummond*, the Court affirmed by an equally divided vote the Oklahoma Supreme Court’s decision barring St. Isidore of Seville, a Catholic virtual charter school. Justice Barrett took no part.⁶⁶ The affirmance sets no precedent. The question Justice Breyer had flagged in his *Espinoza* dissent, “What about charter schools?,” remains formally open

⁵⁸*Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (internal quotation marks omitted).

⁵⁹*Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 783 (1973).

⁶⁰*Mueller v. Allen*, 463 U.S. 388, 399–400 (1983).

⁶¹*Aguilar v. Felton*, 473 U.S. 402, 414 (1985), overruled by *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

⁶²*Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (plurality opinion).

⁶³*Zelman v. Simmons-Harris*, 536 U.S. 639, 647, 653 (2002).

⁶⁴*Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 143–44 (2011).

⁶⁵*Kennedy v. Bremerton School District*, 597 U.S. 507, 534 (2022).

⁶⁶*Oklahoma Statewide Charter School Board v. Drummond*, 605 U.S. 165 (2025) (per curiam), https://www.supremecourt.gov/opinions/24pdf/605us1r33_5h26.pdf.

and one vote from resolution.⁶⁷

B. From Permission to Mandate: The Free Exercise Funding Cases

As recently as 2004, *Locke v. Davey* held that there is “room for play in the joints” between the Religion Clauses. States could therefore decline to fund devotional theology degrees even where the Establishment Clause would permit it.⁶⁸ That play has since been largely eliminated.

Trinity Lutheran Church of Columbia, Inc. v. Comer held in 2017 that excluding a church preschool from a playground-resurfacing grant “solely because it is a church, is odious to our Constitution.”⁶⁹ *Espinoza v. Montana Department of Revenue* held in 2020 that a state no-aid clause could not bar religious schools from a tax-credit scholarship program: “A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”⁷⁰ *Carson v. Makin*, decided in 2022, rejected Maine’s distinction between a school’s religious status and its religious use of public funds. The Court held that “the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination.”⁷¹ Dissenting, Justice Breyer asked whether school districts “that give vouchers for use at charter schools must pay equivalent funds to parents who wish to give their children a religious education.”⁷²

In parallel, *Fulton v. City of Philadelphia* held that a contracting scheme permitting individualized exemptions is not “generally applicable” under *Smith*, so a refusal to extend an exemption to a religious claimant triggers strict scrutiny.⁷³ *Fulton* declined to revisit *Smith* itself.⁷⁴

⁶⁷*Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 537 (2020) (Breyer, J., dissenting); see also Bruce D. Baker, “Charter Schooling in the Post-*Espinoza* & *Fulton* Era,” *School Finance 101* (blog), July 16, 2021, <https://schoolfinance101.com/2021/07/16/charter-schooling-in-the-post-espinoza-fulton-era/>.

⁶⁸*Locke v. Davey*, 540 U.S. 712, 718–19, 725 (2004).

⁶⁹*Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 467 (2017); see *ibid.*, 465 n.3 (plurality footnote limiting holding to “religious identity with respect to playground resurfacing”).

⁷⁰*Espinoza*, 591 U.S. at 487.

⁷¹*Carson v. Makin*, 596 U.S. 767, 787–88 (2022).

⁷²*Ibid.*, 795 (Breyer, J., dissenting).

⁷³*Fulton v. City of Philadelphia*, 593 U.S. 522 (2021).

⁷⁴*Ibid.*, 533.

C. St. Mary Catholic Parish v. Roy

The next step is now before the Court. Colorado’s universal preschool program pays participating providers to serve four-year-olds. It requires providers to enroll children “regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability.”⁷⁵ The Archdiocese of Denver operates preschools that require families to support Catholic teaching on sex and gender. It sought an exemption, was refused, and sued.⁷⁶ The Tenth Circuit held the requirement neutral and generally applicable and applied rational-basis review.⁷⁷ On April 20, 2026, the Court granted certiorari on two questions. The first is what a claimant must show to establish that a law is not generally applicable under *Smith*. The second is whether *Carson* displaces *Smith* only where the government expressly excludes religious persons and institutions. The Court declined the petitioners’ invitation to reconsider *Smith* itself.⁷⁸ Argument is scheduled for November 3, 2026.⁷⁹

If the Court holds that a neutral nondiscrimination condition with any secular exception cannot be applied to religious providers, states that fund private options will lose much of their remaining capacity to attach accountability conditions to the money. Taken together with Part II, the result would be stark. Public money would follow parental exit with few conditions, while parental objection would increasingly govern what happens inside the schools that remain public.

⁷⁵Brief for Petitioners, *St. Mary Catholic Parish v. Roy*, No. 25-581 (U.S. filed June 25, 2026), https://www.supremecourt.gov/DocketPDF/25/25-581/415025/20260625143739952_St%20Mary%20Opening%20Br%20FINAL.pdf.

⁷⁶*Ibid.*

⁷⁷*St. Mary Catholic Parish v. Roy*, 154 F.4th 752 (10th Cir. 2025).

⁷⁸*St. Mary Catholic Parish v. Roy*, No. 25-581 (U.S. Apr. 20, 2026) (order granting certiorari limited to Questions 1 and 2); Petition for a Writ of Certiorari, Questions Presented, *St. Mary Catholic Parish v. Roy*, No. 25-581, <https://www.supremecourt.gov/qp/25-00581qp.pdf>.

⁷⁹Docket, *St. Mary Catholic Parish v. Roy*, No. 25-581, <https://www.supremecourt.gov/docket/docketfiles/html/public/25-581.html>.

IV. Race, Religion, and the Post-*Espinoza* End Game

A. The Dominoes

In July 2020, weeks after *Espinoza*, Preston Green and I argued that the decision was not an end-point but the latest in a sequence running from *Zelman* and *Mitchell*.⁸⁰ We predicted that the next case would involve a religious school that accepts public funds while claiming that the state cannot enforce its nondiscrimination requirements against it. If that claim succeeded, we argued, a state unwilling to subsidize discrimination would be left with a single option: stop funding private providers, including charter schools, and fund and operate only its own schools.⁸¹ A year later, I argued that charter schooling stood at a juncture. It could become “increasingly private, more overtly religious, openly discriminatory and decreasingly transparent,” unless states made charter governance genuinely public.⁸² In 2025, with *Drummond* pending, I warned that religious charter operators could claim exemption from any regulation they say conflicts with their beliefs, including prohibitions on racial discrimination.⁸³

B. What Runyon Did Not Decide

When the race question is raised, defenders of voucher programs typically answer that *Runyon v. McCrary* settles it. It does not. *Runyon* held that 42 U.S.C. § 1981 prohibits private, commercially operated, nonsectarian schools from refusing admission to Black students.⁸⁴ But the Court was explicit about the limits of its holding. The cases before it “do not even present the application of § 1981 to private sectarian schools that practice racial exclusion on religious grounds.”⁸⁵ Preston Green made this point publicly in 2020, in a dispute with an outlet that had appended an editorial

⁸⁰Baker and Green, “Post-*Espinoza* End Game”; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000).

⁸¹Baker and Green, “Post-*Espinoza* End Game.”

⁸²Baker, “Charter Schooling in the Post-*Espinoza* & *Fulton* Era.”

⁸³Bruce D. Baker, “Preserving an Educated Future for America (Short Term Plan),” *School Finance 101* (blog), May 2, 2025, <https://schoolfinance101.com/2025/05/02/preserving-an-educated-future-for-america-short-term-plan/>.

⁸⁴*Runyon v. McCrary*, 427 U.S. 160 (1976).

⁸⁵*Ibid.*, 167.

note to our op-ed asserting otherwise.⁸⁶

In a 2024 article in the *Peabody Journal of Education*, Green, Suzanne Eckes and I develop the argument in full.⁸⁷ *Trinity Lutheran, Espinoza* and *Carson*, we contend, erased the line between religious status and religious use and placed free exercise above Establishment Clause concerns. Those decisions may allow voucher-funded schools to refuse Black students on religious grounds, in which case voucher statutes could finance a modern version of the “segregation academy.”⁸⁸

C. The Backstops and Their Limits

Two precedents stand in the way. *Norwood v. Harrison*, decided in 1973, invalidated Mississippi’s loan of textbooks to racially segregated private schools. It held that “[a] State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination.”⁸⁹ The State, the Court added, must “steer clear” of “giving significant aid to institutions that practice racial or other invidious discrimination.”⁹⁰ *Bob Jones University v. United States*, decided in 1983, upheld the IRS’s denial of tax-exempt status to a university that, on the belief that “the Bible forbids interracial dating and marriage,” enforced a rule that “[t]here is to be no interracial dating.”⁹¹ The Court held that “the Government has a fundamental, overriding interest in eradicating racial discrimination in education” and that the university’s interests “cannot be accommodated with that compelling governmental interest.”⁹²

The *Bob Jones* holding may well survive. Neither it nor *Norwood* has been tested against the post-2017 Free Exercise doctrine. Under that doctrine, a funding condition that admits individualized or secular exceptions may be recast as discrimination against religion and subjected to strict

⁸⁶Preston C. Green III, “On Private Schools and Discrimination: Response to Hechinger Report Editorial Note,” *School Finance 101* (blog), February 27, 2020, <https://schoolfinance101.com/2020/02/27/on-private-schools-and-discrimination-response-to-hechinger-report-editorial-note/>.

⁸⁷Green, Baker, and Eckes, “Potential for Race Discrimination,” 403–15.

⁸⁸*Ibid.*.

⁸⁹*Norwood v. Harrison*, 413 U.S. 455, 466 (1973).

⁹⁰*Ibid.*, 467 (internal quotation marks omitted).

⁹¹*Bob Jones University v. United States*, 461 U.S. 574, 580–81 (1983).

⁹²*Ibid.*, 604.

scrutiny.⁹³ That is precisely the mechanism at issue in *St. Mary*.⁹⁴ And if strict scrutiny applies, the interest in eradicating racial discrimination must be weighed in a doctrinal setting in which the Court has repeatedly found states' asserted interests insufficient.

The history offers no comfort. Among the first state tuition-grant programs in the United States were those enacted to underwrite white flight from desegregation after *Brown v. Board of Education*.⁹⁵ Prince Edward County, Virginia, closed its public schools rather than desegregate. It then supported, through tuition grants, the private schools established “for white children” by the Prince Edward School Foundation.⁹⁶ The Court held in *Griffin v. County School Board* that “closing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws.”⁹⁷ Scholars have traced a direct line from those programs to the modern school choice movement.⁹⁸

V. State Constitutions and the Child's Individual Right

A. Adequacy Is About Children, Not Money

With the federal Establishment Clause largely out of play, and *Espinoza* disabling state no-aid provisions that single out religious schools, state constitutional education clauses are the principal remaining constraint.⁹⁹ Litigation under those clauses is conventionally called “school finance” litigation, but the label misleads. Most education clauses say nothing about money. They obligate the state to provide an education to a defined population, usually defined by age. New Jersey's requires “a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.”¹⁰⁰

⁹³*Fulton v. City of Philadelphia*, 593 U.S. 522 (2021); *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam); *Carson v. Makin*, 596 U.S. 767 (2022).

⁹⁴Questions Presented, *St. Mary Catholic Parish v. Roy*, No. 25-581.

⁹⁵*Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

⁹⁶*Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 223 (1964).

⁹⁷*Ibid.*, 232.

⁹⁸Steve Suitts, *Overturning Brown: The Segregationist Legacy of the Modern School Choice Movement* (Montgomery, AL: NewSouth Books, 2020).

⁹⁹*Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 487 (2020).

¹⁰⁰N.J. Const. art. VIII, § 4, ¶ 1.

State high courts have generally defined the content of that obligation by outcomes for children. In *Rose v. Council for Better Education*, the Kentucky Supreme Court enumerated seven capacities every child must be given the opportunity to develop. Among them is “sufficient knowledge of economic, social, and political systems to enable the student to make informed choices.”¹⁰¹ New York’s Court of Appeals defined a “sound basic education” as “the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.”¹⁰² It later held that such an education must prepare students “to compete for jobs that enable them to support themselves,” for which “a high school level education is now all but indispensable.”¹⁰³ Funding enters the analysis as a remedy, not as the right itself. If the state is depriving children of the outcomes the constitution requires, and additional resources are necessary to cure the deprivation, the state must supply them. Only Kansas’s constitution speaks directly to finance. It requires that “[t]he legislature shall make suitable provision for finance of the educational interests of the state.”¹⁰⁴

B. A Right Held by Each Child

Just as important, these decisions describe the right as one held by children, not by districts or taxpayers. The New Jersey Supreme Court has framed its remedial orders as necessary to ensure that children in the poorest districts “receive the educational entitlements that the Constitution guarantees them.”¹⁰⁵ Several courts have gone further and held education to be a fundamental right. Kentucky’s court stated that “[a] child’s right to an adequate education is a fundamental one under our Constitution.”¹⁰⁶ Wyoming’s held that “the right to a quality education under our state constitution is a fundamental right.”¹⁰⁷ New Hampshire’s held that “a constitutionally adequate public

¹⁰¹*Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 212 (Ky. 1989).

¹⁰²*Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 316 (1995).

¹⁰³*Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 906 (2003); see also *ibid.*, 908 (“a meaningful high school education, one which prepares them to function productively as civic participants”).

¹⁰⁴Kan. Const. art. 6, § 6(b).

¹⁰⁵*Abbott v. Burke*, 153 N.J. 480, 489 (1998).

¹⁰⁶*Rose*, 790 S.W.2d at 212; see also *ibid.*, 206.

¹⁰⁷*Campbell County School District v. State*, 907 P.2d 1238, 1258 (Wyo. 1995); see also *ibid.*, 1257.

education is a fundamental right.”¹⁰⁸ Washington’s Supreme Court has held that “all children residing within the borders of the State possess a ‘right,’ arising from the constitutionally imposed ‘duty’ of the State, to have the State make ample provision for their education.”¹⁰⁹ It later reaffirmed that the education article “confers on children in Washington a positive constitutional right to an amply funded education.”¹¹⁰

C. The Voucher and Account Cases

State courts reviewing voucher and account programs have reached divergent results. The recent decisions upholding programs have tended to frame the question as whether money spent outside the public system impairs that system. They have not asked whether the children receiving the money are being educated.

State	Decision	Program	Outcome
Wyoming	<i>Degenfelder v. Wyoming Education Ass’n</i> (2026) ¹¹¹	Steamboat Legacy Scholarship ESA (up to \$7,000)	Preliminary injunction reversed, unanimously; the court found plaintiffs had not shown infringement of the right to education
Idaho	<i>Committee to Protect & Preserve the Idaho Constitution v. State</i> (2026) ¹¹²	Parental Choice Tax Credit (refundable)	Upheld unanimously
Ohio	<i>Columbus City School District v. State</i> (C.P. 2025), appeal pending ¹¹³	EdChoice	Held to violate art. VI, § 2; ruling stayed; argued on appeal May 12, 2026

¹⁰⁸ *Claremont School District v. Governor*, 142 N.H. 462, 473, 703 A.2d 1353 (1997).

¹⁰⁹ *Seattle School District No. 1 v. State*, 90 Wash. 2d 476, 511–12, 585 P.2d 71 (1978).

¹¹⁰ *McCleary v. State*, 173 Wash. 2d 477, 483, 269 P.3d 227 (2012).

¹¹¹ *Degenfelder v. Wyoming Education Ass’n*, 2026 WY 54 (Wyo. May 14, 2026), <https://stwjboptions.blob.core.usgovcloudapi.net/wsc-opinions/S-25-0203%200204%20Degenfelder%20v.%20WEA%20final.pdf>.

¹¹² *Committee to Protect & Preserve the Idaho Constitution, Inc. v. State*, 583 P.3d 837 (Idaho 2026); Ryan Suppe, “Idaho Supreme Court Upholds Private Education Tax Credit,” *Idaho Capital Sun*, February 5, 2026, <https://idahocapitalsun.com/2026/02/05/idaho-supreme-court-upholds-private-education-tax-credit/>.

¹¹³ *Columbus City School District v. State*, No. 22CV000067 (Ohio C.P. Franklin Cnty. June 24, 2025); Karen Kasler, “A Lawsuit over Ohio’s EdChoice Voucher Program Goes to an Appeals Court,” *WOUB*, May 13, 2026, <https://woub.org/2026/05/13/lawsuit-ohio-edchoice-voucher-program-appeals-court/>.

State	Decision	Program	Outcome
Utah	<i>Utah Education Ass’n v. State</i> (Dist. Ct. 2025), appeal pending ¹¹⁴	Utah Fits All	Held unconstitutional; not enjoined; interlocutory appeal pending
South Carolina	<i>Eidson v. South Carolina Department of Education</i> (2024) ¹¹⁵	Education Scholarship Trust Fund	Struck, 3–2, as a “direct benefit” to private schools
Kentucky	<i>Commonwealth ex rel. Cameron v. Johnson</i> (2022) ¹¹⁶	Education Opportunity Account tax credits	Struck under § 184
Florida	<i>Bush v. Holmes</i> (2006) ¹¹⁷	Opportunity Scholarships	Struck under the uniformity clause, 5–2

The Wyoming decision is the clearest example of the framing. The court reasoned that “[t]he funds for ESAs come from the general fund and do not affect the school funding model or the permanent school fund.”¹¹⁸ It held that the plaintiffs “have failed to allege, and the district court failed to explain, how the Act infringes on their right to education.”¹¹⁹ The state superintendent greeted the decision as confirmation that “this is not a school finance case.”¹²⁰ That is a striking result in a state whose high court has called education a fundamental right.¹²¹ The Florida experience points the same way from the other direction. Florida’s constitution declares education “a paramount duty of the state” and requires “a high quality system of free public schools.”¹²² Its supreme court struck down an earlier voucher program in *Bush v. Holmes*, but it later held that “high quality” supplies no judicially manageable standard.¹²³

¹¹⁴*Utah Education Ass’n v. State* (Utah Dist. Ct. Apr. 18, 2025) (bench ruling); “Families Await Utah Supreme Court Decision on School Voucher Program,” *KUTV*, July 15, 2026, <https://kutv.com/news/education/families-await-utah-supreme-court-decision-on-school-voucher-program>.

¹¹⁵*Eidson v. South Carolina Department of Education*, 906 S.E.2d 345 (S.C. 2024); see also *Adams v. McMaster*, 851 S.E.2d 703 (S.C. 2020).

¹¹⁶*Commonwealth ex rel. Cameron v. Johnson*, No. 2021-SC-0518-TG (Ky. Dec. 15, 2022).

¹¹⁷*Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006).

¹¹⁸*Degenfelder*, 2026 WY 54, ¶ 36.

¹¹⁹*Ibid.*, ¶ 40.

¹²⁰Joshua Wolfson, “Wyoming Supreme Court Ends Block on Public Money for Private Education,” *WyoFile*, May 14, 2026, <https://wyofile.com/wyoming-supreme-court-ends-block-on-public-money-for-private-education/> (quoting Superintendent Megan Degenfelder).

¹²¹*Campbell County*, 907 P.2d at 1258.

¹²²Fla. Const. art. IX, § 1(a).

¹²³*Bush*, 919 So. 2d at 398; *Citizens for Strong Schools, Inc. v. Florida State Board of Education*, 262 So. 3d 127

D. A Right That Follows the Child

If universal accounts are treated as separately funded and outside the school finance system, education clauses will say nothing about public money spent on children who leave the public system. That is, unless the right at stake is an individual, and in some states fundamental, right to an adequate education held by the child herself. A right of that kind does not stay behind when the child leaves. It follows the child, and so does the state's duty to secure the outcomes its courts have defined. On that reading, the relevant question about a universal account program is not only whether it harms the public schools. It is also whether the state is securing, for each child whose education it funds, the capacities its constitution guarantees. That question is the gap through which the eighteen-year-old in the Introduction falls, and it is the most promising place to close it.

VI. Comparative Perspectives

American debate tends to frame the choice as one between parental freedom and a state monopoly on schooling. Peer democracies show that the dichotomy is false. Several fund religious and privately operated schools far more generously than any American state. They also bound parental choice with conditions on curriculum, inspection, admissions, and fees, and some give the child an independent voice.

A. National Arrangements

(Fla. 2019).

Country	Compulsory schooling and home education	Religious and private schools	Child's own voice
Germany	School attendance compulsory under each Land's law; exemption only in exceptional circumstances ¹²⁴	Private substitute schools constitutionally protected but must be approved; approval requires that they not promote "segregation of pupils according to the means of their parents" ¹²⁵	Child decides own religious affiliation at 14; from 12 cannot be raised in a different confession against his or her will ¹²⁶
Netherlands	Compulsory; exemption from enrollment on grounds of religious or philosophical objection only where no school of acceptable orientation is within reasonable distance ¹²⁷	Constitution guarantees public funding of private schools "on the same basis" as public schools, settled in the 1917 Pacification; about two-thirds of primary schools are privately run ¹²⁸	Schools must actively promote citizenship and respect for the basic values of the democratic rule of law (2021) ¹²⁹
France	Instruction compulsory from age 3 (2019); home instruction requires prior authorization from the 2022–23 school year ¹³⁰	Schools under contrat d'association follow national programs; their teachers are paid by the state ¹³¹	General child-protection framework

¹²⁴*Konrad and Others v. Germany* (dec.), no. 35504/03 (Eur. Ct. H.R. Sept. 11, 2006) (quoting Constitution of Baden-Württemberg art. 14(1) and Schulgesetz §§ 72, 76), HUDOC 001-76925.

¹²⁵Grundgesetz für die Bundesrepublik Deutschland [GG] art. 7(4), https://www.gesetze-im-internet.de/gg/art_7.html (author's translation).

¹²⁶Gesetz über die religiöse Kindererziehung [KERzG], July 15, 1921, § 5, https://www.gesetze-im-internet.de/kerzg/_5.html.

¹²⁷Leerplichtwet 1969, art. 5, <https://wetten.overheid.nl/BWBR0002628>.

¹²⁸Grondwet [Constitution of the Kingdom of the Netherlands] art. 23(7), <https://wetten.overheid.nl/BWBR0001840>; European Commission, Eurydice, "Netherlands: Historical Development," <https://eurydice.eacea.ec.europa.eu>; Martina Meelissen et al., "Netherlands," in *TIMSS 2019 Encyclopedia: Education Policy and Curriculum in Mathematics and Science* (Boston: TIMSS & PIRLS International Study Center, Boston College, 2020), <https://timssandpirls.bc.edu/timss2019/encyclopedia/pdf/Netherlands.pdf>.

¹²⁹Wet van 23 juni 2021 tot wijziging van enkele onderwijswetten in verband met de verduidelijking van de burgerschapsopdracht aan scholen in het funderend onderwijs, Stb. 2021, 320.

¹³⁰Loi n° 2019-791 du 26 juillet 2019 pour une école de la confiance, art. 11; Loi n° 2021-1109 du 24 août 2021 confortant le respect des principes de la République, art. 49; Conseil constitutionnel, décision n° 2021-823 DC du 13 août 2021, ¶¶ 66–71.

¹³¹Loi n° 59-1557 du 31 décembre 1959 (loi Debré); European Commission, Eurydice, "France: Organisation of Private Education," <https://eurydice.eacea.ec.europa.eu>.

Country	Compulsory schooling and home education	Religious and private schools	Child's own voice
England	Home education lawful; the Children's Wellbeing and Schools Act 2026 creates registers of children not in school and requires local-authority consent to withdraw a child subject to child-protection enquiries ¹³²	33.5% of state-funded primary and secondary schools have a religious character ¹³³	From three terms before age 16, a pupil may opt into sex education despite parental withdrawal ¹³⁴
Sweden	Education outside school permitted only for "exceptional reasons" and one year at a time ¹³⁵	Independent schools are voucher-funded, may not charge fees, and must keep teaching non-confessional ¹³⁶	General child-protection framework

The pattern is consistent. Generous public support is exchanged for public accountability: a national curriculum or national aims, inspection, admissions conditions, and limits on fees. Germany's and Sweden's fee and admissions conditions show that these systems treat sorting by family means as a known risk of publicly supported private schooling, to be managed by rule.¹³⁷

B. The European Convention: Indoctrination, Not Exposure

Article 2 of Protocol No. 1 to the European Convention on Human Rights provides that "[n]o person shall be denied the right to education." In exercising its educational functions, "the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."¹³⁸ The European Court of Human Rights has read that

¹³²Children's Wellbeing and Schools Act 2026, c. 21, ss. 37–38, <https://www.legislation.gov.uk/ukpga/2026/21>.

¹³³Department for Education, *Schools, Pupils and Their Characteristics: Academic Year 2025/26* (London: DfE, 2026) (6,761 of 20,170 state-funded primary and secondary schools).

¹³⁴Department for Education, *Relationships Education, Relationships and Sex Education (RSE) and Health Education: Statutory Guidance* (London: DfE, 2025), ¶ 19; see Relationships Education, Relationships and Sex Education and Health Education (England) Regulations 2019, SI 2019/924, reg. 4.

¹³⁵Skollag (SFS 2010:800) 24 kap. 23–24 §§.

¹³⁶*Ibid.*, 1 kap. 7 §; 10 kap. 10 §.

¹³⁷GG art. 7(4); Skollag 10 kap. 10 §.

¹³⁸Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, March 20, 1952, ETS No. 9.

guarantee to bar indoctrination, not exposure. In *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, it held that the State “must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions. That is the limit that must not be exceeded.”¹³⁹ Applying that test in *Folgerø v. Norway*, the Grand Chamber found a violation, by nine votes to eight, where Norway refused full exemption from a compulsory subject on Christianity, religion, and philosophy.¹⁴⁰

The same Court has upheld measures that subordinate parental religious objection to a child’s education and integration. In *Konrad v. Germany*, it declared inadmissible a challenge to Germany’s home-schooling ban. It accepted the German Federal Constitutional Court’s emphasis on “the general interest of society in avoiding the emergence of parallel societies based on separate philosophical convictions.”¹⁴¹ In *Osmanoğlu and Kocabaş v. Switzerland*, it held unanimously that “the children’s interest in an all-round education, facilitating their successful social integration,” took precedence over Muslim parents’ wish to exempt their daughters from mixed swimming lessons.¹⁴² And in *Wunderlich v. Germany*, it upheld a partial withdrawal of parental authority to enforce school attendance “to prevent social isolation” and “ensure their integration into society.”¹⁴³

The contrast with *Mahmoud* is direct. Strasbourg asks whether the state *indoctrinates*; *Mahmoud* treats exposure itself as the burden.¹⁴⁴

C. The Convention on the Rights of the Child

The UN Convention on the Rights of the Child recognizes that parents “have the primary responsibility for the upbringing and development of the child.”¹⁴⁵ It describes that responsibility as the provision of “appropriate direction and guidance,” given “in a manner consistent with the evolving

¹³⁹ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, § 53, Series A no. 23 (Eur. Ct. H.R. Dec. 7, 1976).

¹⁴⁰ *Folgerø and Others v. Norway* [GC], no. 15472/02, §§ 84, 102, ECHR 2007-VIII.

¹⁴¹ *Konrad*, no. 35504/03.

¹⁴² *Osmanoğlu and Kocabaş v. Switzerland*, no. 29086/12, § 97 (Eur. Ct. H.R. Jan. 10, 2017).

¹⁴³ *Wunderlich v. Germany*, no. 18925/15, § 51 (Eur. Ct. H.R. Jan. 10, 2019).

¹⁴⁴ *Mahmoud v. Taylor*, No. 24-297, slip op. at 21, 37 (U.S. June 27, 2025).

¹⁴⁵ Convention on the Rights of the Child art. 18(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

capacities of the child.”¹⁴⁶ It guarantees the child “the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”¹⁴⁷ It requires that education be directed to “the development of the child’s personality, talents and mental and physical abilities to their fullest potential” and to “preparation of the child for responsible life in a free society.”¹⁴⁸ It also subjects private educational institutions to those aims and to “such minimum standards as may be laid down by the State.”¹⁴⁹ The United States signed the Convention on February 16, 1995, and has never ratified it. It is the only member of the United Nations that is not a party.¹⁵⁰

D. Cautions

The comparison carries its own cautions. The Dutch and German arrangements grew out of church-state settlements, such as the Dutch Pacification of 1917, that have no analogue under the Establishment Clause.¹⁵¹ And the integration rationale has been applied against religious minorities. *Osmanoğlu* involved Muslim families, and *Konrad* a family whose objections to state schooling were religious.¹⁵² Any American adaptation must take account of the history recounted in Part I, in which compulsory public schooling was itself an instrument of nativism.

VII. Children’s Recourse

A. The Premise

The framework rests on three propositions. Children are rights-holders. Parents are fiduciaries, whose authority exists for the child’s benefit and diminishes as the child matures. The state is the guarantor of a real education for every child, whatever choices adults make, and especially when

¹⁴⁶*Ibid.*, art. 5; see also *ibid.*, art. 14(2).

¹⁴⁷*Ibid.*, art. 12(1).

¹⁴⁸*Ibid.*, art. 29(1)(a), (d).

¹⁴⁹*Ibid.*, art. 29(2).

¹⁵⁰United Nations Treaty Collection, “Convention on the Rights of the Child,” status as of October 2026, ch. IV, no. 11, <https://treaties.un.org>.

¹⁵¹Eurydice, “Netherlands: Historical Development.”

¹⁵²*Osmanoğlu*, no. 29086/12; *Konrad*, no. 35504/03.

the state is paying for those choices. Each proposition has deep roots in the literature. Elizabeth and Robert Scott have developed the fiduciary model of parental authority.¹⁵³ Woodhouse has criticized the property conception underlying *Meyer* and *Pierce*.¹⁵⁴ James Dwyer has argued that the law of religious schooling protects parents' interests at the expense of children's.¹⁵⁵ Amy Gutmann has argued that democratic education requires the state to secure for every child the capacities for deliberation and self-government.¹⁵⁶ The UN Convention, as Part VI showed, codifies the second proposition in the phrase "evolving capacities."¹⁵⁷

B. Doctrinal Footholds

The federal Constitution is not silent about children's own rights. Schooling is the outlier: the one domain in which the parent's interest is presumed to be the child's. Elsewhere the Court has held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹⁵⁸ It has held that students do not shed their constitutional rights at the schoolhouse gate.¹⁵⁹ And it has protected schoolchildren against compelled orthodoxy.¹⁶⁰ *Prince* establishes that parental and religious authority yields to the state's interest in the child's welfare.¹⁶¹ *Plyler* recognizes that education is not "merely some governmental 'benefit' " and that its denial imposes a harm that follows the child "each and every day of his life."¹⁶² *Papasan* expressly left open "whether a minimally adequate education is a fundamental right."¹⁶³ None of these has been assembled into a doctrine of children's educational rights. That is the task.

¹⁵³Elizabeth S. Scott and Robert E. Scott, "Parents as Fiduciaries," *Virginia Law Review* 81, no. 8 (1995): 2401–76.

¹⁵⁴Woodhouse, "Who Owns the Child?," 995–1122.

¹⁵⁵James G. Dwyer, *Religious Schools v. Children's Rights* (Ithaca, NY: Cornell University Press, 1998).

¹⁵⁶Amy Gutmann, *Democratic Education*, rev. ed. (Princeton, NJ: Princeton University Press, 1999).

¹⁵⁷Convention on the Rights of the Child arts. 5, 14(2).

¹⁵⁸*In re Gault*, 387 U.S. 1, 13 (1967).

¹⁵⁹*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).

¹⁶⁰*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁶¹*Prince v. Massachusetts*, 321 U.S. 158, 166–67, 170 (1944).

¹⁶²*Plyler v. Doe*, 457 U.S. 202, 221–22 (1982).

¹⁶³*Papasan v. Allain*, 478 U.S. 265, 285 (1986).

C. What States Can Do Now

Pierce reserved to the state the power “reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils,” and to require the teaching of “studies plainly essential to good citizenship.”¹⁶⁴ On that authority, without overruling anything, a state can do the following:

1. Register every school-age child, in any setting, as England’s 2026 statute now requires.¹⁶⁵
2. Assess learning, not attendance or receipts. Pair assessment with remediation and, after repeated failure, a required change of educational setting.
3. Keep every child in periodic contact with a mandated reporter, such as a teacher, nurse, or counselor. Condition withdrawal from school on review where child-protection concerns are open, as England now does.¹⁶⁶
4. Attach neutral accountability conditions to every public dollar. These include assessment participation, public reporting of outcomes and finances, nondiscrimination in admissions and on the basis of disability, and audits. After *Carson*, such conditions must apply to all participating providers alike. After *Fulton*, they must avoid discretionary exemptions that would defeat general applicability.¹⁶⁷ *St. Mary* will determine how much room remains.¹⁶⁸
5. Give older students a statutory voice in decisions about their own schooling. The model is Justice Douglas’s *Yoder* dissent, Article 12 of the Convention, and Germany’s graduated recognition of a child’s religious choices at ages twelve and fourteen.¹⁶⁹
6. Repeal provisions, like Arizona’s, that deem a funding contract to be school attendance.¹⁷⁰

¹⁶⁴*Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

¹⁶⁵Children’s Wellbeing and Schools Act 2026, c. 21, s. 38.

¹⁶⁶*Ibid.*, s. 37.

¹⁶⁷*Carson v. Makin*, 596 U.S. 767, 787–88 (2022); *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021).

¹⁶⁸Questions Presented, *St. Mary Catholic Parish v. Roy*, No. 25-581.

¹⁶⁹*Wisconsin v. Yoder*, 406 U.S. 205, 242–45 (1972) (Douglas, J., dissenting in part); Convention on the Rights of the Child art. 12; KERzG § 5.

¹⁷⁰Ariz. Rev. Stat. Ann. § 15-2402(I).

D. In State Courts

Challenges under education clauses, like those now pending in Ohio and Utah, are one path.¹⁷¹ The stronger path builds on the individual right that the Washington, Kentucky, Wyoming, and New Hampshire courts have recognized.¹⁷² On this theory, children themselves, through guardians, would claim that the state's duty to secure constitutionally adequate outcomes runs to each child. That includes children whose public education dollars the state has chosen to send elsewhere. The Wyoming decision points the way. The court faulted the plaintiffs because they had "failed to allege" how the program infringed "their right to education."¹⁷³ A child receiving no meaningful instruction under a state-funded account is in a position to make exactly that allegation. Ancillary private-law theories may also reach misspent funds. Arizona, for example, has abrogated parental immunity in favor of a "reasonable and prudent parent" standard.¹⁷⁴ But such theories recover dollars, not lost years of learning.

E. In Federal Courts, Defensively First

In the near term, the federal task is defensive. It means defending neutral funding conditions in and after *St. Mary*. It means confining *Mahmoud* to the instructional content at issue there. And it means building on *Mirabelli*'s recognition that the state may still "shield children from unfit parents."¹⁷⁵ Over time, it means affirmative claims for the minimally adequate education that *Papasan* left open and that the vacated panel decision in *Gary B.* recognized.¹⁷⁶

F. Over the Long Run: Reconsidering Pierce

The long-run project is to revisit the precedents themselves, from the newest and least entrenched toward the oldest. The order is *Carson* and *Espinoza*; then *Zelman* and the abandonment of *Lemon*;

¹⁷¹See notes 113–14, above.

¹⁷²See notes 106–10, above.

¹⁷³*Degenfelder v. Wyoming Education Ass'n*, 2026 WY 54, ¶ 40.

¹⁷⁴*Broadbent v. Broadbent*, 184 Ariz. 74, 907 P.2d 43 (1995); Baker, "Experimenting with Our Children."

¹⁷⁵*Mirabelli v. Bonta*, No. 25A810, slip op. at 6 (U.S. Mar. 2, 2026) (per curiam).

¹⁷⁶*Papasan*, 478 U.S. at 285; *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir.), reh'g en banc granted, opinion vacated, 958 F.3d 1216 (6th Cir. 2020).

then *Mahmoud* and *Mirabelli*; then *Yoder*; and, eventually, the parental-liberty holdings of *Meyer* and *Pierce*. Those last two rest in part on the same conception of economic liberty that the Court repudiated in 1937.¹⁷⁷

Pierce has been read for a century as a shield for parents against the state. Its defenders point to the bargain it struck: parents may leave, but the state retains the power “reasonably to regulate all schools.”¹⁷⁸ That bargain has been unwound, one case at a time. *Carson* holds that a state that funds exit must fund religious exit.¹⁷⁹ *Mahmoud* and *Mirabelli* hold that religious objection can override what happens inside the schools that remain.¹⁸⁰ If *St. Mary* holds that neutral conditions cannot bind the providers who take the money, the regulatory half of *Pierce* will be a dead letter, or close to it, while the exit half continues to grow. At that point *Pierce* is not a check on the problem. It is the foundation on which each of these decisions builds, and it may have to be reversed, not merely reinterpreted.

That is not a call to revive Oregon’s nativism, and any replacement rule must be built so that it cannot be turned against minority families again. It is a call to replace a rule that treats children as their parents’ to direct with one that protects every child, minority families’ children included, in his or her own right.

I am clear about the odds. *Mahmoud*, *Carson* and *Espinoza* were each decided by a six-to-three or five-to-four majority, and premature federal litigation could entrench the very rules it targets.¹⁸¹ This is a project of decades. Most of the near-term gains described above are available without it.

¹⁷⁷*Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Lochner v. New York*, 198 U.S. 45, 53 (1905); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

¹⁷⁸*Pierce*, 268 U.S. at 534.

¹⁷⁹*Carson*, 596 U.S. at 787–88.

¹⁸⁰*Mahmoud v. Taylor*, No. 24-297, slip op. at 37 (U.S. June 27, 2025); *Mirabelli*, slip op.

¹⁸¹*Mahmoud*, slip op. (6–3); *Carson*, 596 U.S. 767 (6–3); *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020) (5–4).

VIII. Objections

A. History

The strongest objection is historical. *Meyer*, *Pierce* and *Farrington* protected German-speaking, Catholic, and Japanese-American families from laws designed to erase their cultures. Oregon's Act was a project of the Klan.¹⁸² Any framework that expands state authority over schooling must be built so that it cannot be turned against minority communities again. Children's Recourse answers this objection in part by locating the right in the child rather than in the state. The state's role is to guarantee outcomes defined by courts in terms of capacities, such as literacy, numeracy, and civic and economic participation.¹⁸³ It is not to prescribe a culture or a creed.

B. Who Holds the Power

A state that can compel attendance can also dictate content. *Barnette*'s warning against official orthodoxy cuts in every direction.¹⁸⁴ The framework's near-term measures are therefore deliberately content-neutral. Registration, assessment of basic capacities, contact with a mandated reporter, and neutral funding conditions do not require any family to profess anything. The European Court's line between indoctrination and objective, pluralistic instruction offers a workable model.¹⁸⁵

C. The Evidence Is Mixed

The empirical record on private school choice does not support confident claims in either direction, and claims of harm should rest on careful data, not anecdote. Rigorous studies of statewide voucher programs have found substantial early test-score losses. Participation in the Louisiana Scholarship Program lowered math scores by about 0.4 standard deviations.¹⁸⁶ Indiana's program produced a

¹⁸²Bunting, "Pierce v. Society of Sisters (1925)"; Abrams, *Cross Purposes*; *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927).

¹⁸³*Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 212 (Ky. 1989); *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 906, 908 (2003).

¹⁸⁴*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁸⁵*Kjeldsen, Busk Madsen and Pedersen v. Denmark*, § 53, Series A no. 23 (Eur. Ct. H.R. Dec. 7, 1976).

¹⁸⁶Atila Abdulkadiroğlu, Parag A. Pathak, and Christopher R. Walters, "Free to Choose: Can School Choice Reduce Student Achievement?," *American Economic Journal: Applied Economics* 10, no. 1 (2018): 175–206, <https://doi.org/10.1257/app.20160634>.

math loss of about 0.15 standard deviations in the first year, which persisted.¹⁸⁷ Ohio's EdChoice participants fared worse on state exams than matched public-school peers.¹⁸⁸ Studies of attainment have been more favorable. Milwaukee's program was associated with higher graduation and four-year college enrollment.¹⁸⁹ The District of Columbia program had a positive effect on graduation but none on math.¹⁹⁰ Florida's tax-credit scholarship raised college enrollment by about six percentage points, mostly at community colleges, with only a small effect on degree completion.¹⁹¹ Data on home-schooled children's outcomes, and on how often home schooling conceals abuse or neglect, are thin and contested.¹⁹² None of these studies, however, examines universal account programs that do not measure learning at all. That absence of evidence is itself the problem the framework addresses.

D. The Middle Ground May Be Enough

Many scholars of education and political theory favor strong regulation to secure autonomy and civic minimums while preserving parents' freedom to exit. Amy Gutmann, Harry Brighouse, and Rob Reich have each defended versions of that position.¹⁹³ Most of the near-term agenda in Part VII is consistent with it. The argument for eventually reconsidering *Pierce* rests on a narrower claim. If the Court forecloses the regulation that *Pierce* itself contemplated, the middle ground disappears, and what remains is exit without accountability.

¹⁸⁷R. Joseph Waddington and Mark Berends, "Impact of the Indiana Choice Scholarship Program: Achievement Effects for Students in Upper Elementary and Middle School," *Journal of Policy Analysis and Management* 37, no. 4 (2018): 783–808, <https://doi.org/10.1002/pam.22086>.

¹⁸⁸David Figlio and Krzysztof Karbownik, *Evaluation of Ohio's EdChoice Scholarship Program: Selection, Competition, and Performance Effects* (Washington, DC: Thomas B. Fordham Institute, 2016).

¹⁸⁹Joshua M. Cowen et al., "School Vouchers and Student Attainment: Evidence from a State-Mandated Study of Milwaukee's Parental Choice Program," *Policy Studies Journal* 41, no. 1 (2013): 147–68, <https://doi.org/10.1111/psj.12006>.

¹⁹⁰Patrick J. Wolf et al., "School Vouchers and Student Outcomes: Experimental Evidence from Washington, DC," *Journal of Policy Analysis and Management* 32, no. 2 (2013): 246–70, <https://doi.org/10.1002/pam.21691>.

¹⁹¹Matthew M. Chingos and Daniel Kuehn, *The Effects of Statewide Private School Choice on College Enrollment and Graduation: Evidence from the Florida Tax Credit Scholarship Program* (Washington, DC: Urban Institute, 2017).

¹⁹²Bartholet, "Homeschooling," 1–80.

¹⁹³Gutmann, *Democratic Education*; Harry Brighouse, *School Choice and Social Justice* (Oxford: Oxford University Press, 2000); Rob Reich, *Bridging Liberalism and Multiculturalism in American Education* (Chicago: University of Chicago Press, 2002).

Conclusion

The pieces have arrived together. Universal account programs measure receipts rather than learning, and they have now been upheld in Idaho and cleared to operate in Wyoming.¹⁹⁴ *Carson* requires states to fund religious instruction once they fund any private option.¹⁹⁵ *Mahmoud* and *Mirabelli* make religious objection a powerful claim inside the public schools that remain.¹⁹⁶ *St. Mary* will decide whether neutral conditions can still bind the providers who take the money.¹⁹⁷ *Drummond*'s equally divided affirmance leaves religious charter schooling one vote away.¹⁹⁸ Taken together, these developments allow a non-state actor to do three things. It can take public money in a child's name. It can define its mission by its own religious beliefs. And it can claim exemption from the rules that protect that child, which govern whom a school may exclude, what it must teach, and whether anyone checks that the child learned anything at all. The state cannot exclude the provider and may soon be unable to condition the money. The parent may choose but owes the child no measurable standard. The child is the one party to the arrangement with no rights of her own.

Pierce told us that “[t]he child is not the mere creature of the State.”¹⁹⁹ That is true. Nor is the child the mere creature of her parents, or of a scholarship-granting organization processing receipts. If we are going to spend public money in a child's name, someone has to be answerable to that child. Under the doctrine the Court has built, no one is. *Children's Recourse* is an effort to change that.

¹⁹⁴*Committee to Protect & Preserve the Idaho Constitution, Inc. v. State*, 583 P.3d 837 (Idaho 2026); *Degenfelder v. Wyoming Education Ass'n*, 2026 WY 54 (Wyo. May 14, 2026); Ariz. Rev. Stat. Ann. § 15-2402.

¹⁹⁵*Carson v. Makin*, 596 U.S. 767, 787–88 (2022).

¹⁹⁶*Mahmoud v. Taylor*, No. 24-297, slip op. at 37 (U.S. June 27, 2025); *Mirabelli v. Bonta*, No. 25A810 (U.S. Mar. 2, 2026) (per curiam).

¹⁹⁷Questions Presented, *St. Mary Catholic Parish v. Roy*, No. 25-581.

¹⁹⁸*Oklahoma Statewide Charter School Board v. Drummond*, 605 U.S. 165 (2025) (per curiam).

¹⁹⁹*Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).