The Washington Post

What the Supreme Court missed about Wednesday's religious-schools case

Monica Kristin Blair

January 23, 2020

On Wednesday, the Supreme Court heard oral arguments for *Espinoza v. Montana Department of Revenue*. In this case, three mothers are suing the state of Montana over access to a now-defunct school choice program that used tax credits to fund private school vouchers. They hoped to send their children to religious schools, but the Montana Constitution forbade public funds from going toward religious organizations, including parochial schools.

The *Espinoza* plaintiffs are backed by a bevy of powerful conservative organizations. Major school-choice and private education advocates including the Cato Institute, the Council for American Private Education and the Billy Graham Evangelistic Association have filed amici curiae briefs supporting the plaintiffs arguing that prohibiting religious schools from getting public aid is a violation of the First Amendment.

On its face, *Espinoza* seems to be a small case concerning a now-defunct school voucher program, but in reality, it is the culmination of a 50-year campaign to provide parochial and other private schools with government money. If successful, these school choice advocates will remake American education by opening the door to publicly funded private religious education across the United States. In addition to breaking down the separation of church and state and taking much-needed funds away from the public education system, a victory by the mothers would exacerbate school segregation, thanks to the long history of racial segregation within parochial schools, something the justices largely ignored during oral arguments.

The plaintiffs and their powerful backers aim to strike down a provision, the Montana Constitution's no-aid provision, that bars allocating public money to sectarian schools. These sorts of amendments restricting aid to religious schools are often nicknamed Blaine amendments after U.S. Rep. James G. Blaine of Maine, who spearheaded an effort in 1875 to add such an amendment to the U.S. Constitution that would have prevented government funding from going toward sectarian schools. Currently, 37 states have them.

Opponents of no-aid provisions argue that they are a product of anti-Catholic sentiment. And they are correct that anti-Catholic sentiment did animate some 19th-century school reforms. But bans on publicly funding religious education actually go back to the founding in states like Virginia, where a 1786 statute was enacted to protect citizens from being compelled to support religious institutions of any kind. More recently, laws against school privatization emerged out of the 20th-century civil rights movement, when activists fought a wave of anti-public-school sentiment that arose in reaction to school desegregation.

Civil rights activists persuaded the Supreme Court to ban public school segregation in the 1954 case *Brown v. Board of Education*, and cities like Detroit began taking small steps to desegregate

their public schools in 1960. But by 1970, the NAACP had come to the conclusion that meaningful school desegregation was impossible within district lines because white residents were simply fleeing to the metro area's mostly white suburbs.

The NAACP sued the city of Detroit for segregating black children in what would become one of the most significant desegregation cases of the century: *Milliken v. Bradley*. The NAACP proposed a new solution in *Milliken*: school desegregation plans that crossed school district lines. In 1974, the Supreme Court ruled against the NAACP, thereby leaving racial divides between urban and suburban school districts intact for decades to come. But while *Milliken* aimed to tackle white flight across public school zones, it did nothing to address white flight to another overwhelmingly white sector of Michigan's schools: the private school system.

In the 1960s, the Michigan legislature began redirecting public funds to the state's overwhelmingly white and segregated private schools. In July 1970, the legislature passed S.B. 1082, a new general education budget that provided $22 million dollars in public aid for nonpublic schools, the majority of which would be used to pay the salaries of private school teachers.

Ninety-nine percent of nonpublic schools in the state were religious, and proponents of the bill argued that S.B. 1082 was a win for religious liberty. They also argued that it would help Catholic Schools that were struggling to afford teacher salaries after decades of relying on the largely unpaid labor of Catholic nuns.

But it was a victory for segregation as well.

Soon, civil rights activists challenged the constitutionality of giving public subsidies and tax breaks to newly formed "segregation academies" — new private schools that were not obligated to comply with desegregation — in Southern states like Mississippi. Michigan's civil rights community saw clear parallels between white flight to private schools in the South and North.

Black activists viewed private school subsidies as a segregation problem because Michigan's private schools, in contrast with its public schools, were overwhelmingly white in 1970. The executive secretary of the Detroit branch of the NAACP, William H. Penn Sr., lambasted "parochiaid" for promoting segregation and disadvantaging poor black children. "In part, this is a deliberate attempt to provide an escape for those who are fleeing the inner-city in an effort to avoid integration. … The key question is 'how can Government prohibit racial segregation in public schools and then foster private schools which are nothing more than segregated institutions.'"

Activists and parents alike also recognized that providing public funding to private schools would drain crucial revenue from public education.

Michigan's liberal-labor-black coalition against school privatization challenged the 1970 bill, gathering 320,000 signatures to place a new constitutional amendment, Proposal C, on the ballot, which would ban public funding for private education (it exempted transportation funds, a savvy move as these same organizations were attempting to encourage the state to pay for public school buses to desegregate). Proposal C passed in November 1970, only three months after S.B. 1082 was signed, with support from 56.77 percent of voters. The public-school coalition had won, and private and parochial school vouchers became unconstitutional in Michigan.

Today, school choice advocates are trying to undo this critical victory. What's more, these school choice organizations want to have their cake and eat it too. They want private schools to benefit from public funding, while remaining exempt from public regulations. But in the United States, unregulated schools are often segregated ones.

While public schools have a segregation problem, it is still true that private schools are more segregated than their public counterparts, and religious private schools are among the worst offenders. What's more, while barring children from enrolling in a private school because of their race is now unconstitutional (albeit hard to prove, as parents of color are usually responsible for proving that their child was a victim of racial discrimination), it is still perfectly legal for private and parochial schools to discriminate based on criteria like disability and sexual orientation.

Activists once fought hard to ensure that public funds go toward public schools because public schools accept every child, regardless of identity or circumstance. We should honor the choice that voters in states like Michigan and Montana have made to keep no-aid provisions on the books and public money in public schools.