

PRESERVING THE EXIT OPTION: STATE PUBLIC EDUCATION MANDATES AND PARENTAL RIGHTS IN EDUCATION

Nicole Stelle Garnett and John A. Meiser***

INTRODUCTION

In the decades leading to the Supreme Court's decisions in *Meyer v. Nebraska*¹ and *Pierce v. Society of Sisters*,² battles over parents' rights to direct how, where, and what their children would be taught were waged on two fronts: The first front centered on public schools, and specifically, parents' demands for accommodations to and exemptions from curricular material and school policies that they found objectionable on religious grounds. The second front focused on parents' ability to choose private, religious schools for their children, and their demands that the state subsidize those choices. Opponents of public-school accommodation and private-school subsidization believed—and argued vehemently—that both would undermine the government's ability to form good citizens through the medium of public schools. This opposition was fueled, as Justice McReynolds observed in *Meyer*, by a “desire . . . to foster a homogeneous people with American ideals.”³

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* John P. Murphy Foundation Professor of Law, University of Notre Dame.

** Associate Clinical Professor of Law and Director, Lindsay & Matt Moroun Religious Liberty Clinic, University of Notre Dame. We are grateful for the research assistance provided by law students Cameron Grinnell, Will Vickery, and Nate Wertjes. A portion of this Essay is adapted from *amicus* briefs filed by the Notre Dame Law School Religious Liberty Clinic in litigation challenging the constitutionality of Ohio's voucher programs and California's special-education funding. Several law students—including Tim Borgerson, Will Clark, Ross D'Entremont, Dan Loesing, Olivia Lyons, and Tim Steininger—assisted in the drafting of those briefs.

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

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

3 *Meyer*, 262 U.S. at 402.

Some things never change. Today, one hundred years after the Court put hard limits on the government's ability "to standardize its children"⁴ in *Meyer* and *Pierce*, these same battles over parents' rights to control how, where, and what their children are taught are fought on the same fronts. In school board meetings and courthouses, parents demand that their children be exempted from curricular content and public-school policies that they find objectionable on religious grounds.⁵ And battles over the scope and scale of publicly funded K–12 educational options other than traditional public schools remain a perennial feature of education policy debates.⁶

The mechanisms for achieving parental rights in education within public schools differ from the mechanisms for achieving these rights through parental choice among schools themselves. To borrow from A. O. Hirschman's typography, parents seek to achieve the former

4 *Pierce*, 268 U.S. at 535.

5 See, e.g., *Mahmoud v. McKnight*, 102 F.4th 191, 201 (4th Cir. 2024) ("Parents contend that [state and federal law] require that they have notice and the opportunity to opt out 'of classroom instruction on . . . sensitive religious and ideological issues.'" (quoting Verified Complaint at 6, *Mahmoud v. McKnight*, 688 F. Supp. 3d 265 (D. Md. 2023) (No. 23-1380))); *Cal. Parents for the Equalization of Educ. Materials v. Torlakson*, 973 F.3d 1010, 1020 (9th Cir. 2020) ("[A group of Hindu parents] argu[es] for a broad due process right to challenge [public-school] materials that they view as religiously bigoted."); *Tatel v. Mt. Lebanon Sch. Dist.*, 752 F. Supp. 3d 512, 525–26 (W.D. Pa. 2024) ("This case is about the extent of constitutional rights of parents of young children in a public elementary school to notice and the ability to opt their young children out of noncurricular instruction on transgender topics."); Libby Stanford, *What the Push for Parents' Rights Means for Schools*, EDUC. WK. (Feb. 22, 2023), <https://www.edweek.org/leadership/what-the-push-for-parents-rights-means-for-schools/2023/02> [<https://perma.cc/CK59-AV4Y>] ("[A] protest [in Ocean City, N.J.] led the local city council to adopt a parents' bill of rights policy that gives parents the power to . . . opt their kids out of curriculum 'that the parent believes is in conflict with [their] conscience or sincerely held moral or religious beliefs.'" (second alteration in original) (quoting Ocean County, N.J., Resolution 2022000684 (May 18, 2022))).

Last June, the U.S. Supreme Court held that, in some circumstances, the First Amendment *requires* that parents be allowed to opt their children out of certain religiously objectionable lessons in public schools—a decision that is sure to foster even more claims of this sort. See generally *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).

6 See, e.g., Amanda Geduld, *Public Funds, Private Schools: A New Analysis of the Early Returns in Eight States*, THE74 (Oct. 23, 2024), <https://www.the74million.org/article/public-funds-private-schools-a-new-analysis-of-the-early-returns-in-eight-states/> [<https://perma.cc/NQ2U-K664>] ("For decades, public funds have been used to subsidize private schooling, but recent debates over the practice have been reinvigorated as the scope of these programs has soared."); Colyn Ritter, *Support for School Choice Policies Remains High*, EDCHOICE (Oct. 2, 2024), <https://www.edchoice.org/support-for-school-choice-policies-remains-high/> [<https://perma.cc/5458-JC5P>] ("While the demand for school choice in America has been consistently strong, . . . there has been much debate on how broad these programs should be.").

through “voice” and the latter through “exit.”⁷ There are no doubt feedback effects in the battles about “voice” and “exit” in both law and education policy. Then, as now, demands for exit rights have frequently been fueled by parents’ unsuccessful efforts to exercise voice within public schools, and vice versa.⁸ As is well documented, early American education debates in the nineteenth century were largely driven by nascent public schools’ hostility to—and refusal to accommodate—Catholic immigrant communities and their children’s beliefs.⁹ Policy fights shifted between demands for better treatment in the public schools and, failing that, appeals for the government to facilitate (or perhaps even stifle) exit options. Demands for public funding for increasingly popular Catholic schools were met by efforts to prohibit *all* government funding for “sectarian” education.¹⁰ In more recent years, parental frustration with public schools—including the perception of low academic expectations and extended school closures during the pandemic—has fueled a dramatic expansion of policies enabling exit.¹¹

While there is much to be said about the interplay of parental voice and exit—and about the extent to which *Pierce* and *Meyer* guarantee parents voice rights in public schools¹²—this is an Essay about ongoing legal battles over parents’ exit rights. When states give parents exit rights through publicly funded private-school choice mechanisms,

7 See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

8 See, e.g., *Lee v. Poudre Sch. Dist.* R-1, No. 23-cv-01117, 2024 WL 2212261, at *7 (D. Colo. May 16, 2024) (“Parents allege that had they been provided notice of the topics planned for discussion . . . they would have elected to opt their children out of District schools and sought alternative education based on their deeply held religious beliefs.”); Vincent P. Lannie & Bernard C. Diethorn, *For the Honor and Glory of God: The Philadelphia Bible Riots of 1840*, 8 HIST. EDUC. Q. 44, 50–53 (1968) (discussing efforts of Catholic bishops in the 19th century “to make the public schools religiously acceptable to Catholic children until they were able to build and maintain parish schools to meet their needs,” *id.* at 53).

9 See *infra* Part II.

10 See *infra* Part II.

11 See generally Nicole Stelle Garnett & Michael Q. McShane, *The School-Choice Moment*, NAT’L REV., Aug. 28, 2023, at 36. All told, over thirty states, Washington, D.C., and Puerto Rico have at least one private school choice program that empowers parents to use public funds to send their child to a private school. *School Choice in America Dashboard*, EDCHOICE (June 7, 2024), <https://www.edchoice.org/school-choice/dashboard/> [<https://perma.cc/BYZ5-6HP9>]. Since 2021, twelve states have extended eligibility to participate in one of these programs to all or most K–12 students. Ed Tarnowski, *School Choice in the States: March 2024*, EDCHOICE (Mar. 29, 2024), <https://www.edchoice.org/school-choice-in-the-states-march-2024/> [<https://perma.cc/5WKY-ZXB4>]; Camille Walsh, *Louisiana Passes Universal School Choice*, STATE POL’Y NETWORK (June 21, 2024), <https://spn.org/articles/louisiana-passes-universal-school-choice> [<https://perma.cc/P5EN-FX4B>].

12 Indeed, there are a number of cases testing the boundaries of parents’ voice rights pending in courts today. See, e.g., cases cited *supra* note 5.

opponents inevitably file lawsuits seeking to block them. More often than not, they argue that state constitutions prohibit the state from providing for education by means other than the medium of public schools.¹³ Until very recently, those arguments frequently centered on state “Blaine amendments”—provisions that denied state support for religious schools, out of a desire to suppress the rapid growth of Catholic immigrant communities during the nineteenth century.¹⁴ But the U.S. Supreme Court has “disavow[ed]” these religiously discriminatory amendments and their “shameful” anti-Catholic lineage,¹⁵ effectively rendering them a dead letter in a series of recent decisions—*Trinity Lutheran Church v. Comer*,¹⁶ *Espinoza v. Montana Department of Revenue*,¹⁷ and *Carson v. Makin*.¹⁸ Through those cases, the Court has made clear that states may neither exclude religious schools from otherwise neutral public benefit programs nor rely on Blaine amendments to invalidate these programs in order to avoid public funds flowing to religious schools. With these amendments largely off the table,¹⁹ opponents

13 See *infra* Part I.

14 See *infra* Part II. Most precisely, a so-called “Blaine amendment” would be a provision adopted after the failure of Senator James Blaine’s proposal to add such a prohibition to the Federal Constitution. For simplicity, however, we refer to all state constitutional provisions that prohibit the funding of religious schools as Blaine amendments, even if they were adopted prior to Blaine’s effort to do so federally.

15 *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion).

16 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

17 *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020).

18 *Carson v. Makin*, 142 S. Ct. 1987 (2022).

19 In a notable exception, last year, a judge in Franklin County, Ohio, issued an order that would invalidate Ohio’s school voucher program on a number of grounds, including that it violates Ohio’s version of a Blaine amendment which prohibits state educational funding from being offered to any “religious or other sect.” OHIO CONST. art. VI, § 2; *accord* *Columbus City Sch. Dist. v. State*, No. 22 CV 67, slip op. at 16–21 (Ohio Ct. Com. Pl. June 24, 2025). The court’s theory was that, even though Ohio’s constitutional framers “were primarily concerned with religious sects,” the use of “other sect[s]” is technically broad enough to cover “non-religious group[s]” as well—and thus can be enforced consistent with the First Amendment. *Id.* at 39 (quoting OHIO CONST. art. VI, § 2) (citing OFFICIAL REPORTS OF THE DEBATES AND PROCEEDINGS, OHIO CONST. CONVENTION 688 (J.V. Smith reporter, 1851)). That decision is pending appeal and seems unlikely to stand, given the rampant anti-Catholicism that led to Ohio’s adoption of this amendment, see *infra* Part II, and the well-documented understanding that the word “sect” was “code for ‘Catholic’” at that time, *Mitchell*, 530 U.S. at 828 (citing Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992)). See also generally, Richard A. Baer, Jr., *The Supreme Court’s Discriminatory Use of the Term “Sectarian,”* 6 J.L. & POL. 449 (1990) (discussing bigoted origins of term “sectarian” in the law).

There also remain open questions about the constitutional validity of provisions in a handful of states that—although they might share the same anti-religious lineage of other Blaine analogues, see *infra* Part II—limit the funding of *all* private schools, religious or not. See ALASKA CONST. art. VII, § 1 (“No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.”); ARIZ. CONST. art. IX, § 10

have fewer weapons to wield against the expansion of parental choice in court; but they are not disarmed entirely. State constitutional provisions mandating that the legislature establish and maintain a system of public schools are now their weapon of choice. Lawsuits challenging parental choice programs almost all include some version of the argument that private school choice programs violate these provisions, which we will refer to as “public education mandates.”

The claims that educational choice funding violates public education mandates primarily take two forms. The first, which has been a cornerstone of litigation for years, including ongoing challenges to new education savings account programs in Arkansas and Utah, and which was recently rejected by the Idaho Supreme Court, is that state education mandates not only require the state to maintain public schools but also prohibit the state from providing any publicly funded alternatives to them.²⁰ The second, which features prominently in litigation targeting Ohio’s longstanding school voucher program, is that private school choice impedes the ability of states to satisfy their constitutional obligation to provide a high-quality system of public schools by diverting resources (or perhaps students) from those schools.²¹ As we discuss in greater detail below, the import of these two arguments is different. The second argument implies that the state can provide some, but not too much, private educational choice. The first claims that the state may not provide any at all.

There is currently fierce debate over the basic merits of these arguments and whether they correctly interpret public education mandates. Prior to these most recent challenges, the arguments have

(“No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.”); HAW. CONST. art. X, § 1 (“[N]or shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution”); N.M. CONST. art. XII, § 3 (“[N]o . . . funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.”); S.C. CONST. art. XI, § 4 (“No money shall be paid from public funds . . . for the direct benefit of any religious or other private educational institution.”); *see also* MISS. CONST. art. VIII, § 208 (“[N]or shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school.”). The South Carolina Supreme Court recently held that the state’s Education Scholarship Trust Fund program violated its “religion neutral” Blaine amendment. *See Eidson v. S.C. Dep’t of Educ.*, 906 S.E.2d 345, 356 (2024); *cf.* Peter Greene, *Court Strikes Down South Carolina School Voucher Program*, FORBES (Sept. 11, 2024, 2:23 PM EDT), <https://www.forbes.com/sites/petergreene/2024/09/11/court-strikes-down-south-carolina-school-voucher-program/> [<https://perma.cc/D7AK-K253>].

20 *See generally* EMILY PARKER, EDUC. COMM’N OF THE STATES, CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION (2016).

21 *See infra* Section I.B.

largely failed.²² It is critical, of course, for those who support parental choice and exit rights to win these battles on the merits to ensure that new educational opportunities are not blocked by inapt constitutional provisions about how a state's public school system is to be funded.²³ But the litigation and debates over these claims has largely overlooked a deeper infirmity of public education mandates that deserves attention: These mandates were frequently adopted at the same time as Blaine amendments and, it stands to reason, share the "shameful pedigree"²⁴ of hostility to Catholic immigrants and the schools they were building. Like the Blaine amendments, the mandates were a part of a broader effort to Americanize and assimilate new religious populations into an intentionally Protestant political community. The particular charge to build a network of (generically Protestant) public schools joined Blaine's effort to stifle parents' ability to access other schools that would accommodate their voice and better serve their children's needs.

Courts and policymakers are rightly circumspect about perpetuating this ugly, bigoted past through the enforcement of Blaine amendments. Those same concerns should recommend caution against aggressive enforcement of the Blaine amendments' close kin in public education mandates. This is not to say that such mandates are in some sense legally invalid. Nor do we suggest that public education mandates were *solely* motivated by bigotry—indeed, no one would deny the importance of ensuring a system of high-quality schools accessible to all. But the interpretation of state education mandates should be limited to safeguarding those worthy aims. These provisions should not be wielded as a new tool to serve the same bigoted ends as Blaine amendments themselves. They should not, that is, be stretched beyond the demand to maintain an effective system of public schools to

22 See, e.g., *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999) (rejecting argument that private school voucher program "undermines" or is implicitly prohibited by public education mandate); *Meredith v. Pence*, 984 N.E.2d 1213, 1222–23 (Ind. 2013) (rejecting education mandate challenge to private school voucher program which "does not replace the public school system, which remains in place and available to all," *id.* at 1223); *Hart v. State*, 774 S.E.2d 281, 289–90 (N.C. 2015) (concluding that the education mandate "does not prohibit [the state] from funding educational initiatives outside of [the public school] system," *id.* at 290); *Schwartz v. Lopez*, 382 P.3d 886, 891 (Nev. 2016) (en banc) (concluding that the public education mandate "does not limit the Legislature's discretion to encourage other methods of education"); *State v. Beaver*, 887 S.E.2d 610, 626 (W. Va. 2022) (concluding that the public education mandate "does not contain any restrictive language prohibiting the Legislature from enacting additional educational initiatives"); see also Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 24 (2017) (discussing cases).

23 Cf. NICOLE STELLE GARNETT & MICHAEL Q. MCSHANE, MANHATTAN INST., IMPLEMENTING K–12 EDUCATION SAVINGS ACCOUNTS 17 (2023).

24 *Mitchell*, 530 U.S. at 828.

the more pernicious end of denying support for innovations *along-side*—and parental exit from—that system. The current ascendance of parental choice policies would have been impossible—indeed unthinkable—to predict when *Pierce* and *Meyer* were decided a century ago. These policies’ embrace of educational pluralism, enabled by the mechanism of exit, represents a definitive rejection of the forced educational homogenization efforts invalidated in those cases. Thanks to a confluence of factors, American education policies in many states now enact the core theoretical principle articulated in those cases: that because a “child is not the mere creature of the State,” parents have the “right, coupled with the high duty,” to “direct his destiny”²⁵ by providing him the particular “education suitable to [his] station in life.”²⁶ Recent U.S. Supreme Court decisions have removed major obstacles—the Blaine amendments—to the further expansion of educational pluralism in the states. State courts should now make clear that state education mandates, adopted at the same time and at least in part for the same shameful reasons, do not stand in the way either.

I. STATE EDUCATION MANDATES AND THE NEW LEGAL BATTLES FOR PARENTAL RIGHTS IN EDUCATION

After over three decades of incremental growth, the tide has turned in the battle for parental choice in education. Nineteen states now have at least one parental choice program that extend eligibility to participate to all students in the state.²⁷ Most universal-eligibility programs employ an innovative model of choice—the education savings account—that empowers parents to spend a portion of the public funding allocated for their children’s education on a range of qualified education expenses including (but not limited to) tuition at a private school.²⁸ Indiana and Ohio expanded eligibility to participate in longstanding school voucher programs to all in the state.²⁹ Oklahoma adopted a refundable tax credit program that covers both private

25 *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

26 *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

27 See Mark Lieberman, Libby Stanford & Victoria A. Ifatusin, *Which States Have Private School Choice?*, EDUC. WK. (Sept. 5, 2025), <https://www.edweek.org/policy-politics/which-states-have-private-school-choice/2024/01> [<https://perma.cc/B5MC-CKVV>].

28 See *id.*

29 See Chantal Fennell, *Ohio Makes Voucher Program Universal*, EDCHOICE (July 5, 2023), <https://www.edchoice.org/media/ohio-makes-voucher-program-universal> [<https://perma.cc/2FRH-LV4Y>]; Casey Smith, *Indiana Private School Voucher Participation Sees Historic Boost*, THE74 (June 6, 2024), <https://www.the74million.org/article/indiana-private-school-voucher-participation-sees-historic-boost> [<https://perma.cc/P5EQ-UUZZ>].

school tuition and homeschooling.³⁰ And several other states adopted more modest programs for low- and moderate-income students, students in failing school districts, or students with disabilities.³¹ According to the parental-choice advocacy group EdChoice, there are currently “75 educational choice programs on the books in 34 states, the District of Columbia and Puerto Rico.”³² Over fifty percent of students are now eligible to participate in a private school choice program, and over 1.3 million do.³³ And the inclusion of the first-ever federal private school choice program in the One Big Beautiful Bill Act, which provides a federal tax credit for donations to organizations that fund private school scholarships, will bring private school choice to all states in 2027.³⁴ In January 2024, thirty-six percent of K–12 students in the United States were eligible to participate in one of these programs, although only about two percent (approximately one million students) did.³⁵

For parental choice advocates, the pace and scope of these victories has been breathtaking and cause for great celebration. But the battles for parental control over the hearts and minds of their children

30 See generally *Oklahoma Parental Choice Tax Credit Program*, OKLA. TAX COMM’N, <https://oklahoma.gov/tax/individuals/parental-choice-tax-credit.html> [<https://perma.cc/93KT-XR49>] (last visited Jan. 16, 2026).

31 See *School Choice in America Dashboard*, *supra* note 11.

32 *School Choice FAQs*, EDCHOICE, <https://www.edchoice.org/school-choice/faqs/> [<https://perma.cc/S8YA-VG92>] (last visited Jan. 16, 2026).

33 See Nicole Stelle Garnett, *The Expanding Power of Parental Rights*, NAT’L REV., Oct. 2025, at 44, 47; Brandon Ruder, *School Choice Surge: Private School Program Use Up 25% Nationwide*, EDCHOICE (Aug. 26, 2025), <https://www.edchoice.org/2025-families-are-voting-with-their-feet-and-their-tax-dollars/> [<https://perma.cc/H897-BE47>].

34 See One Big Beautiful Bill Act, Pub. L. No. 119-21, § 70411, 139 Stat. 72, 215–18 (2025).

35 See Colyn Ritter, *2024 EdChoice Share: Exploring Where America’s Students Are Educated*, EDCHOICE (Jan. 17, 2024), <https://www.edchoice.org/2024-edchoice-share-exploring-where-americas-students-are-educated/> [<https://perma.cc/8HL8-MX94>]. Additionally, forty-six states authorize charter schools—which are publicly funded and defined as “public schools” but are privately operated and freed from both the operational control of and most regulations governing traditional district public schools. *Education Choice State Policy Scan: Charter Schools*, NAT’L CONF. OF STATE LEGISLATURES (July 21, 2025), <https://www.ncsl.org/education/education-choice-state-policy-scan-charter-schools> [<https://perma.cc/S6GS-YZ7D>]. During the 2021–22 school year, nearly four million children—or 7.8% of all public school students—attended a charter school. See Jamison White, *How Many Charter Schools and Students Are There?*, NAT’L ALL. FOR PUB. CHARTER SCHS. (Oct. 30, 2025), <https://data.publiccharters.org/knowledge-base/1-how-many-charter-schools-and-students-are-there/> [<https://perma.cc/LVM4-5WYU>]. And, while the law invalidated in *Pierce* obligated parents to send their children not just to a public school but to a “public school of the district in which [the] child resides,” *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530 n.* (1925) (quoting 1922 Or. Laws 9), a majority of states have policies that either mandate or permit both interdistrict or intradistrict public school choice. See Nicole Stelle Garnett, *Decoupling Property and Education*, 123 COLUM. L. REV. 1367, 1375–78 (2023).

will continue, and in many states where the parental choice beachhead is now established, the battlefields will shift from state legislatures to state courts. Indeed, as parental choice expands, many of the most important parental rights battles are being fought in courts, where new programs must be defended against claims that they violate various state constitutional provisions.³⁶ After *Trinity Lutheran*, *Espinoza*, and *Carson* rendered Blaine amendments largely unenforceable,³⁷ state education mandates are now the weapon of choice against these programs. New parental choice programs are now routinely challenged through lawsuits that contain some version of the argument that a public education mandate prohibits the state from funding non-public schools. While the precise contours of these arguments vary, they generally divide into two types: either (a) the state's mandates prohibit funding of private schools outright or (b) although some funding of private schools may be allowed, the challenged programs divert too many resources away from public schools, thus undermining their effectiveness.³⁸

36 Even—or perhaps especially—at this unprecedented moment in the battle for parental choice, advocates may be tempted to wonder whether *Pierce* and *Meyer* might be wielded to secure more, and more capacious, choices. After all, many parental choice programs are modest in scope and scale, many states do not give parents choices at all, and some likely—if the question is left to state legislatures—never will. Of the available constitutional hooks on which to hang such a demand, parental rights seem a natural fit. We are skeptical that in many circumstances these will be winning arguments, especially with a formalist Court that is skeptical of unenumerated rights. See, e.g., Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs*, Bruen, and Kennedy: *The Role of History and Tradition*, 118 NW. L. REV. 433 (2023); see also, e.g., *Littlejohn v. Sch. Bd. of Leon Cnty.*, 132 F.4th 1232, 1280 (11th Cir. 2025) (Newsom, J., concurring) (criticizing substantive due process as “untethered from traditional interpretive sources” and questioning the expansion of unenumerated parental rights claims under *Meyer* and *Pierce*).

37 Following *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), many commentators suggested that Blaine amendments would block the expansion of private school choice in many states. See, e.g., Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 167–70 (2003); Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMEND. L. REV. 45 (2003); Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (2003). The recent series of Supreme Court decisions have put those predictions to rest, although Blaine amendment arguments persist in the handful of states with constitutions that limit the funding of all private schools. See MONT. CONST. art. V, § 11(5) (prohibiting the legislature from making any appropriation for “educational . . . purposes to any private individual, private association, or private corporation not under control of the state”).

38 See Garnett & McShane, *supra* note 11, at 40.

A. *Funding Exclusivity Arguments*

The first argument—that, by mandating a system of public schools, state constitutions thereby prohibit *all* public funding of private educational alternatives—has featured prominently in recent litigation and enjoyed some limited success in courts. The argument itself takes somewhat different forms, depending on the particulars of a state’s public education mandate. Each, however, rests on the basic presumption that, where state constitutions mandate a system of public education—and provide for particular funding sources to support it—they *also* prohibit a state from spending money on alternative educational methods. To date, these arguments—while routinely raised in litigation challenging new parental choice programs—have largely failed.³⁹

There are, however, a few notable exceptions. In 2015, the Washington Supreme Court invalidated the state’s nascent charter school law because it concluded that charter schools could not be funded with resources reserved for public (or “common”) schools.⁴⁰ Article IX, section 2, of Washington’s constitution directs the state legislature to “provide for a general and uniform system of public schools” and states that “the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.”⁴¹ Although Washington’s charter law defined charter schools as part of these “common” schools, the Washington Supreme Court disagreed; the court held that because the charter schools were “run by an appointed board or nonprofit organization,” were freed from many public-school regulations, and were thus “not subject to local voter control,” they did not qualify as common schools.⁴² The court then went on to hold that “*all* of the basic education funds” in the State’s operating budget (including charter-school funding) are “for the exclusive use of the common schools”—whether or not those funds are held in a special common-school fund, raised specifically by common-school taxes, or segregated in any way from the State’s general fund.⁴³ Thus, in the court’s view, Washington’s constitution would not permit any “diversion of basic education funds” to alternative schooling methods like charter schools, even if

39 See Garnett, *supra* note 22 (discussing cases).

40 League of Women Voters of Wash. v. State, 355 P.3d 1131, 1137–40 (Wash. 2015) (explaining that charter schools do not qualify as “common schools,” and thus the “Charter School Act’s provisions authorizing diversion of . . . restricted funds are unconstitutional,” *id.* at 1137, 1140).

41 WASH. CONST. art. IX, § 2.

42 League of Women Voters, 355 P.3d at 1137.

43 *Id.* at 1139 (emphasis added) (citing WASH. REV. CODE § 28A.150.380(1) (2015)).

those funds simply “follow[ed] the student[,]” to provide funding for a pupil that no longer would be educated in the public school system.⁴⁴

More recently, in December 2022, the Kentucky Supreme Court invalidated an education savings account program on similar grounds, holding that the state lacked the authority to fund non-public K–12 educational options without express voter approval.⁴⁵ But, unlike in Washington, the Kentucky Supreme Court did not do so on the basis of a constitutional provision that explicitly restricted particular *uses* of funds appropriated for common schools. Rather, the court held that Kentucky’s education savings account program impliedly violated a constitutional provision that restricts the State’s ability to “*raise[] or collect[] [tax funds] for education other than in common schools*”—even though the law levied no new taxes and instead funded the savings accounts through the donations of private taxpayers, which were offset by tax credits.⁴⁶ In the court’s view, it did not matter that the law collected no taxes and did not implicate any money that ever “ma[d]e it to the State Treasury.”⁴⁷ Rather, the court read Kentucky’s public education mandate broadly, to prohibit (without specific voter approval) any measure that might reduce tax “sums legally owed to the Commonwealth of Kentucky” and which might otherwise have been put to “public use including allocation to the Department of Education.”⁴⁸ The court’s logic is difficult to follow and, at bottom, seems to reduce to little more than the intuition that public money spent (or tax collections forgone) in furtherance of education outside of the system of public schools is constitutionally suspect. Almost a year to the day later, a trial judge invalidated Kentucky’s new charter school law on similar grounds.⁴⁹

An even more muscular version of these arguments features prominently in ongoing litigation challenging Arkansas’s new education savings account program. In 2023, Arkansas enacted legislation—the Arkansas LEARNS Act—which paired increased funding for public schools (especially for public school teachers’ salaries) with a new education savings account, the Arkansas Children’s Educational

44 *Id.* at 1140 (quoting Brief of Respondent/Cross-Appellant at 40, *League of Women Voters*, 355 P.3d 1131 (No. 89714-0)) (quote corrected).

45 *See* *Commonwealth ex rel. Cameron v. Johnson*, 658 S.W.3d 25, 29, 43 (Ky. 2022).

46 *Id.* at 35 (quoting KY. CONST. § 184 (emphasis added)); *id.* at 35–49.

47 *Id.* at 39.

48 *Id.*

49 *See* McKenna Horsley, *Judge Rules Kentucky’s Charter School Law Unconstitutional*, KY. LANTERN (Dec. 11, 2023, 5:46 PM), <https://kentuckylantern.com/2023/12/11/judge-rules-kentuckys-charter-school-law-unconstitutional> [<https://perma.cc/2HH6-SRL6>].

Freedom Account program.⁵⁰ The Educational Freedom Account program empowers eligible students to spend a portion of the public funds allocated to their education on a range of eligible educational expenses, including private school tuition and fees, tutoring, technology, testing fees, career training and industry credentials, transportation, and textbooks.⁵¹ Participating students are allocated funding roughly equal to the state's share of public education spent per pupil in the prior year,⁵² which amounted to \$6,672 during the program's first school year in 2023–24.⁵³ Eligibility to participate was initially limited to particular classes of K–12 students—students with disabilities, homeless students, students in foster care, active-military families, students in failing schools or school districts, and students entering kindergarten; by the third year of the program (beginning in 2025), all K–12 students who are eligible to attend a public school may participate.⁵⁴

On June 7, 2024, four public school parents filed a lawsuit in state court challenging the Educational Freedom Account program under several provisions of the Arkansas Constitution, including three that contain a public education mandate.⁵⁵ As in Washington and Kentucky, the plaintiffs allege that the program violates state constitutional restrictions on the use of money “belonging to the public school fund . . . for any [reason] other than for the respective purposes to which it belongs.”⁵⁶ But, going a step further, they also argue that the program violates an unstated prohibition on funding private education that is supposedly implied by the provisions that mandate a public education system to begin with. This argument focuses on two inter-related provisions. The first is article XIV, section 1 (“Free School System”), which provides in relevant part, “Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good

50 S. 294, 94th Gen. Assemb., Reg. Sess. (Ark. 2023). See generally *Arkansas LEARNS*, ARK. DEP'T OF EDUC., <https://learns.ade.arkansas.gov> [[https:// perma.cc/YQA6-Z54R](https://perma.cc/YQA6-Z54R)] (last visited Jan 17, 2026).

51 See ARK. CODE ANN. §§ 6-18-2503(11), 6-18-2505 (2025).

52 During a child's first year in the program, the amount allotted is ninety percent of the state's per-pupil funding. *Id.* § 6-18-2505(a)(1). For each school year thereafter, the amount rises to a full one hundred percent of the state's per-pupil funding. *Id.* § 6-18-2505(a)(2).

53 *Arkansas Children's Educational Freedom Account Program*, EDCHOICE (Dec. 16, 2025), <https://www.edchoice.org/school-choice/programs/arkansas-childrens-educational-freedom-account-program> [<https://perma.cc/A9AM-DCRV>].

54 See *id.* Likewise, while the program was initially capped at 1.5% of total public enrollment, in the 2025–26 school year, there will be no enrollment cap. *Id.*

55 Complaint at ¶¶ 4–10, *Faulkenberry v. Ark. Dep't of Educ.*, No. 60CV-24-4630 (Ark. Cir. Ct. June 7, 2024).

56 *Id.* ¶ 69 (quoting ARK. CONST. art. XIV, § 2).

government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.”⁵⁷ The second is article XIV, section 3, which provides, “The General Assembly shall provide for the support of common schools by general law.”⁵⁸

The plaintiffs allege that an application of the *expressio unius, exclusio alterius* canon renders any public spending on private education unconstitutional.⁵⁹ By mandating that the state maintain and fund public schools, the plaintiffs argue, the Arkansas Constitution impliedly prohibits the state from funding “any other system [of education] which is not free and not public.”⁶⁰ They further contend that the constitution’s accompanying “specific authorization of tax levies in support of common schools” requires the “exclusion of support for schools which are not ‘common schools’ or ‘public schools.’”⁶¹ For its part, the State of Arkansas has responded that the *expressio unius* line of reasoning is inapposite when interpreting its state constitution, which, unlike the Federal Constitution, does not *grant* specified legislative powers but rather delineates particular *limitations on* the otherwise “plenary authority to enact legislation.”⁶² As a matter of basic state constitutional theory, Arkansas is correct: State constitutions are adopted against the backdrop of broad residual state powers and thus are typically understood to constrain—but not create—the state’s authority to act in certain ways.⁶³ Nonetheless, in August 2024, the county court denied the State’s motion to dismiss (without engaging with this particular argument),⁶⁴ and litigation remains ongoing as of the time of writing.

The *expressio unius* argument also features in a lawsuit filed in May 2024 challenging the Utah Fits All education savings account program.⁶⁵ The program, which extends eligibility to all students in the state with a preference for low-income students, allows students to

57 ARK. CONST. art. XIV, § 1; *see also* Complaint, *supra* note 55, ¶ 62.

58 ARK. CONST. art. XIV, § 3(a); *see also* Complaint, *supra* note 55, ¶ 76.

59 *See, e.g.*, Complaint, *supra* note 55, ¶ 77.

60 *Id.* ¶ 63.

61 *Id.* ¶ 78.

62 Brief in Support of Defendants’ Motion to Dismiss at 13, *Faulkenberry v. Ark. Dep’t of Educ.*, No. 60CV-24-4630 (Ark. Cir. Ct. Aug. 12, 2024) (citing *Erxleben v. Horton Printing Co.*, 675 S.W.2d 638, 640 (Ark. 1984)).

63 *See* RICHARD BRIFFAULT, LAURIE REYNOLDS, NESTOR M. DAVIDSON, ERIN ADELE SCHARFF & RICK SU, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 57–63 (9th ed. 2022).

64 *Faulkenberry*, No. 60CV-24-4630.

65 *See generally* Complaint for Declaratory & Injunctive Relief, *Labresh v. Cox*, No. 240904193 (Utah Dist. Ct. Apr. 18, 2025).

receive up to \$8,000 to pay for a range of educational expenses, including private school tuition.⁶⁶ The complaint alleges that the program violates several provisions of the Utah Constitution, including two that contain public education mandates.⁶⁷ First, article III, ordinance 4 provides that “[t]he Legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and be free from sectarian control.”⁶⁸ Second, article X, section 1 provides that “[t]he Legislature shall provide for the establishment and maintenance of the state’s education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control.”⁶⁹ The complaint alleges that the Utah Fits All program runs afoul of these provisions by “establishing a program within the public education system that is not free and is not ‘open to all the children of Utah.’”⁷⁰ The plaintiffs argue that “[t]he State cannot outsource its obligation to provide a free and open public education system” and accuse the state of undermining “its core constitutional duty to ensure that state education programs are free of charge and open . . . to all students by funding private entities and licensing them to do indirectly what the State cannot do directly.”⁷¹

In April 2025, a judge on the Salt Lake County District Court agreed and granted summary judgment to the plaintiffs on these grounds.⁷² Strangely enough, the court began by acknowledging the underlying difficulty of the *expressio unius* argument highlighted by the State of Arkansas in defending its own program: that state constitutional provisions do not *grant* specified powers but instead impose *particularly defined limits upon* the State’s otherwise plenary legislative power.⁷³ Yet the court found that this general rule does not apply with respect to education in Utah. Instead, Utah’s public education mandate “is a ‘ceiling’” that defines and restricts precisely how the State may support education.⁷⁴ According to the court, the Utah Constitution’s “clear expression of one duty” to maintain a public education

66 See UTAH CODE ANN. §§ 53F-6-401, 53F-6-402 (LexisNexis 2024). See generally UTAH FITS ALL SCHOLARSHIP PROGRAM, FAMILY HANDBOOK: 2024–2025 SCHOOL YEAR (2024).

67 See Complaint for Declaratory & Injunctive Relief, *supra* note 65, ¶¶ 3–6.

68 UTAH CONST. art. III, ordinance 4; see also Complaint for Declaratory & Injunctive Relief, *supra* note 65, ¶ 85.

69 UTAH CONST. art. X, § 1; see also Complaint for Declaratory & Injunctive Relief, *supra* note 65, ¶ 85.

70 Complaint for Declaratory & Injunctive Relief, *supra* note 65, ¶ 82 (quoting Utah Sch. Bds. Ass’n v. Utah State Bd. of Educ., 17 P.3d 1125, 1129 (Utah 2001)).

71 *Id.* ¶ 84.

72 Labresh v. Cox, No. 240904193, slip op. at 57 (Utah Dist. Ct. Apr. 18, 2025).

73 *Id.* at 24.

74 *Id.* at 33, 32–33 (citation omitted).

system that is open to all, “coupled with the absence of any *general* duty to provide” education more broadly, “impliedly restricts the legislature from creating [any] . . . education program outside the public school system.”⁷⁵ Thus, even though “Utah’s public education system ‘remains firmly in place’ regardless of the [school choice] Program,” the court found that the State lacked any power to support educational initiatives alongside that system.⁷⁶ At the time of writing, the defendants’ appeal to the Utah Supreme Court remains pending.

Most recently, in February 2026, the Idaho Supreme Court rejected the argument that a new refundable tax credit program that enables parents to seek reimbursement for educational expenses, including private school fees and tuition, was precluded by the state’s education mandate. Writing for a unanimous court, Justice Bevan concluded that Idaho’s public education mandate “establishes a floor, and not a ceiling.” He reasoned that since “[t]he Idaho Constitution is not a grant but a limitation on legislative power . . . when a constitutional provision mandates the legislature do something that it has authority to do, it is not reasonable to read that mandate as restricting the legislature’s broader power to do something more.” Again, we think it worth noting that this observation about the nature of state constitutions—government powers rather than grant them—ought to rule out *expressio unius* arguments based upon public education mandates in most states.

B. Resource Drain Arguments

The second argument—that private school choice programs may unlawfully drain resources that are needed to adequately maintain a system of public education—seems on somewhat firmer theoretical ground, at least at the extremes. To be sure, a state presumably could direct educational spending so exclusively to alternative educational opportunities that it failed to satisfy its basic obligation to sustain a mechanism for free and adequate public education for all. But, while less rigid in its formulation, this argument derives from the same basic—and, in our view, dubious—premise that public education mandates should be interpreted to implicitly restrict the funding of educational alternatives. And because its lines are less formal, the accompanying theories for how much “drain” is too great are not clear. Moreover, in many cases, it would be difficult to show that any given school-choice program is to “blame” for an underfunded public-education system—or that invalidating such a program would be an appropriate remedy for the identified problem. In all, arguments like these

⁷⁵ *Id.* at 34 (emphasis added).

⁷⁶ *Id.* at 32.

often implicate questions of educational or fiscal policy and seem difficult for courts to police. Still, claims of this kind are regularly seen in challenges today, and they too have had at least some limited success in courts.

In 2006, the Florida Supreme Court invalidated a voucher program for students in failing school districts on the grounds that it ran afoul of article IX, section 1 of the Florida Constitution, which provides, “Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools.”⁷⁷ Even though the provision also authorizes the state to provide for “other public education programs that the needs of the people may require,”⁷⁸ the court concluded that the voucher program would unlawfully “divert[] funds that would otherwise be provided to the system of free public schools that is the exclusive means set out in the Constitution . . . to make adequate provision for the education of children.”⁷⁹ In response to the dissent’s argument that the voucher program did not prevent the state from “continu[ing] to fund the public schools at a level that [keep] them ‘uniform, efficient, safe, secure, and high quality,’” the court opined that “because voucher payments reduce funding for the public education system,” the program “by its very nature undermines the system of ‘high quality’ free public schools”—whether those funds are lost on “either a small or large scale.”⁸⁰ Finally, the court added, because the participating private schools were not controlled by the public school system, they therefore undermined its requisite “uniformity.”⁸¹

More recently, this “public drain” theory underlies litigation challenging two voucher programs in Ohio—the EdChoice Scholarship and the Educational Choice Expansion Scholarship program. In 2022, over 100 school districts, organized by a public-school interest group called “Vouchers Hurt Ohio,” and several parents and public school students filed a lawsuit alleging (among other things) that these programs violate article VI, section 2 of the Ohio Constitution.⁸² The

77 *Bush v. Holmes*, 919 So. 2d 392, 403, 413 (Fla. 2006) (emphasis omitted) (quoting FLA. CONST. art. IX, § 1(a)).

78 FLA. CONST. art. IX, § 1(a).

79 *Bush*, 919 So. 2d at 408–09.

80 *Id.* at 409 (quoting FLA. CONST. art. IX, § 1(a)).

81 *See id.* Regarding the authority to fund “other public education programs,” the court held that this applies only to “existing systems of junior colleges, adult education, etc.,” and not to alternate ways to publicly support K–12 education outside of the traditional public school system. *Id.* at 411 (first quoting FLA. CONST. art. IX, §1(a); and then quoting Bd. of Pub. Instruction v. State Treasurer, 231 So. 2d 1, 2 (Fla. 1970) (per curiam)).

82 *See* Complaint for Declaratory Judgment and Injunctive Relief ¶¶ 98–152, Columbus City Sch. Dist. v. State, No. 22 CV 67 (Ohio Ct. Com. Pl. June 24, 2025); *see also* Press Release, Vouchers Hurt Ohio, Vouchers Hurt Ohio and Ohio E&A Coalition File Lawsuit

provision, which includes both a requirement that the state maintain public schools and a Blaine-like prohibition on the public funding of sectarian schools, provides,

The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but, no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this State.⁸³

In 1999, the Ohio Supreme Court rejected the argument that the state's first voucher program—the same one upheld by the U.S. Supreme Court in *Zelman v. Simmons-Harris*⁸⁴—violated the state's education mandate.⁸⁵ But the districts argue that the choice programs have grown so significantly in scope and scale—the state recently extended eligibility to participate to all students—that they have since become unconstitutional.⁸⁶ The plaintiffs' claims flows in significant part from the fact that the Ohio Supreme Court has held that the state's education mandate creates a judicially enforceable right to a quality public education.⁸⁷ In 1997, in *DeRolph v. State*, the court held that “Ohio's elementary and secondary public schools are neither thorough nor efficient” and ordered the legislature to remedy the problem.⁸⁸ The court observed, “[i]n addition to deteriorating buildings and related conditions, it is clear . . . that many . . . school districts . . . cannot provide the basic resources necessary to educate our youth.”⁸⁹ It concluded, “Although a student's success depends upon numerous factors

Against Private School Voucher Program (Jan. 4, 2022), <https://vouchershurttoohio.com/vouchers-hurt-ohio-and-ohio-ca-coalitionfile-lawsuit-against-private-school-voucher-program> [<https://perma.cc/W8BN-RMM6>].

83 OHIO CONST. art. VI, § 2.

84 *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

85 *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999).

86 See Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 82, at ¶¶ 4–8. The Wisconsin Supreme Court recently declined to assume original jurisdiction in a similar lawsuit claiming that the state's charter-school and voucher programs violated the Wisconsin Constitution's public education mandate because they diverted funds reserved for public schools. *Underwood v. Vos*, 6 N.W.3d 701 (Wis. 2023). The private activist funding the litigation has indicated that the suit will be refiled in the state trial court. Scott Bauer, *Wisconsin Supreme Court Refuses to Hear Lawsuit Challenging Voucher School Program*, AP NEWS (Dec. 13, 2023, 5:17 PM EST), <https://apnews.com/article/wisconsin-voucher-school-choice-supreme-court-3092a7165c03c8193191631a663ba3f6> [<https://perma.cc/BV4J-EA8W>].

87 *DeRolph v. State*, 677 N.E.2d 733, 745 (Ohio 1997).

88 *Id.*

89 *Id.* at 744.

besides money, we must ensure that there is enough money that students have the chance to succeed.”⁹⁰

The complaint against the new voucher program alleges, among other things, that the programs violate article VI, section 2 by depriving public school districts of the resources needed to satisfy the state’s constitutional obligation to provide a “thorough and efficient” system of public schools.⁹¹ The complaint styles the allegations as follows: “This voucher program effectively cripples the public school districts’ resources, creates an ‘uncommon,’ or private, system of schools unconstitutionally funded by taxpayers, siphons hundreds of millions of dollars of taxpayer funds into private (and mostly religious) institutions, and discriminates against minority students by increasing segregation in Ohio’s public schools.”⁹²

In a motion for summary judgment, the plaintiffs unpacked the theory, arguing that “uncontested evidence shows that the [program] enriches private schools at the expense of public school districts, which lack sufficient funding to meet student needs and comply with legal obligations.”⁹³ The State, for its part, responded that the record shows instead that its voucher program exists comfortably alongside the State’s otherwise sufficient public schools: Ohio, according to its Attorney General, has long “increase[ed] funds to public schools *and* offer[ed] school choice, and traditional schools are not ‘losing’ any money to which they are allegedly entitled.”⁹⁴

In June 2025, a judge in Franklin County, Ohio, agreed with the plaintiffs and granted summary judgment for them on this basis.⁹⁵ The court found that Ohio’s public schools are underfunded in various ways and suggested that the state’s public education mandate prevented it from spending on other educational initiatives until that shortfall is corrected.⁹⁶ Put differently, the court’s decision effectively functions as a more contextualized version of the *expressio unius*

90 *Id.* at 746.

91 OHIO CONST. art. VI, § 2.

92 Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 82, at 3–4.

93 Plaintiff’s Motion for Summary Judgment with Incorporated Memorandum in Support at 31, *Columbus City Sch. Dist. v. State*, No. 22 CV 67 (Ohio Ct. Com. Pl. June 24, 2025).

94 State Defendants’ Memorandum in Support of Motion for Summary Judgment at 2, *Columbus City Sch. Dist.*, No. 22 CV 67.

95 *Columbus City Sch. Dist.*, No. 22 CV 67, slip op. at 21. To even reach this point, the court found that it was not bound by an Ohio Supreme Court decision upholding the voucher program under the same claim in 1999, because that decision was tied to past “funding level[s]” and did not assess the impact of the now “larger” program on Ohio’s public education system. *See id.* at 17–20 (emphasis omitted) (quoting *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999)).

96 *See id.* at 18, 20, 22–26.

arguments discussed above: At least when the public school system is *not* adequately supported, the obligation to maintain such a system implicitly precludes the state from spending on education in any other form.

The court's decision reveals the difficulties in applying the "resource drain" theory of public education mandates. Ohio, of course, disputes the court's central premise that its public schools are inadequately supported.⁹⁷ But, even if they are, it argues that there is no evidence that the voucher program itself is to blame for the shortfall—and thus striking it down is not an appropriate remedy to ameliorate any violation of the public education mandate.⁹⁸ Indeed, the state pointed out, Ohio "has always funded private schools" consistent with its public education mandate, suggesting no incompatibility between the two.⁹⁹ And, more to the point, the state argued that there was no actual connection between any shortfall in public-school funding and the challenged voucher program—which expanded during the same time that the plaintiff school districts had actually received *increased* funding.¹⁰⁰ Specifically, that program does not draw from the same pool of money as the public schools, and eliminating the program would not direct additional funds to those schools.¹⁰¹ In other words, perhaps Ohio has failed to spend enough on its public schools, but the voucher program did not "drain" their money and should not be shut down accordingly. As a group of parents who intervened in defense of the program put it, "If Plaintiffs believe the public schools need more money, they can lobby their legislators or file an adequacy lawsuit [challenging the level of public-school funding]. But what they cannot do is invalidate the Program and claim its funding for themselves."¹⁰²

While acknowledging these points, the court responded with a more general observation about the fungibility of money: Because the amount of voucher funding was similar to the asserted shortfall in public-education funding, "[i]t is not unreasonable to believe that if the EdChoice voucher program were struck down, some of its funding would be shifted to distressed public schools."¹⁰³ Drain from the public schools, it seems, might be presumed where money is spent on some

97 See State Defendants' Memorandum in Support of Motion for Summary Judgment, *supra* note 94, at 29–33.

98 See *id.* at 26–29.

99 *Columbus City Sch. Dist.*, No. 22 CV 67, slip op. at 20.

100 See State Defendants' Memorandum in Support of Motion for Summary Judgment, *supra* note 94, at 29–30.

101 See *id.* at 2–27.

102 Intervenor-Defendants' Reply Memorandum in Support of Motion for Summary Judgment at 2, *Columbus City Sch. Dist.*, No. 22 CV 67.

103 *Columbus City Sch. Dist.*, No. 22 CV 67, slip op. at 25.

form of education. The State has appealed, and the case remains pending at the time of writing.

* * *

In large part, the claims in these cases seem to miss their fundamental mark by weaponizing state obligations to build public schools to attack additional efforts at educational innovation. State courts are divided on whether public education mandates even raise judicially enforceable rights—as opposed to nonjusticiable policy questions—at all.¹⁰⁴ But even successful litigation, in which courts have concluded that public school systems are unconstitutional for a variety of reasons—the system is unequal, inadequate, fails to provide for equal educational opportunities, and so forth—tends to focus on supposed inadequacies within the state’s public educational system as a whole.¹⁰⁵ For good reason: The question these laws actually raise is whether the state has satisfied its broad obligation to provide sufficient public educational resources to serve the needs of all children. That obligation is only implicated to the extent that a state does *not* offer such resources; it is not undermined merely because the state *also* offers additional resources beyond public schools.

Thus, public education advocates (and courts) should direct their energies toward a state’s method of funding and maintaining public education as a whole—not scrutinizing whether every single instance of educational spending is devoted to maintaining a government-run or homogenized public school. Even in states where the education mandate is judicially enforceable, deploying those mandates to block educational innovation or exit options as a backdoor way of ensuring even *more* funding for a sufficient and functioning system of public schools is inappropriate. And, as the Ohio litigation demonstrates, even where a public school system is underfunded or inadequately supported, the claims in these cases raise difficult questions of what judicial remedies are appropriate to address that problem.

II. VOICE, EXIT, AND THE HISTORY OF STATE EDUCATION MANDATES

Until recently, arguments about whether state education mandates either prohibit or limit states from supporting elementary and secondary education by means other than public schools—including by empowering families to use money appropriated for their children’s

104 See generally *School-Funding Court Decisions by State*, CTR. FOR EDUC. EQUITY, <https://cee.tc.columbia.edu/schoolfundinginfo> [<https://perma.cc/DRN7-ESVA>] (last visited Dec. 15, 2024).

105 See Garnett, *supra* note 22, at 65 (“With the exception of *Bush v. Holmes* [in Florida], successful [funding] uniformity challenges have targeted disparities *within* the public school system, not alternatives to it.” (emphasis added)).

education at private schools—had by and large been rejected. Most state supreme courts have concluded that on their face, constitutional provisions requiring states to maintain public schools do not preclude them from funding alternatives to them. In our view, this is the correct conclusion on the merits of the arguments. Public education mandates obligate states to create and maintain sufficient public educational resources to serve all children; they do not typically prevent states from *also* funding programs that support educational choice alongside that system.

But both legal and policy debates have overlooked another reason for being skeptical of the claim that state education mandates prohibit parental choice—namely that the history of these mandates is tied up with the same bigoted history of Blaine amendments. Just as courts refuse to perpetuate that ignominious past through enforcement of Blaine amendments today, they should be reluctant to extend public education mandates to achieve the same discriminatory results through new means.

A. *Blaine Amendments, Bible Wars, and Assimilation and Homogenization in Early Public Schools*

The history of state education mandates cannot be disentangled from the history of state Blaine amendments—constitutional prohibitions on the public funding of independent religious schools. The story of the Blaine amendments, and their roots in our nation’s ugly history of anti-Catholicism, is by now well known and can be briefly summarized. Critically for present purposes, the “common schools” movement of the nineteenth century—the forerunner to today’s public school system—lies at the heart of that story. Like the broader Blaine amendment movement, the growth of common schools was linked to, and often fueled by, severe animosity toward Catholic immigrants and a desire to ensure that their children would be molded, educated, and indeed assimilated by the state, rather than their parents.¹⁰⁶

106 See *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2266–67 (2020) (Thomas, J., concurring) (summarizing history); *id.* at 2267–74 (Alito, J., concurring); PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 297–98 (2004); Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 130 (2001); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 298 (2001); Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657 (1998); Garnett, *supra* note 37. But cf. Jill Goldenziel, *Blaine’s Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57 (2005) (arguing that at least some state no-funding provisions are not linked to the federal Blaine amendment).

As Charles Glenn (among many others) has ably demonstrated, the animating goal of the common-school movement was not simply to educate American children, but rather to Americanize a rapidly burgeoning immigrant population through the medium of public schools.¹⁰⁷ This project was to be accomplished by exposing all children, and especially Catholic ones, to a kind of “least-common-denominator Protestantism” reflected in, for example, the requirement that all students recite daily from the *King James Bible*.¹⁰⁸ Often, Catholics sought to exercise their voice, demanding accommodations in public schools from distinctly Protestant curricular practices they objected to on religious grounds.¹⁰⁹ But Catholics also opted to exit. They had built (or wished to build) their own schools and they sought some equality in public funding to support them alongside the Protestant common schools.¹¹⁰

Ultimately, the call for funding support culminated in a nationwide legal effort to suppress the growth of so-called “sectarian” schools outside the broadly Protestant mainstream.¹¹¹ In 1875, President Ulysses S. Grant called for Congress to ensure that “[n]o sectarian tenets shall ever be taught in any school supported in whole or in part by the [government].”¹¹² Grant’s use of “sectarian tenets” did not signify *religious* beliefs generally, but more precisely those beliefs that deviated from generally accepted forms of Protestant Christianity; as Richard Baer has observed, “sectarian” is a term that “always implies that there exists a contrasting mainstream, a right way of thinking, a common position that deserves to be accepted.”¹¹³ In Baer’s words, that term was used particularly “to keep religious and social ‘untouchables’ in their proper place” by excluding those “whose religious or philosophical beliefs . . . did not correspond to [the majority’s] own vision.”¹¹⁴

107 See generally CHARLES LESLIE GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* (1988); LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL: 1825–1925*, at 77 (1987); Green, *supra* note 19, at 45.

108 See Jeffries & Ryan, *supra* note 106, at 298; see also Green, *supra* note 19, at 45 (“The entire [common school] curriculum centered around general assumptions of God’s existence, the sense of His universe, and the ‘spirituality’ of human nature. Schools were the primary promulgators of this Protestant way of life.” (footnote omitted)).

109 See, e.g., Green, *supra* note 19, at 44–47 (discussing mixed success of Catholic challenges to *King James Bible* reading in schools).

110 See MARGARET F. BRINIG & NICOLE STELLE GARNETT, *LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS’ IMPORTANCE IN URBAN AMERICA 11–18* (2014).

111 See *Espinoza*, 140 S. Ct. at 2270 (Alito, J., concurring).

112 4 CONG. REC. 181 (1875).

113 Baer, *supra* note 19, at 451; see also *Espinoza*, 140 S. Ct. at 2272 (Alito, J., concurring).

114 Baer, *supra* note 19, at 451; see also Robert G. Natelson, *Why Nineteenth Century Bans on “Sectarian” Aid Are Facially Unconstitutional: New Evidence on Plain Meaning*, 19 *FEDERALIST SOC’Y REV.* 98, 100 (2018) (“[D]ictionary definitions and newspaper usage . . . show that

Thus, that term was typically used to signify particular disfavored groups, including Catholics, Jews, Mormons, and Muslims.¹¹⁵ In the schools context, there is wide agreement that “sectarian” was understood more pointedly to mean *Catholic* schools.¹¹⁶ Answering President Grant’s call, in 1875, Senator James Blaine proposed an amendment to the U.S. Constitution that would have prohibited the public funding of schools “under the control of any religious sect.”¹¹⁷ The amendment narrowly failed, passing the House but falling just short of the two-thirds majority needed in the Senate.¹¹⁸ Thereafter, many states added a no-aid provision to their own constitutions; many new states were even required to do so as a condition of admission into the United States.¹¹⁹

While the anti-Catholic history of Blaine amendments is well documented and widely acknowledged,¹²⁰ contemporary discussions (and condemnations) of those measures frequently overlook the degree to which broader debates over public education policy focused on ensuring the Protestant character of the nation and its public schools. Blaine and his allies did not just want to prevent a Catholic education; they wanted to propagate a Protestant one.¹²¹ Like the goal of preventing funding of independent “sectarian” schools, concern over securing the Protestant character of public education was animated by an abiding interest in ensuring that immigrant children, and in particular Catholic ones, would attend uniform public schools where they would be Americanized (and Protestant-ized).¹²² As Philip Hamburger has

sectarian referred specifically to religions and religious people the speaker deemed bigoted or out of the mainstream.”).

115 See Natelson, *supra* note 114, at 104; see, e.g., *The Nation*, MILWAUKEE DAILY SENTINEL, Dec. 7, 1880, at 1 (referencing “[t]he Mormon sectarian organization”); *Religious State of Abyssinia*, 17 VT. CHRON. (Windsor) 33 (1842) (referencing “Jewish sectarians”); *What Is Sectarianism*, 19 OHIO OBSERVER (Hudson) 45 (1845) (describing sectarians as “Roman Catholics and the Mohammedans”).

116 *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (citing Green, *supra* note 19, at 38).

117 4 CONG. REC. 205 (1875).

118 *Espinoza*, 140 S. Ct. at 2268 (Alito, J., concurring).

119 *Id.* at 2268–69.

120 See, e.g., *id.* at 2267–70; *Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004); *Mitchell*, 530 U.S. at 828–29.

121 Cf. Ward M. McAfee, *The Historical Context of the Failed Federal Blaine Amendment of 1876*, 2 FIRST AMEND. L. REV. 1, 2 (2003).

122 See, e.g., *id.* (“The American public school had been created in part to make its charges, many of which were the children of recently arrived immigrants, fully ‘American.’”); see also *id.* at 9, 16 (noting that northerners were concerned about “the Roman Catholic Church taking control of public education” and “they saw African American Protestants as their allies in what they regarded as a more important fight against the Roman Catholic immigrant invasion of Protestant America”).

described, Blaine's attempt to prohibit public funding of schools under the control of a singular "sect" was "an anti-Catholic measure that still permitted a generalized Protestantism in public schools as long as this was not the Protestantism of any one sect."¹²³ It would have left the "Protestant sects undisturbed in their . . . *collective* mastery over the public school system."¹²⁴ As Justice Alito has observed, the efforts to preserve that educational mastery are inextricable from the "strong nativist movement" of the same time.¹²⁵ Indeed, in the nineteenth century, a wave of immigration brought with it the rapid growth of religious communities outside the Protestant mainstream.¹²⁶ That, in turn, prompted a wave of nativist hostility against these growing populations.¹²⁷ Groups like the nativist Know Nothing Party spread fear that the new immigrants "would attempt to subvert" the U.S. political system.¹²⁸ They worried, in particular, that they would undermine the social order by building a network of independent schools through which they could teach their own messages to the next generation.¹²⁹

Sentiments like these run throughout the works of Horace Mann, who is widely regarded as the father of the nineteenth-century common-school movement. Mann believed that the common schools should assume a parental role in order to "elevate mankind into the upper and purer regions of civilization, Christianity, and the worship

123 HAMBURGER, *supra* note 106, at 298.

124 *Id.* (emphasis added) (quoting EQUAL RIGHTS IN RELIGION: REPORT OF THE CONTINENTAL CONGRESS OF LIBERALS, AND ORGANIZATION OF THE NATIONAL LIBERAL LEAGUE (Boston, Nat'l Liberal League 1876)).

125 *Espinoza*, 140 S. Ct. at 2271 (Alito, J., concurring) (quoting Viteritti, *supra* note 106, at 667).

126 *Id.* at 2269.

127 *Id.* at 2269–70.

128 *Id.* at 2269 (quoting HAMBURGER, *supra* note 106, at 206); *see also* TYLER ANBINDER, NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850S, at 135–36 (1992).

129 *See* MARGARET C. DEPALMA, DIALOGUE ON THE FRONTIER: CATHOLIC AND PROTESTANT RELATIONS, 1793–1883, at 82 (2004). Contemporary news reports publicized a variety of these fears, often in lurid language. *See, e.g.,* STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE 99 (2012) (describing Cincinnati newspaper article, which "declared that Catholic opposition to Bible reading was part of a 'Romanist policy' that sought 'the overthrow, the abolition, of the whole American scheme of Common School Education'" (citations omitted)); SAMUEL F.B. MORSE, FOREIGN CONSPIRACY AGAINST THE LIBERTIES OF THE UNITED STATES 103 (New York, Leavitt, Lord & Co. 1835) (stating that "Popery is the natural enemy of general education" and describing Catholic schools as the "prisons of the youthful intellect of the country" (emphasis omitted)); *Espinoza*, 140 S. Ct. at 2269 (Alito, J., concurring) (quoting 1873 New York Times article that decried "[s]ectarian [e]ducation" as a "[c]rusade" that would undermine "the admirable system of public school education" (quoting *Sectarian Education: Anti-Public School Crusade*, N.Y. TIMES, Aug. 24, 1873, at 8)).

of the true God.”¹³⁰ Mann invoked a backdrop of abuses by Catholic Europe or non-Christian nations in Africa and Asia¹³¹ to implore “[f]athers, mothers, patriots, Christians” to build a system of common schools that would develop the “nobler faculties” of “reason and conscience and a sense of responsibility to [God]” during “the docile and teachable years of childhood.”¹³² He condemned “all those who are obstructing the progress of this cause” for “impelling the race backwards into barbarism and idolatry.”¹³³ The obstructors, of course, were often Catholics who objected to the pervasive Protestantism in common schools.¹³⁴ And because Mann well knew that “the children of Pagans [tend] to be Pagans; of Mahommedans, Mahommedans; and of Catholics and Protestants, to be respectively Catholics and Protestants,” he insisted on a public school system that would “exert[] . . . our influence” and “transfuse our best sentiments.”¹³⁵ That is to say Mann sought a system of schools that would exert a broadly *Christian* influence fitting to “a Protestant and a Republican country.”¹³⁶ In Mann’s view, to create a common school system without such undergirding Protestant principles “would be as though we were to form a human body forgetting to put in a heart.”¹³⁷

Debates over maintaining the Protestant character of public schools were frequently more intense than debates about funding private schools. These debates tended to center around Catholics’ efforts to eliminate (or excuse their children from) the requirement that schoolchildren read the *King James Bible*.¹³⁸ By the mid-nineteenth

130 GLENN, *supra* note 107, at 171–72 (quoting Horace Mann, *Publisher’s Notice*, 8 COMMON SCH. J. 1, 15 (1846)).

131 See HORACE MANN, *The Necessity of Education in a Republican Government*, in LECTURES AND ANNUAL REPORTS ON EDUCATION 143, 170–73 (Boston, Lee & Shepard 1872) [hereinafter MANN, *The Necessity of Education*]; see also HORACE MANN, *What God Does, and What He Leaves for Man to Do, in the Work of Education*, in LECTURES AND ANNUAL REPORTS ON EDUCATION, *supra*, at 191, 200 [hereinafter MANN, *What God Does*] (describing “the miserable generations [who] rise and suffer and perish [in Africa and Asia], like so many swarms of insects on the banks of the Nile or the Ganges”).

132 MANN, *The Necessity of Education*, *supra* note 131, at 187 (emphasis omitted).

133 GLENN, *supra* note 107, at 172 (quoting Mann, *supra* note 130, at 15).

134 See JORGENSEN, *supra* note 107.

135 MANN, *What God Does*, *supra* note 131, at 200–01.

136 HORACE MANN, *An Historical View of Education; Showing Its Dignity and Its Degradation*, in LECTURES AND ANNUAL REPORTS ON EDUCATION, *supra* note 131, at 241, 290 [hereinafter MANN, *An Historical View of Education*]; see also HORACE MANN, *Prospectus of the Common-School Journal*, in LECTURES AND ANNUAL REPORTS ON EDUCATION, *supra* note 131, at 1, 29 [hereinafter MANN, *Prospectus of the Common-School Journal*] (urging an education grounded in “the points on which different portions of a [Protestant] Christian community . . . agree”).

137 MANN, *Prospectus of the Common-School Journal*, *supra* note 136, at 29.

138 See JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM: A HISTORY* 37–42 (2003).

century, mandatory *King James Bible* recitation in public schools had become emblematic of a very real Catholic concern about ubiquitous Protestant indoctrination in public schools, including textbooks that combined celebrations of the efforts of Luther and Calvin with warnings about the dangers of “popery.”¹³⁹

When public officials even nodded in the direction of accommodation, violence often followed.¹⁴⁰ The most spectacular of these incidents was the 1844 Philadelphia Bible Riots. In 1838, Pennsylvania—like many states—enacted a law making the Bible a mandatory textbook in all public schools, as it “contain[ed] the best extant code of morality” to impart onto children.¹⁴¹ Philadelphia Bishop Francis Kenrick, in response, repeatedly asked that schools permit Catholic children to read the Catholic version of the Bible in school and urged Catholic parents to remove their children from public schools that insisted on using the *King James Bible*.¹⁴² In 1843, the Philadelphia Board of School Commissioners passed a resolution allowing children to opt out of religious exercises upon the request of their parents and further permitting them to read any version of the Bible that they pleased,

139 *Id.* at 39. A particularly sensational example occurred in Boston in 1859, when a public school principal was charged with assault for beating a student who refused to recite the Ten Commandments from the *King James Bible*. *Id.* at 8. The student, Thomas Whall, was a Catholic—like three-quarters of the students in the school—and informed his teacher that his father had forbidden him to read from the Protestant Bible. *Id.* at 7. Whall’s pastor, Fr. Bernadine Wiget, had also urged him, along with several hundred boys in the St. Mary’s Church Sunday school, not to recite Protestant prayers in school. *Id.* at 8. A week after Whall first refused to read the required passage, the assistant principal entered his classroom and announced that she would “whip him till he yields.” *Id.* Whall withstood thirty minutes of his hands being beaten to shreds by with a rattan cane. *Id.*; JORGENSEN, *supra* note 107, at 91. The mayor of Boston subsequently ordered the expulsion of all students who refused to conform to the school curriculum, including the recitation of the Protestant bible. See JORGENSEN, *supra* note 107, at 91–92. Over the next several weeks, hundreds of Catholic school children were expelled when, on orders from the local bishop, they refused to participate in the required devotional exercises and attempted to read the Ten Commandments from the Catholic Bible. MCGREEVY, *supra* note 138, at 8; JORGENSEN, *supra* note 107, at 92. When the assault case reached the Boston police court, the defendant’s attorney argued that the real criminal was Father Wiget, complaining, “Who is this priest who comes here from a foreign land to instruct us in our laws? . . . [T]he real objection is to the Bible itself, for, while that is read daily in our schools, America can never be Catholic.” MCGREEVY, *supra* note 138, at 8. Following a trial, the judge—who was a member of the nativist Know Nothing Party—ruled that the school official had not committed a criminal act but had instead correctly reprimanded an insubordinate child for refusing to comply with the mandatory curricular requirements of the Boston public schools. See *id.* Whall’s refusal to recite the Protestant version of the Ten Commandments threatened, in his view, the “granite foundation on which our republican form of government rests.” *Id.*

140 See HAMBURGER, *supra* note 106, at 216–17.

141 Lannie & Diethorn, *supra* note 8, at 48.

142 See *id.* at 48–57, 64.

provided that it was “without note or comment.”¹⁴³ Those final words prevented Catholic children from reading the heavily annotated Catholic *Douay-Rheims Bible*, and there was no unannotated English version of the Catholic Bible available at the time.¹⁴⁴ Still, Kenrick welcomed the resolution as a compromise.¹⁴⁵ Nativist Protestants did not. There ensued a flurry of anti-Catholic polemics in local papers arguing that Catholics were attempting to convert public schools into “infidel” institutions.¹⁴⁶ One paper asked whether citizens were “to yield our personal liberty, our inherited rights, our very Bibles . . . to the will, the ignorance, or the wickedness of these hordes of foreigners, subjects of a foreign despot” and “Papists” to whom the Protestant majority had “yielded . . . already too much.”¹⁴⁷ “‘The Bible in the public schools’ quickly became a nativist rallying cry.”¹⁴⁸

On May 3, 1844, Catholics and nativists clashed in the city’s Kensington neighborhood, and a riot ensued.¹⁴⁹ Over the next three days, entire blocks of Catholic homes were burned, as were St. Michael and St. Augustine churches and schools.¹⁵⁰ The city’s oldest church—St. Mary’s—was fortunately spared, but only because the nativist mob arriving to burn it down was dispersed by military troops.¹⁵¹ After three days, the violence subsided, although the governor was forced to dispatch troops to guard all Catholic churches for the next two weeks.¹⁵² Violence ensued on a smaller scale in July, 1844, and culminated with nativists dragging a cannon to the door of St. Philip Neri church.¹⁵³ The mob dispersed only after the Governor dispatched several thousand soldiers to the city.¹⁵⁴ A grand jury subsequently issued a statement laying the blame for the riots at the feet of the Catholics,

143 JORGENSEN, *supra* note 107, at 78 (quoting Lannie & Diethorn, *supra* note 8, at 57).

144 Lannie & Diethorn, *supra* note 8, at 58.

145 *Id.* at 64–65.

146 JORGENSEN, *supra* note 107, at 79 (citation omitted); *see also* Lannie & Diethorn, *supra* note 8, at 59 (“[The Protestant press] considered the whole affair as a Catholic device to . . . undermine the Christian, that is Protestant, and republican institutions of the United States. . . . [They] maintained that Catholics were deliberately interfering with public schools that were essentially and rightly Protestant . . .”).

147 Lannie & Diethorn, *supra* note 8, at 67 (quoting *Bibles in Public Schools*, 21 EPISCOPAL RECORDER (Phila.) 202 (1844)).

148 BRINIG & GARNETT, *supra* note 110, at 14.

149 *See* JORGENSEN, *supra* note 107, at 80–81.

150 *Id.* at 81.

151 *Id.*

152 *Id.*

153 JAMES. F. CONNELLY, THE HISTORY OF THE ARCHDIOCESE OF PHILADELPHIA 182–84 (1976).

154 *Id.* at 184.

concluding “that the riots had been caused by ‘the efforts of a portion of the community to exclude the Bible from our Public Schools.’”¹⁵⁵

During the nineteenth century, some state courts also 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.¹⁵⁶ Some courts praised the practice as supporting the development of morals and good discipline, taking care to emphasize the foundational role of non-sectarian Christianity in American society.¹⁵⁷ One court characterized the argument that the *King James Bible* could not be constitutionally included in the public school curriculum as absurd.¹⁵⁸

In *Donahoe v. Richards*,¹⁵⁹ decided in 1854, the Maine Supreme Court, however, took care to spell out its view of what was at stake. The decision’s backstory is a dramatic one. 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.¹⁶⁰ Father Bapst had previously sought to secure an accommodation for Catholic students, asking that they be permitted to recite from the *Douay-Rheims Bible* instead.¹⁶¹ His request was, not surprisingly, rebuked.¹⁶² The following day,

155 JORGENSON, *supra* note 107, at 82; *see also* CONNELLY, *supra* note 153, 178–86.

156 *See, e.g.*, Pfeiffer v. Bd. of Educ., 77 N.W. 250, 252–53 (Mich. 1898); Nessel v. Hum, 1 Ohio N.P. 140, 143–44 (Ct. Com. Pl. 1894); *see also* Moore v. Monroe, 20 N.W. 475, 475–76 (Iowa 1884) (holding that Biblical instruction in public schools did not violate Iowa’s First Amendment analogue so long as children had opportunity to opt out of mandatory readings).

157 *See, e.g.*, Spiller v. Inhabitants of Woburn, 94 Mass. (12 Allen) 127, 128–29 (1866) (noting, with respect to mandatory Bible recitation, “[n]o more appropriate method could be adopted of keeping in the minds of both teachers and scholars that one of the chief objects of education, as declared by the statutes of this commonwealth, and which teachers are especially enjoined to carry into effect, is ‘to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice, and a sacred regard for truth’” (quoting MASS. GEN. LAWS. ch. 71, § 30 (2025))).

158 *Stevenson v. Hanyon*, 7 Pa. D. 585, 590–91 (Ct. Com. Pl. 1898) (rejecting request for an injunction preventing reading of *King James Bible* in public schools as “absurd[.]” because Christianity was part of the law of Pennsylvania and observing that “[w]e do not understand how the reading of the Bible in the public schools can be termed sectarian instruction”).

159 *Donahoe v. Richards*, 38 Me. 379 (1854).

160 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>].

161 *Id.*

162 *Id.*

sixteen students were expelled for following Father Bapst's instructions.¹⁶³ In response, Ellsworth erupted in anti-Catholic fervor.¹⁶⁴ Nativists torched both of the town's Catholic churches and blew up the small Catholic school that Bapst had recently founded.¹⁶⁵ (The establishment of the school was also a flash point for the mob.¹⁶⁶) Father Bapst's bishop, fearing for his safety, ordered him to leave town.¹⁶⁷ When Bapst surreptitiously returned to visit his flock, the nativists apprehended him.¹⁶⁸ 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.¹⁶⁹ He survived, but barely—apparently, their matches failed.¹⁷⁰ Father Bapst, who later became the first president of Boston College, was tormented by memories of this ordeal throughout his life.¹⁷¹

One of the children who was disciplined for following Father Bapst's instructions—Bridget Donahoe—challenged her expulsion in Maine courts on religious liberty grounds.¹⁷² The Maine Supreme Court rejected both her claim and her request for an accommodation allowing her to read from the *Douay-Rheims Bible*.¹⁷³ The Court's opinion stressed the importance of a uniform public education and the need to adhere to the established curriculum in order to ensure that immigrant children became good citizens.¹⁷⁴ The opinion's concluding paragraph makes jarringly clear why:

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 It is the duty of those to whom this sacred trust is confided, to discharge it with magnanimous liberality and Christian kindness.¹⁷⁵

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*; see also *John Bapst*, NEW ADVENT, <https://www.newadvent.org/cathen/02258a.htm> [<https://perma.cc/XEG4-FDJB>] (last visited Jan. 27, 2025).

170 Garnett, *supra* note 160; NEW ADVENT, *supra* note 169.

171 Garnett, *supra* note 160.

172 See generally *Donahoe v. Richards*, 38 Me. 379 (1854).

173 *Id.* at 409–13.

174 See *id.* at 413.

175 *Id.*

The import was clear. Mandatory Protestant devotions in public schools were necessary to assimilate the “foreign masses.” Such devotions exposed immigrant, and especially Catholic, children to “the liberal spirit of our laws and institutions,” which, the court implied, meant Protestant Christianity. And it was the “sacred” duty of American citizens to ensure that such indoctrinations would remain.

B. Pursuing Assimilation and Homogenization Through Public Education Mandates

Despite the robust attention on Blaine amendments by scholars and courts, those measures may not have been the only (or perhaps even the most important) legal tool deployed by those who wished to ensure a uniformly Protestant character in American education. Indeed, at the same time that Blaine’s allies were pushing his amendment in state legislatures across the country, states also widely adopted constitutional provisions requiring the legislature to maintain a system of public schools. Several states adopted such provisions in the mid-nineteenth century,¹⁷⁶ although before the Civil War many other state constitutions provided for the support and maintenance of public schools but did not necessarily require them.¹⁷⁷ Like Blaine amendments, however, in the years following the war public education mandates multiplied quickly.¹⁷⁸ All states admitted after the Civil War except one adopted constitutional provisions imposing a duty to establish a system of public schools, and Congress initially denied the petition for entry into the union of the one state that did not—New Mexico.¹⁷⁹ The education mandates in these states also routinely specified that “sectarian” groups shall have no “control” in the public school system.¹⁸⁰ After the Civil War, some southern states were effectively

176 See *infra* Appendix A.

177 See Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW. U. L. REV. 1031, 1053–56 (2022).

178 See *id.*; *infra* Appendix A.

179 Black, *supra* note 177, at 1055. While new states admitted after the federal Blaine amendment failed in 1875 were often required to include a Blaine amendment as a condition for entering the Union, *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2268–69 (Alito, J., concurring), it is unclear whether Congress also always required the adoption of education mandates.

180 See, e.g., OKLA. CONST. art. I, § 5 (“Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control”); UTAH CONST. art. X, § 1 (“The Legislature shall provide for the establishment and maintenance of the state’s education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control.”); WASH. CONST. art. IX, § 4 (“All schools maintained or supported wholly or in part by the public [education] funds shall be forever free from sectarian control or influence.”); WYO. CONST.

required to include an education mandate as a condition of reentering the Union, although many readmitted states did so voluntarily.¹⁸¹ Reconstruction-era constitutional conventions in southern states emphasized the importance of a uniform public education as the means to prepare citizens to participate in democracy.¹⁸² Derek Black has argued that this “wave of constitutional education mandates became the model for the rest of the nation.”¹⁸³ Subsequently, northern states without a public education mandate voluntarily added one in the process of constitutional revision (although a number of states had already adopted one previously). By 1868, all but four states’ constitutions mandated a system of public schools, and the remainder acted soon thereafter to do so.¹⁸⁴ By 1875, only one state—Connecticut—lacked an education mandate in its constitution, although the document did reserve certain funds for public schools.¹⁸⁵

The historical connection between nineteenth-century battles over efforts to preserve the Protestant character of America’s public education and the adoption of state constitutional educational mandates has not been adequately explored. A full historical account of that connection—or an originalist account of the relationship between Blaine amendments and education mandates—is beyond the scope of this Essay. Tellingly, however, public education mandates and provisions prohibiting the public funding of religious schools frequently were ratified either at the same time or within a few years of one another, as is evident in the table below.¹⁸⁶ Most southern states initially adopted a public education mandate in their Reconstruction-era constitutions, and there is some evidence that they were at least tacitly required to do so as a condition of reentering the Union.¹⁸⁷ After

art. 21, § 28 (“The legislature shall make laws for the establishment and maintenance of systems of public schools which shall be open to all the children of the state and free from sectarian control.”).

181 Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 779–81 (2018).

182 See Black, *supra* note 177, at 1053–54.

183 *Id.* at 1055.

184 Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. STATE L. REV. 429, 457–60.

185 Black, *supra* note 177, at 1055–56.

186 See *infra* Appendix A.

187 Congress considered whether to include a requirement that states “establish and sustain a system of public schools open to all, without distinction of race or color” in the Reconstruction Act of 1867, which established the criteria for reentering the Union. Black, *supra* note 181, at 779 (quoting CONG. GLOBE, 40th Cong., 1st Sess. 165 (1867)). This proposal failed by the narrowest possible margin (20 to 20). *Id.* As Derek Black has argued, however, Congress exercised its authority to determine whether the reentering states’ constitutions conformed to the Republican Guarantee Clause, and education was one of the requirements for passing that bar. *Id.* at 779–81.

Reconstruction, most southern states adopted new “segregationist” constitutions that included a revised education mandate, required the segregation of public schools, and adopted, for the first time, a Blaine amendment.¹⁸⁸ A complete list of the dates that each state adopted an education guarantee and a Blaine amendment is included in the Appendix.¹⁸⁹ As it shows, in the great majority of states with both a Blaine amendment and an education mandate, these provisions were adopted at the same time.¹⁹⁰

In light of the illicit (and well-documented) motivations underlying the Blaine amendments and the fights over Protestantism in public schools, it is fair to question the extent to which contemporaneous education mandates were motivated by similar desires to homogenize and Americanize immigrant communities. Indeed, state education mandates were typically followed, within a few years, by the enactment of compulsory attendance laws, which had as their goal not just to educate children but particularly to control the growth and influence of Catholics and other immigrants.¹⁹¹ As Philip Hamburger has observed, nativists “perceived public education as an essential means of preserving American principles—especially, perhaps, separation. Only the government could ensure appropriate instruction in America’s ‘glorious heritage of civil and religious liberty’”¹⁹² As a result, by the mid-nineteenth century, nativist legislatures began to contemplate requiring *attendance* at the very public schools the states had recently been obliged to create.¹⁹³ These efforts were supported by, among other groups, the Ku Klux Klan, which argued publicly that, unlike in Catholic schools, in public schools children would be “taught *how to think, not what to think*.”¹⁹⁴

188 See ALA. CONST. of 1875, art. XIII, §§ 1, 8; GA. CONST. of 1877, art. I, § 1, para. XIV; *id.* art. VIII, § 1, para. I; FLA. CONST. of 1885, art. XII, §§ 1, 12, 13; LA. CONST. of 1879, art. 224; *id.* art. 227; MISS. CONST. art. 8, § 201 (amended 1987); *id.* § 207 (repealed 1978); *id.* § 208; S.C. CONST. art. XI, §§ 5, 7, 9 (amended 1973); TEX. CONST. art. VII, § 1; *id.* § 5 (amended 2019); *id.* § 7 (repealed 1969).

189 See *infra* Appendix A.

190 See *infra* Appendix A.

191 See Calabresi & Perl, *supra* note 184, at 469 (“[I]t is doubtful whether those laws were originally passed primarily because of the importance of education or simply to protect school-aged children that were being coerced to work for their families or because of anti-Catholic sentiment.”); R. FREEMAN BUTTS, PUBLIC EDUCATION IN THE UNITED STATES: FROM REVOLUTION TO REFORM 102 (1978) (“[T]here was undoubtedly a religious motive on the part of native-born Protestants to try to prevent the spread of what they considered not only ‘foreign’ language cultures but an alien Roman Catholic religion.”).

192 HAMBURGER, *supra* note 106, at 413 (quoting Orestes Brownson, *A Know-Nothing Legislature*, 3 BROWNSON’S Q. REV. 393, 398 (1855)).

193 *Id.* at 413–14.

194 *Id.* at 414 (citation omitted).

Ohio is a useful case study to explore these links. Article VI, section 2 of the Ohio Constitution directly pairs both a requirement that the state maintain public schools and a Blaine-like prohibition on the public funding of sectarian schools.¹⁹⁵ That provision reads,

The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but, no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this State.¹⁹⁶

It is difficult to dispute that anti-Catholic sentiment and concerns over the need to assimilate Catholic children through heavily Protestant public schools influenced its adoption.

When the no-funding provision of article VI, section 2 was first ratified in 1851, virulent anti-Catholic nativism had already taken hold in Ohio, where Catholic immigrants were increasingly settling. In Cincinnati, for example, immigrants made up nearly half the population, and the Catholic population of the diocese of Cincinnati grew from about 50,000 in 1844 to about 75,000 in 1850.¹⁹⁷ The boom in the Catholic population was reflected in the city's Catholic schools, whose enrollment went from 2,527 students in 1848 to 4,494 just three years later.¹⁹⁸ The rapid rise of Catholic immigrants led, predictably, to a rise in anti-Catholic nativism. The anti-immigrant, anti-Catholic Know Nothing Party, something of a precursor to the Ku Klux Klan, epitomized the trend.¹⁹⁹ Know Nothing representatives were elected to hundreds of seats at the state and federal level, including to numerous

195 OHIO CONST. art. VI, § 2. The Ohio Supreme Court has made clear on more than one occasion that article VI, section 2 does not prohibit programs, including parental choice programs, that indirectly benefit religious schools. *See Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999) (holding that school voucher program does not violate the no-funding provision of article VI, section 2 because it does not actually direct school funds from the state to religious schools); *see also* *Protestants & Other Ams. United for Separation of Church & State v. Essex*, 275 N.E.2d 603, 608 (Ohio 1971) (“[T]he sole fact that some private schools receive an indirect benefit from general programs supported at public expense does not mean that such schools have an exclusive right to, or control of, any part of the school funds of this state . . .”).

196 OHIO CONST. art. VI, § 2.

197 *See* DEPALMA, *supra* note 129, at 103; James A. Gutowski, *Politics and Parochial Schools in Archbishop John Purcell's Ohio 67* (May 2009) (Ph.D. dissertation, Cleveland State University), https://etd.ohiolink.edu/acprod/odb_etd/etd/r/1501/10?clear=10&p10_accession_num=csu1254177639 [<https://perma.cc/F6L5-HSNP>].

198 Gutowski, *supra* note 197, at 67, 86.

199 *See* *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2268–72 (2020) (Alito, J., concurring).

offices in Ohio in 1854 and 1855; all told the party had more than 120,000 members in the state and two representatives in Congress.²⁰⁰

And, in a familiar story, the Know Nothings and others in Ohio contended that immigrants—and especially Catholics—would destroy the country. Among other things, they warned that Catholics would undermine the social and political order by subverting the assimilationist goal of public schools.²⁰¹ As elsewhere, the state’s public schools had a distinctly Protestant character, and many Ohioans feared Catholic corruption of Ohio’s youth.²⁰² In Cincinnati, Archbishop John Baptist Purcell had been petitioning the city’s school board for more than a decade, objecting to the mandatory reading of the *King James Bible* in public schools and to the schools’ use of textbooks that demeaned Catholics.²⁰³ But in 1853, the Archbishop’s objections ignited an anti-Catholic backlash.²⁰⁴ An independent “Free School Ticket” was nominated specifically to prevent the apportionment of tax dollars to “sectarian” schools; the party’s mayoral candidate, anti-Catholic James D. Taylor, won thirty-five percent of the vote, finishing just four points behind the winner.²⁰⁵

These controversies boiled over into violence. In 1850, a mob in Chillicothe, Ohio, attacked a Catholic school run by the Sisters of Notre Dame.²⁰⁶ In 1853, a mob besieged Archbishop Purcell’s residence and burned a visiting Cardinal in effigy.²⁰⁷ That same year a nativist mob attacked the Cincinnati German neighborhood of “Over the Rhine,” clashing with Catholic residents, firing a cannon in the streets, and destroying ballot boxes.²⁰⁸ Echoing the Philadelphia riots of 1844, a “Cincinnati Bible War” broke out in 1869 after the school board adopted a resolution banning the use of the Bible in public schools.²⁰⁹ Many in the city believed this decision was part of a Catholic ploy to hinder public education.²¹⁰ The *Christian Advocate*, a Cincinnati

200 See *id.* at 2269; LUKE RITTER, *INVENTING AMERICA’S FIRST IMMIGRATION CRISIS: POLITICAL NATIVISM IN THE ANTEBELLUM WEST* 148–53 (2021).

201 See DEPALMA, *supra* note 129, at 82–84.

202 Cf. *id.* at 82.

203 See Stephan F. Brumberg, *The Cincinnati Bible War (1869–1873) and Its Impact on the Education of the City’s Protestants, Catholics, and Jews*, 54 AM. JEWISH ARCHIVES J., no. 2, 2002, at 11, 14; DEPALMA, *supra* note 129, at 104; Gutowski, *supra* note 197, at 89–90.

204 See DEPALMA, *supra* note 129, at 104–05.

205 See *id.* at 105; James A. Gutowski, *Bibles, Ballots, and Bills: Political Resistance to Parochial Education in 1870s Ohio*, 36 U.S. CATH. HISTORIAN, Fall 2018, at 51, 55.

206 Gutowski, *supra* note 197, at 87.

207 RITTER, *supra* note 200, at 155.

208 See DEPALMA, *supra* note 129, at 110.

209 See GREEN, *supra* note 129, at 93, 97.

210 *Id.* One opponent alleged that Catholics were trying “to knock out [the Republic’s] underpinning, to poison the very wells of its water of life . . . [to] darken the [very] light by which it lives and breathes,” and to “plunge [the nation] into the bottomless pit of

newspaper, “declared that Catholic opposition to Bible reading was part of a ‘Romanist policy’ that sought ‘the overthrow, the abolition, of the whole American scheme of Common School Education.’”²¹¹

While anti-Catholic hostility was evident in 1851 when Ohio’s education mandate was first adopted, the animus underlying that provision was made especially clear when the provision was retained at the state’s next constitutional convention in 1873–74. There, Joseph Carbery, a delegate to the convention and a Catholic, proposed an amendment to remove the mandate and its accompanying exclusion of funding for religious schools.²¹² Carbery argued that it was unjust to tax Catholics to support public schools that, in good conscience, their children often could not attend.²¹³ Carbery argued that the common schools were effectively closed to Catholics and taught in ways that denigrated their religion and compelled children to read Bible translations and sing hymns that amounted to “a form of Protestant worship in which we do not believe.”²¹⁴ His goal was modest: to foster religious toleration and freedom of conscience for Catholics who frequently enjoyed neither.²¹⁵

But Carbery’s fellow delegates refused to credit this plea. In response, one intimated that Catholics secretly wished to dominate the country and to eliminate religious liberty entirely.²¹⁶ Another argued that Catholic immigrants sought “the supremacy of the church over all the world.”²¹⁷ Arguments like these—that immigrants, and particularly Catholics, wanted to conquer the United States—had long been a trope of the nativist movement. In 1835, for example, Lyman Beecher, president of Lane Theological Seminary in Cincinnati, published *A Plea for the West*, in which he argued that the Pope intended to rule over the entire Mississippi Valley.²¹⁸

Atheism.” *Id.* at 99 (first, second, and fourth alterations in original) (quote corrected) (quoting A.D. MAYO, RELIGION IN THE COMMON SCHOOLS: THREE LECTURES DELIVERED IN THE CITY OF CINCINNATI, IN OCTOBER, 1869 at 17, 27 (Cincinnati, Robert Clarke & Co. 1869)).

211 *Id.* at 99 (quoting *Conspiracy Against the School System*, DAILY GAZETTE (Davenport), Dec. 3, 1869, at 2).

212 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES, THIRD CONST. CONVENTION OF OHIO 2186 (J.G. Adel reporter, 1874) (proposed amendment of Joseph P. Carbery to OHIO CONST. art. VI, § 2).

213 *Id.* at 2209.

214 *Id.*

215 *See id.* at 2203–07 (arguing for proportional state support for all religious schools so that no majority religion could “violate . . . man’s conscience” and enforce its worldview through the school system, *id.* at 2206).

216 *Id.* at 2207 (statement of J.W. McCormick).

217 *Id.* at 2209 (statement of T.E. Cunningham).

218 *See* DEPALMA, *supra* note 129, at 87; LYMAN BEECHER, A PLEA FOR THE WEST (Cincinnati, Truman & Smith, 2d ed. 1835).

Debate at Ohio's constitutional convention centered specifically on a supposed Catholic plot to control the minds of the youth.²¹⁹ One delegate warned that the proposal to eliminate the no-aid provision could be "reduced down just to this: that it is an assertion, on the part of the [Catholic] church, of supremacy over the rising generation, the growing children of this country."²²⁰ Another lamented that children in Catholic schools would have "their little minds . . . filled with jealousies, hatred, revilings, envy, and their imaginations . . . racked to invent slanders, detractions and injuries to be heaped on each other. God forbid that free America should witness these unholy scenes."²²¹ Were the clause eliminated, he warned, the "mental agony produced by the strife which must necessarily follow . . . [would] exceed the bodily suffering produced by the rack, under the Inquisition."²²² He painted a scene of religious believers "under the insane fervor of religious excitement" attempting to "baptiz[e] the earth in what their frenzied zeal calls infidel blood."²²³ The public schools, by contrast, would be a utopian melting pot: There, children of all backgrounds would "mingle together [and] form a loving group of little friends," whose "glad peals of laughter [would] ring out merrily and . . . wake up a joyous community to thank God for the common schools."²²⁴ In his words, the framers of article VI, section 2 had to safeguard the assimilationist force of common schools against "the evil results of a misguided sectarian education staring them in the face."²²⁵

To combat this supposed "evil," the delegates to the convention clung to the no-funding provision to ensure that Catholic or other "sectarian" schools would not operate on equal terms with all others. Some delegates sought to go further still, proposing an amendment that would have allowed the Ohio legislature to require all students to attend the public schools for a set amount of time during certain ages.²²⁶ Decades earlier, exactly this sort of law had been considered by the state legislature; children would have been required to attend public schools for three months each year, effectively preventing them

219 Statements like these echoed another favorite trope of the anti-Catholic nativist movement, that Catholic schools were the "*prisons* of the youthful intellect of the country." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2269 (2020) (Alito, J., concurring) (quoting GLENN, *supra* note 107, at 69).

220 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES, THIRD CONST. CONVENTION OF OHIO 2209 (J.G. Adel reporter, 1874) (statement of T.E. Cunningham).

221 *Id.* at 2188 (statement of Asher Cook).

222 *Id.*

223 *Id.*

224 *Id.*

225 *Id.*

226 *Id.* at 2186 (Committee on Education Report by Asher Cook, John D. Sears, Henry F. Page & Rodolph DeSteiguer).

from attending Catholic ones.²²⁷ Requirements like these might have closed the Catholic schools completely. And while that more dramatic measure failed, article VI, section 2, in its own more limited way enshrined much of the anti-Catholic prejudice that resonated in the state and at the constitutional convention at the time.²²⁸

The history of other states looks similar. Of course, there are the well-documented events in Philadelphia and Maine described above,²²⁹ along with similar episodes in New York²³⁰ and Massachusetts.²³¹ But

227 Gutowski, *supra* note 205, at 54.

228 These controversies also infected Ohio politics more broadly. In 1875, just a year after article VI, section 2, was re-ratified, a Catholic member of the Ohio House of Representatives, John Geghan, introduced a bill that would allow inmates in state prisons access to ministers from their own denominations. Gutowski, *supra* note 205, at 64. The bill's opponents, however, saw sinister motives. One newspaper warned, for example, that "the Catholics—the aggressive, prying, carping emissaries of Rome . . . are trying to give the education of the young into the hands of priests . . ." *Sectarianism in Prison—Mr. Geghan's Substitute*, CLEVELAND LEADER, Mar. 26, 1875, at 4. And when a Catholic newspaper celebrated the bill and expressed support for Geghan's Democratic party, the bill quickly became linked to the issue of school funding. See Gutowski, *supra* note 205, at 64–65. Edwin Cowles of *The Cleveland Leader*, for example, took the statement as a sign that Catholic voters were "taking orders from the archbishop of Cincinnati who had been commanded by Rome to destroy the public school system." *Id.* at 65 (citing *The Catholic Telegraph of Cincinnati*, CLEVELAND LEADER, Apr. 5, 1875, at 4). In 1875, political cartoonist Thomas Nast published a cartoon in *Harper's Weekly* that accused the same Archbishop of aspirations to a throne in Ohio and depicted images of the Pope "reigning in the United States" and a priest standing in the "Ohio Roman Legislature" with a bill labeled "down with public schools." Thomas Nast, *The Established (Foreign) Church in Ohio*, 19 HARPER'S WKLY. (N.Y.) 693 (1875); see *infra* Appendix B., fig.1. Broader political fights were likewise shaped by these controversies. In Ohio's 1875 gubernatorial race, for example, Republican candidate Rutherford B. Hayes connected the Geghan bill to the question of public-school funding throughout his campaign, directing that pamphlets about the Geghan bill and the schools be printed and distributed throughout the state. See Gutowski, *supra* note 205, at 68–70. The controversy over the Geghan bill resonated nationally, as well. *Harper's Weekly*, for example, opined that Democratic support for the Geghan bill showed that the Democrats "submit with groveling subserviency to the arrogant demands of the papal hierarchy, and are ready to sacrifice the most cherished principles of our political system" in an "attack upon the system of common-school education in Ohio." *The Great Question in Ohio*, 19 HARPER'S WKLY. (N.Y.) 698 (1875). When the October elections saw Geghan defeated in the House and Hayes elected governor, Nast published another cartoon, this one labeled "Canonized—Ohio, October 12, 1875," which depicted Geghan and his bill being fired from a cannon set up in defense of the public schools. Thomas Nast, *Canonized—Ohio, October 12, 1875*, 19 HARPER'S WKLY. (N.Y.) 928 (1875); see *infra* Appendix B, fig.2.

229 See *supra* Section II.A.

230 See generally Lannie & Diethorn, *supra* note 8 (describing similarities and connections between the nineteenth-century common-school controversies in Philadelphia and New York); see also *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2272 (2020) (Alito, J., concurring).

231 See Stephen Puleo, *Boston and the Irish, on the Anniversary of the Ursuline Convent Riots*, BEACON BROADSIDE (Aug. 12, 2010), <https://www.beaconbroadside.com/broadside/2010/08/boston-and-the-irish-on-the-anniversary-of-the-ursuline-convent-riots.html> [https://

the push against the influence of Catholics or other religious immigrants in the public schools was not isolated to the east. California, for example, adopted both a version of Blaine's failed amendment and a public education guarantee in 1879.²³² In combination, those provisions mandated a "system of common schools" in order to "preserv[e] . . . the rights and liberties of the people," but outlawed both the funding "of any sectarian or denominational school" and the incorporation of "any sectarian or denominational doctrine" in the common schools.²³³ As in Ohio, there is little doubt that prejudices about the untoward influence of Catholic and other immigrants motivated those provisions.

Prejudices against Catholic and Jewish immigrants were deep seated in California by the late nineteenth century. For one early American visitor to the region, gaining control of California from Catholic Spain in the early nineteenth century was needed to free its people from the "degrading shackles of ignorance and superstition."²³⁴ As California experienced its own influx of immigration in the 1830s, it too became home to nativist paranoia that a "foreign" "army" educated by the "despotic governments of Catholic Europe" would threaten American ideals.²³⁵ Protestant preachers implored Americans to move west "to make California the Massachusetts of the Pacific"—a state founded on Puritan values.²³⁶

Once again, religious schools were the familiar battleground. As elsewhere in the country, publicly funded common education included Bible reading and prayer, and many sought to stamp out disfavored "sectarian" beliefs that differed.²³⁷ In the 1850s, the Know Nothings gained political control across the state, including the governor's office, by seizing on public outrage at a recently enacted law that briefly allowed public funds to go to Catholic schools.²³⁸ Those prejudices

perma.cc/EB33-NZKK]. See generally Steven Taylor, *Progressive Nativism: The Know-Nothing Party in Massachusetts*, 28 HIST. J. MASS. 167 (2000) (describing rise of "anti-immigrant and anti-Catholic" positions of the Know-Nothing Party in Massachusetts, *id.* at 167).

232 See CAL. CONST. art. IX, §§ 1, 5, 8.

233 *Id.*

234 KEVIN STARR, AMERICANS AND THE CALIFORNIA DREAM, 1850–1915, at 15–16 (1973) (quoting WILLIAM SHALER, JOURNAL OF A VOYAGE BETWEEN CHINA AND THE NORTH-WESTERN COAST OF AMERICA, MADE IN 1804, at 75 (Saunders Studio Press 1935) (1808)).

235 BEECHER, *supra* note 218, at 56–57.

236 STARR, *supra* note 234, at 86 (emphasis omitted) (quoting T. DWIGHT HUNT, ADDRESS DELIVERED BEFORE THE NEW ENGLAND SOCIETY OF SAN FRANCISCO 20 (San Francisco, Cook, Kenny & Co. 1853)).

237 See BEECHER, *supra* note 218, at 12; DEBATES AND PROCEEDINGS, CONST. CONVENTION OF THE STATE OF CALIFORNIA 785 (E.B. Willis & P.K. Stockton stenographers, 1881) (statement of James Caples); *Id.* at 802 (statement of John P. West).

238 See STARR, *supra* note 234, at 94; *Our Common School Law*, 3 PAC. (S.F.) 60 (1854) (arguing that schools must be "free from sectarian influence and prejudice").

persisted throughout the nineteenth century,²³⁹ and ensured significant support for the Blaine movement. Reverend John Hemphill, a pastor in San Francisco, praised Blaine's proposal for reining in "sectarian" Catholic education while still preserving public schools' generic Protestant teachings.²⁴⁰ He opined that preventing sectarianism while retaining schools' Christianity appropriately "recogniz[ed] . . . that this is a Christian nation," not one founded by "Jew[s], Moham-medan[s], Buddist[s], Confucian[s] or Pagan[s]." ²⁴¹ Editors at the *Sacramento Bee* apparently agreed, though they observed that the amendment was largely unnecessary in the political climate of the time.²⁴² The newspaper reprinted an account from the *New York Tribune*, which praised Blaine's amendment as a shrewd political maneuver, even if the prejudices that made it so popular also rendered it superfluous: "Every politician knows the average well-to-do citizen" is sensitive to "the possibility of Roman Catholic aggression particularly with reference to the schools,"²⁴³ and thus Blaine's "proposal ha[d] the great advantage of being in a form to which nobody can object."²⁴⁴

After Blaine's federal proposal failed, California adopted its own along with the accompanying public education mandate. Both were adopted, much like Ohio's similar provisions, at a constitutional convention that was openly hostile to immigrants and Catholics. One delegate warned that sectarian schools served immigrants who "ma[d]e it their business to rob and plunder."²⁴⁵ Another argued that children "educated in sectarian schools . . . will know everything else but their duties as citizens"—apparently to great applause.²⁴⁶ He insisted, instead, that the State ensure children "be educated in the common schools in order to make thorough American citizens out of them."²⁴⁷ Even "sectarian" orphanages came under fire for being "hostile systems" that gave too much power to Catholic immigrants.²⁴⁸ And, again

239 See, e.g., *The Attack upon the Common Schools*, SACRAMENTO DAILY UNION, Apr. 15, 1861, at 3 (blaming political divisions on "sectarian[s]" who would "make an attack upon the Common Schools of this State"); Paul Goda, *The Historical Background of California's Constitutional Provisions Prohibiting Aid to Sectarian Schools*, 46 CAL. HIST. SOC'Y Q. 149, 157 (1967) (discussing failed reelection of a "Jesuitical demagogue" to the Superintendent of Public Instruction (citation omitted)).

240 See *The Public Schools: A Lecture by Rev. Mr. Hemphill on the President's Message*, DAILY ALTA CAL. (S.F.), Dec. 13, 1875, at 1.

241 *Id.*

242 See Goda, *supra* note 239, at 159–60.

243 *Id.* (quoting *The Schools and the President*, BEE (Sacramento), Dec. 13, 1875, at 1).

244 *The Schools and the President*, *supra* note 243.

245 DEBATES AND PROCEEDINGS, CONST. CONVENTION OF THE STATE OF CALIFORNIA 802 (E.B. Willis & P.K. Stockton stenographers, 1881) (statement of John P. West).

246 *Id.* at 1265 (statement of Alphonse Vacquerel).

247 *Id.*

248 *Id.* at 785 (statement of James Caples).

like elsewhere in the country, because a broad form of Protestantism was not considered to be “sectarian,” the amendment had no effect on the operation of existing common schools as functionally Protestant.²⁴⁹

Other similar stories abound. When Arkansas reentered the Union in 1868, it, like Ohio, adopted a public education mandate that both required the creation of a public school system and, in the same text, denied any “religious or other sect . . . any . . . control of any part of the school funds.”²⁵⁰ That proposal appears to come from the same checkered history of anti-Catholicism and nativism as the others discussed here.²⁵¹ A similar education mandate was included in Utah’s original 1895 constitution, along with a Blaine amendment.²⁵² Contemporary commentary suggests that anti-Catholicism likely also infected that constitutional process.²⁵³ So too in Illinois, which adopted both an education mandate and a Blaine amendment in 1870—and presumably many of the dozens of other states that adopted provisions like these during this time.²⁵⁴

* * *

As is surely obvious, there are many noble and worthy reasons that governments should create and maintain systems of free and open public education for all. Derek Black has further argued that the inclusion of state education mandates following the Civil War is suggestive of a federal right to public education.²⁵⁵ We do not mean to suggest that public school systems should *not* be maintained, nor do we engage with the difficult question of what rights to public education the Federal Constitution may promise.

Our claim is more limited: As the foregoing evidence suggests, the motives for passing these particular educational mandates in the mid-to-late-nineteenth century may not have been entirely benevolent. Undeniably state education mandates grew out of the common-school

249 See Goda, *supra* note 239, at 165–66.

250 ARK. CONST. of 1868, art. IX, § 1.

251 See, e.g., HAMBURGER, *supra* note 106, at 413–14 (discussing the Ku Klux Klan’s support for public education in Arkansas).

252 UTAH CONST. art. X, § 13 (amended 1987).

253 See, e.g., *Bible Knowledge*, 4 UNIV. CHRON. (Salt Lake City) 137 (1895); *Dr. York Stirs up the A.P.A.’s: A Large Meeting Last Evening to Hear Him Denounce the Churches*, STANDARD (Ogden), Dec. 5, 1895, at 1; *Will Lecture in Ogden*, STANDARD (Ogden), Nov. 30, 1895, at 4; *An Unusual Thing*, DAILY TRIB. (Salt Lake City), Sept. 15, 1895, at 5.

254 DEBATES AND PROCEEDINGS, CONST. CONVENTION OF THE STATE OF ILL. 1741 (Ely et al. stenographers, 1870) (statement of John P. Gamble) (“[I]f boards of education . . . are ready to vote the precious Bible out of the public schools, and forbid the use of religious books and the singing of sacred songs in the schools—what is this but the beginning of national suicide? . . . Then the Papacy will grasp [power], and the American republic become the grave of liberty.”).

255 Black, *supra* note 181, at 788–90.

movement, which was motivated—at least in part—by the same nativist, bigoted sentiments as Blaine amendments. And although we do not endeavor here to canvas the full history of public education mandates across the country, there appears to be good reason to believe that these legal provisions were formally—and perhaps inextricably—linked in many states that adopted them.

The connections between the Blaine movement and the growth of public education mandates deserve further exploration, and the full motivations beneath such mandates deserve greater attention by scholars and courts alike. At bottom, care should be taken to ensure that such mandates are interpreted to promote the benign aims of establishing a system of free educational opportunities for all—not to be wielded as tools for Blaine’s same pernicious goal of stifling measures that empower parents to exit that system when it fails to serve their children’s needs.

CONCLUSION

In *Pierce*, the U.S. Supreme Court held that the Federal Constitution gives parents exit rights in the education of their children. But without public funding, many parents struggle to exercise those rights. One hundred years later, an explosion of parental choice in the states is making exit a realistic possibility for millions of parents. The Court has made clear that the Blaine amendments—borne of bigotry and designed to curtail exit from public schools—cannot be wielded to block state laws that facilitate parents’ ability to find schools that are the best fit for their own children.

Now opponents of exit have turned to the Blaine amendments’ cousins—state education mandates—as an alternative strategy for blocking parents’ exit option. On their own terms, these provisions do not restrict parental choice, but rather simply require states to maintain public schools. They should be interpreted and enforced according to those terms. To do otherwise not only defies the basic language and scope of those laws but threatens to employ them as new vehicles to extend the “shameful” legacy of Blaine amendments that the Supreme Court has appropriately worked to put to rest elsewhere.²⁵⁶ Indeed, there is good reason to believe that public education mandates were adopted at least in part for the same nativist, bigoted reasons that Blaine amendments were—and out of the same desire to foist a homogenous, mandatory education on all children, as invalidated in *Pierce*.

256 Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion).

In recent years, courts and commentators have widely acknowledged and condemned those motivations in the Blaine context. Similar attention should be given—by courts and scholars but also those advocates who care about religious freedom and parental rights—to evidence of similar motivations in ongoing debates and litigation over the appropriate scope of public education mandates.

APPENDIX A

State	Education Guarantee Adopted	Blaine Amendment Adopted
Alabama	1868	1875
Alaska	1956	1956
Arizona	1910	1910
Arkansas	1868	None
California	1879	1879
Colorado	1876	1876
Delaware	1897	1897
Florida	1868	1885
Georgia	1868	1877
Hawaii	1959	1959
Idaho	1890	1890
Illinois	1870	1870
Indiana	1851	1851
Iowa	1846	None
Kansas	1861	1861
Kentucky	1891	1891
Louisiana	1868	1879
Maine	1820	None
Maryland	1864	None
Massachusetts	1780, as interpreted by <i>McDuffy v. Secretary of the Executive Office of</i>	1855

	<i>Education</i> , 615 N.E.2d 516 (Mass. 1993).	
Michigan	1835	1835
Minnesota	1857	1858
Mississippi	1869	1890
Missouri	1865	1875
Montana	1884	1889
Nebraska	1866	1875
Nevada	1864	1880
New Hampshire	1784, as interpreted by <i>Claremont School District v. Governor</i> , 635 A.2d 1375 (N.H. 1993).	1877
New Jersey	1947	None
New Mexico	1911	1911
New York	1894	1894
North Carolina	1868	None
North Dakota	1889	1889
Ohio	1851	1851
Oklahoma	1907	1907
Oregon	1857	1857
Pennsylvania	1874	1874
Rhode Island	1842	None
South Carolina	1868	1895

South Dakota	1889	1889
Tennessee	1834	None
Texas	1876	1876
Utah	1895	1895
Vermont	1777	None
Virginia	1869	1870
Washington	1889	1889
West Virginia	1863	None
Wyoming	1889	1889

APPENDIX B



Figure 1. Thomas Nast, *The Established (Foreign) Church of Ohio*, 19 HARPER'S WKLY. (N.Y.) 693 (1875).

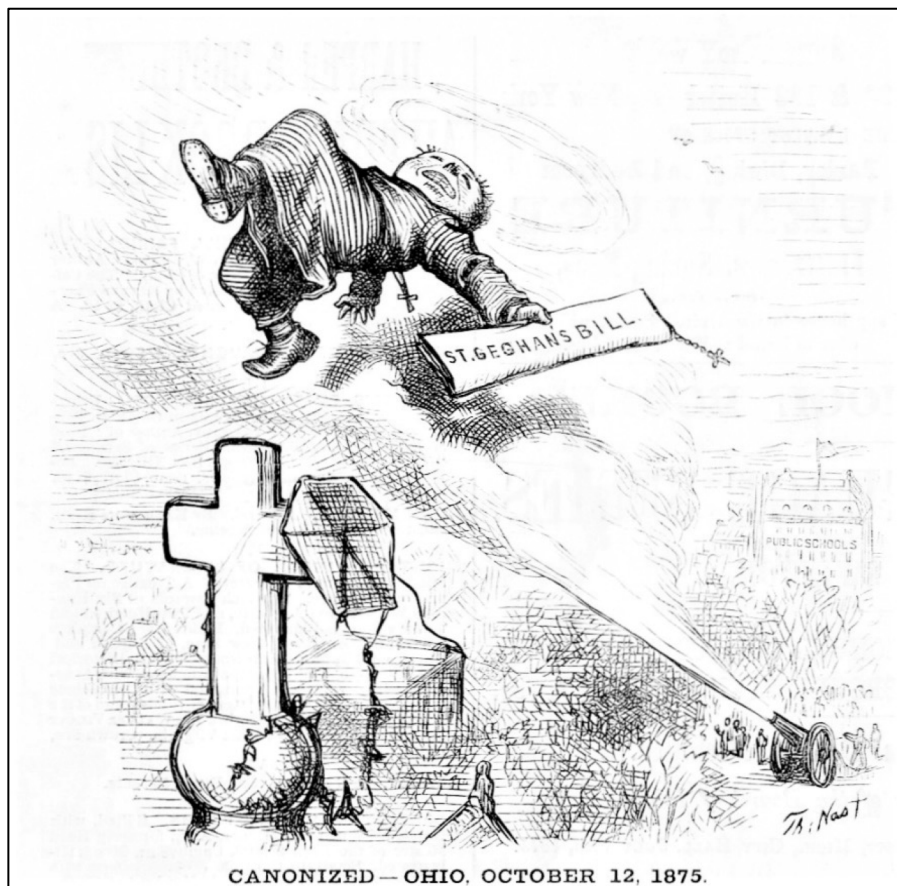


Figure 2. Thomas Nast, *Canonized—Ohio, October 12, 1875*, 19
HARPER'S WKLY. (N.Y.) 928 (1875).