

US Supreme Court considers ending ban on public funding for religious schools

By Nancy Hanover
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On January 22, the US Supreme Court heard oral arguments in *Espinoza v. Montana Department of Revenue*, a deeply reactionary case which takes aim at both the democratic principle of separation of church and state and the right to free, universal public education.

At stake is the legality of school voucher-type programs designed to divert millions in government dollars to private schools, the majority of which are religious-based. Should the court rule against Montana, which is very possible, the case will open the floodgates nationally for the dramatic expansion of these programs, an escalation of attacks on public schools and promotion of religious backwardness and divisions.

In 2015, a tax-credit scholarship program was created in Montana which allowed taxpayers to claim dollar-for-dollar tax credits for “donations” to a Student Scholarship Organization (SSO). The SSO then funneled the money into private scholarships, in some cases for the family members of contributors. Regardless of direct personal benefit, however, the individuals and businesses lowered their state tax payments by using the SSO intermediary to fund private schools. Out of 13 schools which benefited from this funding in Montana, 12 were religious-based.

In a December 2018 ruling, the Montana Supreme Court invalidated the scheme citing the “no-aid provision” of the state constitution which bars payments to religious schools. Thirty-seven US states have similar prohibitions, known as “Blaine Amendments.” A ruling against the Montana revenue department would serve as a green light to end all such no-aid provisions across the country.

Montana’s State Constitution is explicit, outlawing “any direct or indirect appropriation or payment from any public fund or monies ... for any sectarian purpose or to aid any church, school, academy, seminary, college, university or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.” The state’s 2018 high court ruling rightfully explained, “By creating a diversionary scheme whereby money otherwise bound for the public treasury is diverted, the Legislature has created an indirect payment.”

In their appeal of the state ruling to the US Supreme Court, plaintiffs Kendra Espinoza, Jeri Ellen Anderson and Jamie Schaefer claim discrimination, a violation of religious liberty and free-exercise rights. The group are low-income parents who used SSO tax scholarships at the Stillwater Christian School. *Espinoza*

v. has been brought by the libertarian *InMontana* for Justice and the case has received support from a wide array of well-heeled extreme-right organizations including the Koch Foundation, American Legislative Exchange Council (ALEC), and the family of US Secretary of Education Betsy DeVos. Supporting *amicus curiae* briefs have also been filed by dozens of other organizations including the Agudath Israel of America, Alliance for Choice in Education, former Wisconsin governor Scott Walker, the Christian Legal Society and the Trump administration.

A transparent purpose of “tax credit scholarships” is looting public coffers for private interests and opening the door to wholesale privatization of public education. The National School Boards Association makes this argument, in a supplementary brief, stating that the program is unconstitutional because of it strips money from public schools. “As the Montana constitutional delegates recognized, funneling public money to private schools does not propel improvement of public education, but rather, drains already limited resources and dilutes broad community support, undermining the very schools that most American children, including low-income children, attend.”

Nine states with Blaine Amendments have collectively filed another *amicus brief*, arguing that no-aid provisions “sought to solidify the Framers’ original design separating church and State.”

Douglas Layock, a law professor at the University of Texas at Austin and a leading scholar on religious-liberty issues, noted in *Education Week* the speed of the legal attack. If the high court rules against Montana, he said, “We will have gone from a presumption against aid to religious schools, to it’s permitted, to it’s required in some circumstances ... all in about 35 years.”

Last week Secretary DeVos also rolled out new rules which demand that faith-based colleges and student groups are given equal access to federal grants. Billionaire DeVos has long been a proponent of using schools for religious indoctrination, coupled with child labor and a thoroughly class-based “education system.”

Moreover, DeVos and the Trump administration are seeking to federalize these tax schemes. They have put at the center of their K-12 education proposals a call for a national tax-credit scholarship plan with funding of \$5 billion. Tax-credit scholarships have already stripped hundreds of thousands of dollars from local school districts spanning 18 states—including Alabama, Arizona, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Nevada, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Carolina and Virginia.

Trump's support to *Espinoza* is part and parcel of his fascistic appeal to the evangelical right. On January 3, he outlined a barrage of such initiatives, including overturning the prohibitions on school prayer. He couched his remarks in the anticommunism which has more and more dominated his 2020 message, saying, "We will not allow faithful Americans to be bullied by the hard left."

Some Supreme Court pundits have predicted a victory for *Espinoza et al* noting that five of the current US Supreme Court justices attended Catholic school. Justice Clarence Thomas has long opposed Blaine and the exclusion of religious schools from state aid. "This doctrine, born of bigotry, should be buried now," he said 20 years ago. The outcome of the case, expected by summer, is said to rest with the votes of Roberts and Breyer.

Supporters of the tax scholarship, like Thomas, stridently argue that the refusal to fund religious schools originated primarily from anti-Catholic bigotry and that the current case is about "the 150-year battle for religious freedom." History shows otherwise.

The principle of the separation of church and state and the fight for public education have a long historical connection, arising from the Enlightenment. That intellectual tradition which held that Nature was knowable and operated in accordance with laws that were accessible to the human mind has provided a theoretical foundation for the struggle for social emancipation and equality across the generations.

Enlightenment rationalists Voltaire and Diderot are credited as the first to state that it was the responsibility of government to educate a critical, responsible citizenry. Nicolas de Condorcet, also a major figure who worked with Thomas Paine and Benjamin Franklin, pushed the conception further, calling for a uniform structure of public education and equal chances for all.

Thomas Jefferson, the author of the famous description of the Establishment Clause of the First Amendment as "a wall of separation between church and state," was the first American to put forward a plan for public education. Arguing that democracy could be effective only in the hands of an enlightened people, he proposed public funding for at least three years of education for all children.

The common school movement of the 1830s was based specifically on the exclusion of religious instruction and increased taxes to finance schools. As the Encyclopedia Britannica notes, "Bringing the common school into being was not easy. Against it bulked the doctrine that any education that excluded religious instruction—as all state-maintained schools were legally compelled to do—was godless."

Nevertheless in the brief 12 years during Horace Mann's tenure on the Massachusetts Board of Education beginning in 1837, common schools were established, school appropriations doubled, teachers were paid more and the school year was extended. Similar campaigns spread among New England states and Pennsylvania and became known as "the educational awakening."

Following the Civil War and the growth of the industrial North, the fight for universal high-quality public education took a substantial leap. This included pedagogical advances along the lines of Enlightenment thinkers Johann Heinrich Pestalozzi and Friedrich Froebel, which advocated education of the poor,

promoted a child-centered approach to learning and added kindergarten.

In 1875, addressing war veterans, President Ulysses S. Grant called for church and state to be "forever separate." He said, "Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the church and state forever separate. With these safeguards, I believe the battles which created the Army of the Tennessee will not have been fought in vain."

It was this inspirational speech that led Senator James G. Blaine to advocate his constitutional amendment barring public money to be used for religious schools. The measure passed in the US House of Representatives but failed by four votes in the Senate. Nevertheless, due to overwhelming popular support, 37 states including Montana passed their own "baby Blaines."

The strongest advocates for secular education sought to suppress Catholic-Protestant divisions and expand access to schooling to the growing working class. Barring aid to religious schools was widely seen as critical to protect religious liberty.

The ruling oligarchy, Republican and Democratic alike, now seek to turn the clock backward, trampling on the entire legacy of hard-fought democratic rights. The promotion of religious obscurantism is a component of this attack, on graphic display when Attorney General Jeff Sessions defended the incarceration of children at the US-Mexican border citing Romans 13 to "obey the laws of government."

Of a piece with the attempt to tear down the "wall of separation of church and state" are the attacks on birthright citizenship, separation of powers and the First Amendment. These events warn, once again, that there is no longer a constituency within the ruling oligarchy for foundational democratic rights and that the capitalist system represents a mortal threat to all basic rights.

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