Feature

The Centennial of *Pierce v. Society of Sisters*

The landmark decision legitimates the past, opens windows to the future of school choice

PIERCE V. SOCIETY OF SISTERS of the Holy Names of Jesus and Mary is a landmark court decision worthy of a centennial celebration by those engaged in the school choice movement. Announced by the U.S. Supreme Court on June 1, 1925, it guarantees parents the right to send their children to a private school. Yet a realistic appraisal must appreciate *Pierce* more as a precursor for what came later than for what the opinion itself declared. Though the decision uses a compelling phrase that rings across time—"the child is not the mere creature of the state"—the decision is best understood as consolidating existing practice at the time rather than setting a new agenda for American schools.

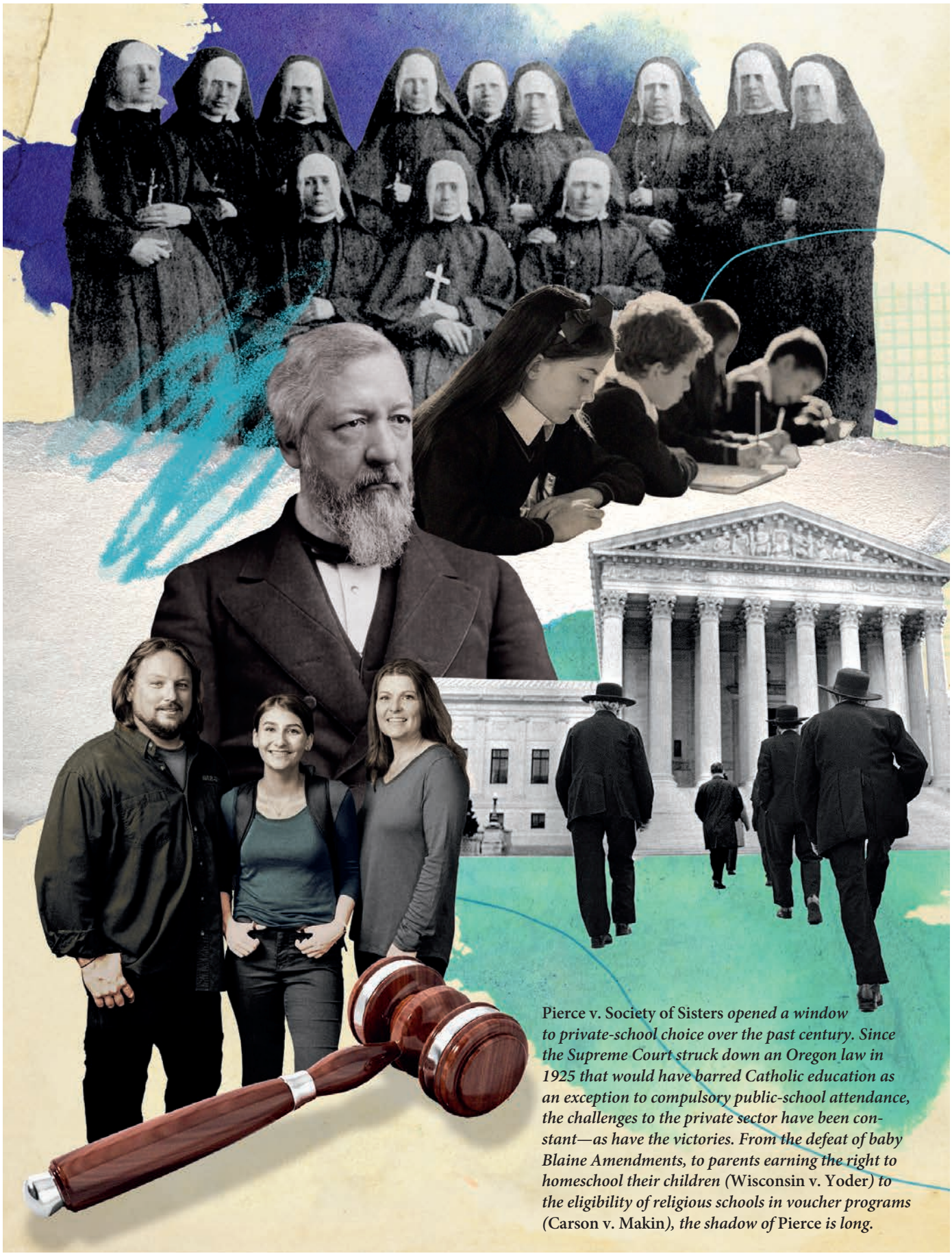
In 1922, Oregon voters passed an initiative that would amend the state's compulsory education law by deleting the private-school exception, thus compelling children between the ages of eight and 18 to attend public schools only. The Ku Klux Klan, known in the North as much for its anti-immigrant and anti-Catholic views as for its racist ideology, together with other like-minded organizations, campaigned successfully for the amendment. The law was about to take effect in 1926 when the Supreme Court, in *Pierce,* found it unconstitutional.

Pierce struck down an odious piece of legislation, and for that alone it deserves commemoration, but its practical effects were very limited. At the time, no other state or federal law prevented families from sending their children to private schools, though Nebraska had forbidden teaching in the German language, a restriction the Supreme Court deemed unconstitutional in *Meyer v. Nebraska* (1923).

The major issue facing private schools in the preceding decades had involved their financing, not their existence. Pierce does not address school finances in any way, nor does it give parents the right to withhold formal instruction at school. On the contrary, it says quite explicitly that "no question is raised concerning the power of the State . . . to require that all children of proper age attend some school."

Today's modern school-choice movement owes a debt to *Pierce* only because subsequent rulings took a direction the court did not foreshadow. Admittedly, the decision gives constitutional footing to alternative forms of schooling beyond the compulsory,

By PAUL E. PETERSON



Pierce v. Society of Sisters *opened a window to private-school choice over the past century. Since the Supreme Court struck down an Oregon law in 1925 that would have barred Catholic education as an exception to compulsory public-school attendance, the challenges to the private sector have been constant—as have the victories. From the defeat of baby Blaine Amendments, to parents earning the right to homeschool their children (***Wisconsin v. Yoder***) to the eligibility of religious schools in voucher programs (***Carson v. Makin***), the shadow of* **Pierce** *is long.*

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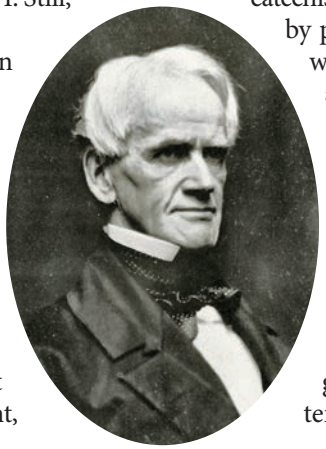
state-directed school system established by the followers of Horace Mann. But *Pierce* neither questions bans on public aid to religious schools nor endorses homeschooling. Those innovations would arrive many court decisions later. Only then would today's robust, tripartite system of school choice—private, charter, and homeschool—evolve to its current level.

A Status Quo Decision

Pierce's immediate impact was to preserve a private sector as old as the nation itself. A Catholic school opened in Philadelphia in 1782, and the number of such schools expanded rapidly with the arrival of Catholic immigrants from Ireland and Germany. This influx generated a perceived threat of "papist domination" in a hitherto overwhelmingly Protestant nation. In response, Horace Mann, secretary to the Massachusetts Board of Education, instigated a nationwide state-directed, compulsory public-school system that had a vaguely Unitarian cast not unlike Mann's own religious preference. To preserve their own faith community, Catholic leaders asked for public financial support for their own separate education system. Even though these requests were almost always denied, the U.S. Council of Catholic Bishops, in 1884, directed every diocese to provide for the Catholic education of parish children. On the eve of World War I, Archbishop John Lancaster Spalding celebrated the parish response to the bishops' call: "The greatest religious fact in the United States today is the Catholic school system, maintained without any aid by the people who love it." Over one million children attended Catholic schools at the time.

Oregon deviated from this practice when its voters embraced the initiative that banned instruction at any nonpublic school. It won a majority vote amid anti-immigrant sentiment sweeping the country after World War I. Still, Oregon was unique.

The issue of the day was not whether children could be taught in nonpublic settings but whether religious schools could receive public money. Catholic dioceses continued to plead for government aid, but these requests were routinely rejected by a predominantly Protestant nation. Maine Senator James Blaine, in 1874, with his eyes on the White House, proposed a constitutional amendment that would prohibit "money raised by taxation in any State" to be used for schools "under the control of any religious sect." President Ulysses S. Grant endorsed the Blaine Amendment, the National Education Association backed it, the House of Representatives approved it, but the Senate, by only a single vote, failed to give it the required two-thirds majority vote. Thirty-seven states inserted similar provisions, known as baby Blaine Amendments, into their own constitutions.



The godfather of public education, Horace Mann initiated a nationwide public school system administered by states.

WIKIMEDIA

Today's modern school-choice movement owes a debt to *Pierce*. The decision gives constitutional footing to alternative forms of schooling beyond the compulsory, state-directed school system.

Even without taxpayer dollars, private schooling advanced in the decades following the *Pierce* decision. After World War II, when Catholics entered the economic mainstream, parishes prospered, secondary schools were built, and the baby boom inspired educational commitment. The private sector expanded further when evangelical Christian schools were established in the South in the wake of the *Brown* decision. The opening of these schools was motivated in good part by a desire to preserve racial segregation (though Black pupils were increasingly welcomed to most of them in the decades following). The private-education sector peaked at about 14 percent during the early 1970s.

As the cost of schooling shot upward, private-school enrollments contracted. The Catholic share of all private enrollments dropped from around 80 percent of the total in the 1970s to less than 50 percent in 2021. Catholic schools no longer enjoyed the free labor of nuns who took an oath of poverty to provide instruction consistent with the Catholic catechism. The salaries of their teachers lagged those paid by public schools, but they still needed to keep pace with the rising cost of labor in the larger society. Sex abuse scandals and waning religious commitment added to the church's woes. Enrollment growth at other private schools offset some of the decline, but the percentage of students enrolled in the entire private-education sector fell to about 8 percent of all school-age enrollments.

Aid to Parochial Schools

Fiscally pressed, private schools turned to the government for help. For decades they encountered constitutional barriers not unlike the baby Blaine Amendments *Pierce* had left intact. In *Committee for Public Education v. Nyquist* (1973), the Supreme Court said government funds could not be used for tuition at an Orthodox Jewish school on the grounds it

violated the Establishment Clause of the First Amendment.

Three decades later, the legal situation shifted when the court, in *Zelman v. Simmons-Harris* (2002), found a voucher program in Cleveland constitutional on the grounds the program served educational rather than religious purposes. An even more abrupt change occurred in 2022, when the court ruled in *Carson v. Makin* that the Free Exercise Clause of the First Amendment required the inclusion of religious schools in a voucher program that had been available only to parents of children attending secular private schools. Excluding those who wished to attend religious schools imposed an unconstitutional cost on the exercise of their religion, the majority opinion said. Also, baby Blaine provisions by states were declared invalid if used to justify such exclusions.

As the constitutional context changed, so did the willingness of states to provide financial help to those attending religious schools. About half of the states now cover some private-school tuition through school vouchers, scholarships funded by tax credits, or education savings accounts. Yet even in these states, commitment is less than wholesale. Florida and South Carolina courts say school vouchers violate a constitutional clause that requires a unitary school system. Other states limit aid to lower-income families, place a cap on the number and size of student scholarships, or offer aid only to children with disabilities. About 12 percent of students attending private schools—roughly 1 percent of all U.S. students—receive a government subsidy.

JEFFREY ISAAC GREENBERG 11+ / ALAMY STOCK PHOTO

In matters of public funding for religious education, courts look more to the Free Exercise Clause—a legacy of* Pierce *that redounds to a future with more private-school options.

Additional states may adopt tuition-relief policies. Congress, in legislation now under consideration, could enact a nationwide school-choice program. But future growth in the private sector remains uncertain. As birth rates decline, the competition for students is increasing. Public schools face rapidly rising pension, health care, and other legacy costs. If migration to other sectors accelerates, many public schools may face closure. School districts and those who work for them are likely to oppose the expansion of their competitors.

Equal Spending

In many states, public-school parents have the right to equal and adequate education expenditure at the school their child attends. A long campaign for fiscal equity has yielded numerous court decisions that have boosted and equalized spending across school districts within the same state. That effort was undertaken without regard for its potential impact on private education, but because of the *Carson* decision, the movement could spill over into the private sector.

In the 1972 *Serrano v. Priest* case, the California high court interpreted the Equal Opportunity Clause of the Fourteenth Amendment as requiring equal levels of per-pupil expenditure by all school districts. The U.S. Supreme Court ruled to the contrary, saying a right to equal per-pupil funding is not to be found in the Fourteenth Amendment nor anywhere else in the U.S. Constitution. Nevertheless, in a reconsideration of *Serrano*, the Supreme Court of California said its state constitution guaranteed such a right. Later, the Kentucky high court declared that district expenditures per pupil must be adequate to pass constitutional muster (*Rose v. Council for Better Education, Inc.*, 1989). Since those decisions, equal or adequate funding has been declared a constitutional necessity in most states.

The same reasoning has yet to be applied to disparities in funding between public and private schools. The latter typically operate with one-half to two-thirds of the per-pupil expenditure available to public schools. If the courts were to apply the logic in Carson, they could find a constitutional right to require equal funding across the two sectors.

Pierce does not begin to hint at any right to equal funding between private and public sectors, but the practice is widespread in other industrialized countries. In France, Britain, Germany, Australia, Canada, the Netherlands, and elsewhere, governments provide roughly equivalent fiscal support for education in religious and secular schools.

Religious Charter Schools

Just as *Pierce* had no direct impact on private-school finance, so too has it had little significance for charter schools. That could change if the Supreme Court broadens the free exercise doctrine enunciated in *Carson*.

Forty-six states have enacted laws permitting the authorization of charter schools. Charters are quasi-public entities authorized by a state agency and publicly funded but managed by a nonprofit board. Authorizing agencies may be school districts, the state education department, a state university, mayoral offices, or a

special authorizing board. The charter sector has grown markedly since the first such school opened in Minnesota in 1991. Today it has reached about 7 percent of all students, but the rate of growth has slowed recently.

Charters do not enjoy the same rights to equal expenditures available to public schools under *Serrano*-style decisions, so schools in this sector spend about 20 percent less per pupil, on average, than is spent by nearby district schools. Nor do parents have a right to send their child to a charter school. State legislatures and authorizing agents are often reluctant to approve new charter schools out of a concern they will accelerate enrollment declines at district-operated schools in areas where enrollments are dropping. Oversubscribed charter schools often must turn away scores of applicants they cannot accommodate.

The legal and political landscape for charters could have shifted dramatically in 2025. The Supreme Court in April heard oral argument in *St. Isidore of Seville Catholic Virtual School v. Drummond,* a challenge to an Oklahoma court decision upholding the denied authorization of a Catholic charter school on the grounds it would violate the First Amendment's Establishment Clause. But on May 22, the court deadlocked on the decision 4–4 (after Justice Amy Coney Barrett recused herself from the case), effectively affirming the Oklahoma court's denial and leaving the possibility of religious charter schools to another case for another day. If the high court ever extends to charters the free exercise principle enunciated in *Carson,* then states that allow secular organizations to operate charter schools will not be able to deny that privilege to those that provide religious instruction.

Homeschooling

Pierce itself offers no constitutional support for substituting the home for the schoolhouse. The right to avoid compulsory schooling was not enunciated by the high court until 1972, when it said in *Wisconsin v. Yoder* that Amish parents had a right to educate their children at home after they had completed 8th grade. Before that ruling, only three states had in place a statutory framework for the practice of homeschooling, and the share of school-age children being educated at home was estimated to be well under 1 percent.

Yoder induced a major shift in state policy. States adopted frameworks for the regulation of homeschooling and, by so doing, provided a statutory right to parents. Homeschooling is now legal in every state, though under widely varying conditions. Regulation is more intensive in states that lean Democratic than in those likely to vote Republican. In the latter, homeschoolers typically need only to notify the district of their intentions. In some Democratic states, homeschoolers must receive permission from the local school district, which may require a homeschooling plan and student participation in state standardized tests.

As the constitutional context changed, so did the willingness of states to provide financial help to those attending religious schools. About half of the states now cover some private-school tuition.

The proportion of school-age children educated at home has increased from about 3 percent before the Covid pandemic to around 6 percent currently—roughly the same as the percentage attending charter schools. That share dwarfs homeschooling levels in Europe. France, Sweden, Germany, and Greece, among other countries, simply forbid the practice. A former opera singer once told me she never sang in Germany because of its restrictive homeschooling laws—authorities would have taken her daughter from her to ensure she went to school. In some countries, one can obtain an exemption from compulsory education if one is qualified to teach, adopts an acceptable curriculum, and presents the child for annual examinations. Very few families succeed at navigating the rules. England's laws are less stringent. Parents have the responsibility to provide "any . . . educational needs [the child] may have, either by regular attendance at school or otherwise." Still, only a little more than 1 percent of English children are homeschooled.

In the United States, the Home School Legal Defense Association (HSLDA) protects and enhances statutory rights to homeschool. It promises parents, for a $150 membership fee, legal assistance if they are threatened with prosecution for noncompliance with compulsory education laws. Over 100,000 homeschoolers have joined the organization, giving HSLDA resources that historian Milton Gaither says are used to mobilize members in support of legislative objectives.

> [B]ills aiming to increase homeschooling regulations almost always die in committee due to massive outcry from homeschoolers, responding to HSLDA alerts, and bills aiming to decrease homeschooling regulations are often successful, sometimes because of vocal advocacy by homeschoolers, and sometimes because of behind-the-scenes lobbying by HSLDA and its allies.

Since the Covid pandemic, homeschoolers have begun exploring new terrains. Parents have access to greatly expanded online instructional resources, facilitating homeschooling at the secondary school level. A growing number of homeschoolers are forming cooperatives where parents share the responsibilities of teaching small groups of students more general courses and hire tutors to provide specialized instruction. Other homeschoolers reach agreements with private schools, charters, or even friendly school districts, which allow children to be taught partly at home and partly at school. In some locales, homeschooled children are allowed to participate in district sports programs.

And the funds are starting to follow this burgeoning sector. Florida, Arizona, West Virginia, and 15 other states have enacted education savings accounts that set aside as much as $8,000 per child that families can use for educational purposes if a child is not attending public school. While that money is usually used to pay tuition at a private school, it can also be used for ancillary homeschool expenses, such as the purchase of computers, curricular materials, private tutoring, and music lessons.

However, the right to unfettered homeschooling does not go uncontested. In March 2025, a committee of the Illinois House of Representatives approved a bill resembling laws governing homeschooling in Europe. If enacted, the proposed legislation would require parents or guardians who teach their kids at home to notify their district of their intentions and show proof that they "have a high school diploma or its recognized equivalent." If district officials believe a child is not receiving proper instruction at home, they could ask for teaching materials and examples of student work. As Gaither would expect, homeschooling parents crowded the hearing rooms and hallways of the state capitol, casting doubt on the likelihood the bill would succeed in navigating the legislative labyrinth.

MARTHA STEWART

Harvard's Elizabeth Bartholet is among the vocal critics of homeschooling, questioning whether students receive an adequate education and are safe from abuse.

Critics of permissionless homeschooling have become increasingly concerned about the rights of students vis-à-vis their parents. Harvard Law Professor Elizabeth Bartholet argues that states should "deny the right to homeschool, subject to carefully delineated exceptions for situations in which homeschooling is needed." Like other critics, she says most parents are not capable of providing an adequate education, that their children do not acquire the skills needed for successful careers, and that they are isolated from their peer group. Abuse is the headline charge. "Child abuse and neglect characterize a significant subset of homeschooling families," Bartholet says. Child abuse is certainly a matter of public concern, but a recent study finds abuse is no greater in a homeschooling setting than otherwise, and even Bartholet admits "there is no way now to determine the exact scope of the child maltreatment problem in homeschooling."

Windows to the Future

Compulsory schooling spread throughout the United States after Massachusetts, at Horace Mann's behest, enacted such a law in 1852. Public schools fiercely defended their terrain when Catholic dioceses claimed the government should also fund the schools that parish children were attending. But not until Oregon voted to ban nonpublic schools did any state attempt to restrict a family's right to educate their child as they please. When *Pierce* struck down that infamous amendment to Oregon law, it was not breaking new ground but formally legitimizing a settled practice.

Pierce nonetheless opened windows to the future. The decision made clear that alternatives to public education were deeply embedded in a political tradition that gave precedence to the rights of the individual over the needs of the state. Pierce might have ignored baby Blaine Amendments that prohibited state funds from being used to support religious schools, but *Zelman* later said parents could receive a voucher for their child to attend a religious school. *Carson,* going further, declared the denial of vouchers for religious schools interfered with the free exercise of religion. *Pierce* might not have taken a position on whether a child could be kept from school altogether, but *Yoder* later legitimized homeschooling. Finally, Pierce might not have envisioned state-authorized religious schools— and the denial of a Catholic charter school in Oklahoma keeps that vision firmly in the future—but one day it could open the school door to religious charter schools authorized and funded by the state.

Pierce did not launch the school choice movement, but 100 years ago it laid the groundwork to advance the education options families enjoy today.

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