

School Choice

The Blaine Amendments & Anti-Catholicism



On June 1, 2007, the U.S. Commission on Civil Rights (the “Commission”) conducted a briefing in Washington, D.C. on the status and effect of Blaine Amendments, which are provisions in state constitutions that restrict the use of public funds to support private religious schools.

The Commission heard testimony from Anthony R. Picarello, Jr., Vice President and General Counsel of the Becket Fund; K. Hollyn Hollman, General Counsel of the Baptist Joint Committee for Religious Liberty; Ellen Johnson, President of American Atheists; and Richard D. Komer, Senior Litigation Attorney at the Institute for Justice.

Following are biographies of the four panelists, prepared statements by the four panelists, a written statement submitted by the Anti-Defamation League, and the transcript of the proceeding.

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Panelists' Biographies

Anthony Picarello

Mr. Picarello is vice president and general counsel of the Becket Fund for Religious Liberty. He has worked at the Becket Fund for over six years. He joined the Becket Fund after a three and a half year tour of duty at Covington & Burling in Washington, D.C. While in law school at the University of Virginia, Mr. Picarello served as essays editor of the Virginia Law Review and won the University of Virginia's Jessup International Law Moot Court Competition. He went on to clerk at the federal district court in Portland, Maine.

Before becoming a lawyer, Mr. Picarello earned his A.M. in religious studies from the University of Chicago and his A.B., *magna cum laude*, in social anthropology and comparative religion from Harvard University.

Mr. Picarello's bar memberships include Virginia, District of Columbia, United States Supreme Court, United States Court of Appeals for the First, Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits, the United States District Courts for the Eastern District of Virginia, the District of Columbia, and the Northern District of Illinois.

Hollyn Hollman

Ms. Hollman is general counsel of the Baptist Joint Committee for Religious Liberty in Washington, D.C., a religious liberty education and advocacy group formed nearly seven decades ago. As general counsel, Ms. Hollman provides legal analysis on church-state issues that arise before Congress, the courts, and administrative agencies. Her work includes preparing friend-of-the-court submissions, presentations for research institutions and religious organizations, and issue briefings for congressional staff.

Ms. Hollman writes a regular column for the Baptist Joint Committee's monthly publication, *Report from the Capital*. In addition, she consults with national print media on matters relating to church-state relations and has appeared in leading publications including *The Washington Post*, *USA Today*, *The Christian Science Monitor*, and *Christian Century*. Ms. Hollman has also appeared on National Public Radio, CNN, C-SPAN, Fox News Channel, NBC Nightly News and PBS "Religion and Ethics Newsweekly."

Prior to her work at the Baptist Joint Committee, Ms. Hollman was an attorney in private practice specializing in employment law and litigation. She practiced in firms in Nashville, Tennessee, and in the District of Columbia. She is a member of the U.S. Supreme Court, District of Columbia and Tennessee bars. Ms. Hollman graduated with a B.A. in politics from Wake Forest University. She received her J.D. from the

University of Tennessee College of Law, where she was a member of the Tennessee Law Review and the National Moot Court Team.

Ellen Johnson

Ms. Johnson is president of American Atheists and has been so for nearly a decade. In 1998, Ms. Johnson met with the Office of Public Liaison for the Clinton White House to discuss the subject of giving Atheists a “place at the table” in the discussion of issues of concern to our nation’s Atheists. Ms. Johnson has also testified before the United States Commission on Civil Rights on the unconstitutional expression of religion in public schools.

In 2001 Ms. Johnson met with the Minister of Foreign Affairs at the Pakistan Embassy in Washington, D.C. to discuss the unlawful imprisonment of Dr. Younis Shaikh, a Rationalist, on the charge of blasphemy. He has now been released from prison. That same year, Ms. Johnson was made an Honorary Associate of the Rationalist International. She also serves as an Honorary Board Member of “Scouting For All,” a nationwide group that seeks to end discrimination against Atheists and gays within the Boy Scouts of America.

Ms. Johnson has co-hosted the cable television program, “The Atheist Viewpoint,” since 1994. It now airs on over 45 cable systems throughout the United States. She is also a frequent guest on national radio and television shows, including the Fox Network’s “Hannity & Colmes,” “Heartland” with John Kasich, “The O’Reilly Factor,” MSNBC’s “Scarborough Country,” “The Larry King Show,” a Barbara Walters special, CNN’s “Paula Zahn Now,” and C-SPAN’s public affairs program, “Washington Journal.”

Ms. Johnson was chairperson of the Godless Americans March on Washington Task Force which on November 2, 2002 brought together thousands of Atheists, Freethinkers, Secular Humanists and other nonbelievers for an unprecedented display of unity in our nation’s capital.

Ms. Johnson also serves as executive director of the Godless Americans Political Action Committee, a nationwide initiative to support and elect Atheists to public office.

Richard Komer

Mr. Komer serves as senior litigation attorney at the Institute for Justice. He litigates school choice cases in both federal and state courts. Several of his current cases involve the constitutionality of allowing school choice programs to include religious schools among the private schools that can participate.

Prior to his work at the Institute, Mr. Komer worked as a civil rights lawyer for the federal government, working at the Department of Education and Justice, as well as the Equal Employment Opportunity Commission as a special assistant to the Chairman,

Clarence Thomas. His most recent government employment was as Deputy Assistant Secretary for Civil Rights at the Department of Education.

Mr. Komer received his law degree from the University of Virginia in 1978 and his B.A. from Harvard College in 1974.

Panelists' Statements

Anthony R. Picarello, Jr.
Vice President & General Counsel
The Becket Fund for Religious Liberty

Good morning. My name is Anthony Picarello, and I am Vice President and General Counsel for the Becket Fund for Religious Liberty. Thank you for the opportunity to come before you today to discuss the history of Blaine Amendments, and particularly their connection to anti-Catholicism.

This issue has been a special concern of the Becket Fund for many years. The Becket Fund is a nonpartisan, interfaith, public-interest law firm dedicated to protecting the free expression of all religious traditions. That mission includes opposition to government discrimination based on religion, including the government's exclusion of religious people or groups from public life or public benefits. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, as both primary counsel and *amicus curiae*.

Accordingly, the Becket Fund has been actively involved in litigation challenging "Blaine Amendments" as violations of the First and Fourteenth Amendments to the United States Constitution. As you know, Blaine Amendments are state constitutional amendments that were passed in the latter half of the 19th Century out of the nativist sentiment then prevalent in the United States. They expressed and implemented that sentiment by excluding from government funding schools that taught "sectarian" faiths (mainly Catholicism), while allowing those funds to the "common schools," which taught the "common" or "nonsectarian" faith (*i.e.*, non-denominational Protestantism).

The first of these amendments were passed in New York and Massachusetts, corresponding to waves of Catholic immigration, but they gradually spread through the Midwest. In 1875, James G. Blaine, a Congressman and presidential candidate came to be associated with these amendments by proposing one at the federal level. Although Blaine's amendment narrowly failed, it triggered a broader movement to add similar amendments to state constitutions that did not already have them, especially among the western states then in the process of being admitted into the Union. The last Blaine Amendment was added in the early 20th Century, leaving the current total at approximately thirty-five.

In short, Blaine Amendments were not designed to implement benign concerns for the separation of church and state traceable to the founding, but instead to target for special disadvantage the faiths of immigrants, especially Catholicism.

For years, The Becket Fund has worked to correct the historical revisionism that would erase this shameful chapter in our nation's history in order to protect state Blaine Amendments for use as the last constitutional weapon available to attack democratically enacted, religion-neutral school voucher programs, or social service programs that

contract with faith-based providers. We have filed three *amicus* briefs before the U.S. Supreme Court to document in detail the history of the federal and state Blaine Amendments.¹ We pursue lower court litigation on behalf of students and their parents who have suffered exclusion from educational benefits based on religion because of Blaine Amendments.² And we maintain a website dedicated exclusively to the history and current effects of Blaine Amendments (www.blaineamendments.org).

I realize that I only have a short time for my prepared remarks, so I feel constrained to paint in relatively broad strokes, with the hope of addressing the details in the course of our discussion later. So I'll limit myself to three broader points.

First, I want to identify the watermark of a true Blaine Amendment, which is use of the term “sectarian” to identify those who should be excluded from government aid. **Second**, I want to describe briefly how a majority of Justices currently sitting on the Supreme Court have already acknowledged the historical connection between the Blaine Amendments and anti-Catholicism. **Third**, I'd like to highlight some of the growing body of historical scholarship that has focused on and traced out in detail those same connections.

I.

One of the surest ways to spot a Blaine Amendment in a state constitution is to look for use of the term “sectarian” to describe the kind of entity (such as a “school,” “society,” or “institution”) that bears special legal disadvantage in the form of exclusion from government aid. The term “sectarian” is *not* synonymous with “religious” but instead refers to a narrower subcategory, connoting one or more “sects” or “denominations” of religion. For example, “nonsectarian prayer” is unmistakably religious but is not tied to

¹ See Brief of *Amici Curiae* the Becket Fund for Religious Liberty, *et al.*, in Support of Respondent in *Locke v. Davey*, 540 U.S. 712 (2004) (filed Sept. 8, 2003) (available at www.becketfund.org/litigate/LockeAmicus.pdf); Brief of the Becket Fund for Religious Liberty as *Amicus Curiae* in Support of Petitioners in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (filed Nov. 9, 2001) (available at www.becketfund.org/litigate/ZelmanAmicus.pdf); Brief of the Becket Fund for Religious Liberty as *Amicus Curiae* in Support of Petitioners in *Mitchell v. Helms*, 530 U.S. 793 (2000) (filed Aug. 19, 1999) (available at www.becketfund.org/litigate/MitchellAmicus.pdf).

² For the Becket Fund's own Blaine Amendment cases in the lower courts, see *Pucket v. Rounds*, No. 03-CV-5033 (D.S.D. filed Apr. 23, 2003); *Boyette v. Galvin*, 311 F. Supp. 2d 237 (D. Mass. 2004), *aff'd*, 412 F.3d 271 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 1165 (2006).

For Blaine Amendment cases where the Becket Fund has filed *amicus* briefs, see Brief *Amicus Curiae* of the Becket Fund for Religious Liberty Supporting Defendants-Appellees and Reversal in *Barnes-Wallace v. Boy Scouts of America*, 471 F.3d 1038 (9th Cir. 2006) (filed Feb. 24, 2005) (available at www.becketfund.org/files/63241.pdf); Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Appellants and of Reversal in *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (filed Jan. 24, 2005) (available at www.becketfund.org/pdfs/338_44.pdf); Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Reversal in *Gallwey v. Grimm*, 48 P.2d 274 (Wash. 2002) (filed Apr. 12, 2001) (available at www.becketfund.org/litigate/GallweyAmicus.pdf).

any one religious sect.³ The term “sectarian,” moreover, usually bears a pejorative meaning. Webster’s ⁴Dictionary defines “sectarian” to mean “of or relating to a sect or sects, narrow-minded and ready to quarrel over petty differences of opinion.” Along the same lines, the linguist William Safire recently noted that “[s]ectarian is a word long associated with religion that has a nastier connotation than its synonym denominational.”⁵ Thus, standing alone, the bare term “sectarian” in a state constitution both draws a religion-based distinction between those who receive and do not receive government aid, and indicates a government purpose to deny government aid to some disfavored subset of all religious persons or groups.⁶

Although the distinction between “sectarian” and “religious” may occasionally be blurred in common usage today, it was not when the Blaine Amendments first became law. Indeed, their historical context makes clear that their use of the term “sectarian” was not an oversight or a matter of mere semantics, but instead a common legal device to target for special disadvantage those who resisted the “common religion” then taught in the “common schools.” In other words, the meaning of “sectarian” can best be understood by reference to the “nonsectarian” religion to which it was opposed at the time.

Specifically, the term “sectarian” both expressed and implemented hostility to the faiths of those immigrants (especially, but not only, Catholics) who resisted assimilation to the “nonsectarian” Protestantism then taught as the “common faith” in the “common schools.” Denying aid only to “sectarian” schools allowed the government to continue funding the teaching of the government’s preferred “nonsectarian” faith through the public schools, while penalizing financially those who resisted that faith. In other words, state constitutional provisions that de-funded “sectarian” groups were not designed to implement benign concerns for the separation of church and state traceable to the founding, but instead to target for special disadvantage the faiths of the religious minorities of the late 19th Century – especially the religions of immigrants, and especially Catholicism.

II.

This basic history of the meaning of “sectarian” as a legal term has been confirmed in opinions of the U.S. Supreme Court written or joined by six current Justices.⁷ In *Mitchell*

³See, e.g., *Lee v. Weisman*, 505 U.S. 577, 581-82, 588-89 (1992).

⁴WEBSTER’S DICTIONARY OF THE ENGLISH LANGUAGE, THE NEW LEXICON (Encyclopedic Ed., Lexicon Pub. 1989).

⁵“Is It Sectarian Violence, Communal Fighting or Civil War?” *New York Times* (Apr. 9, 2006).

⁶See *Peter v. Wedl*, 155 F.3d 992, 996 (8th Cir. 1998) (“A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”) (quoting *Romer*, 517 U.S. at 633). See also *Romer*, 517 U.S. at 634 (“a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest”).

⁷The two opinions at issue encompass the votes of seven Justices, but Chief Justice Rehnquist has since passed away. I would expect both Chief Justice Roberts and Justice Alito to join this number in due course.

v. Helms, 530 U.S. 793 (2000), a plurality of four Justices acknowledged and condemned the religious bigotry that gave rise to the state laws that targeted “sectarian” faiths, commonly called “Blaine Amendments.” *See id.* at 828-29 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.). The opinion criticized the Court’s prior use of the term “sectarian” in Establishment Clause jurisprudence, because “hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.” *Id.* at 828. The opinion continued:

Opposition to aid to “sectarian” schools acquired prominence in the 1870s with Congress’ consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that “sectarian” was code for “Catholic.” *See generally* Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992).

Mitchell, 530 U.S. at 828. The plurality concluded that “the exclusion of pervasively sectarian schools from otherwise permissible aid programs” – the very purpose and effect of the state constitutional provisions here – represented a “doctrine, born of bigotry, [that] should be buried now.” *Id.* at 829.

In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), three Justices provided a detailed account of the relevant history in dissent. *See id.* at 720-21 (dissenting opinion of Breyer, J., joined by Stevens and Souter, JJ.). Not only did they recognize that the Blaine Amendment movement was a form of backlash against “political efforts to right the wrong of discrimination against religious minorities in public education,” they explained how the term “sectarian” functioned within that movement. *Id.* at 721.

[H]istorians point out that during the early years of the Republic, American schools – including the first public schools – were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals. *See, e.g.,* D. Tyack, *Onward Christian Soldiers: Religion in the American Common School, in History and Education* 217-226 (P. Nash ed. 1970). Those practices may have wrongly discriminated against members of minority religions, but given the small number of such individuals, the teaching of Protestant religions in schools did not threaten serious social conflict.

Zelman, 536 U.S. at 720. The Justices recounted how the wave of immigration starting in the mid-19th Century increased the number of those suffering from this discrimination, and correspondingly the intensity of religious hostility surrounding the “School Question”:

Not surprisingly, with this increase in numbers, members of non-Protestant religions, particularly Catholics, began to resist the Protestant domination of the public schools. Scholars report that by the mid-19th century religious conflict

over matters such as Bible reading “grew intense,” as Catholics resisted and Protestants fought back to preserve their domination. Jeffries & Ryan, [*A Political History of the Establishment Clause*, 100 MICH. L. REV. 279,] 300 [(Nov. 2001)] “Dreading Catholic domination,” native Protestants “terrorized Catholics.” P. Hamburger, *Separation of Church and State* 219 (2002). In some States “Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds ... rioted over whether Catholic children could be released from the classroom during Bible reading.” Jeffries & Ryan, 100 MICH. L. REV., at 300.

Zelman, 536 U.S. at 720-21. Finally, the Justices detailed how Catholic efforts to correct this increasingly severe discrimination elicited a reaction in the form of the proposed federal Blaine Amendment and its successful state progeny:

Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the “Protestant position” on this matter, scholars report, “was that public schools must be ‘nonsectarian’ (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support ‘sectarian’ schools (which in practical terms meant Catholic.)” [Jeffries & Ryan] at 301. And this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for “sectarian” (*i.e.*, Catholic) schooling for children. [Jeffries & Ryan] at 301-305. *See also* Hamburger, *supra*, at 287.

Zelman, 536 U.S. at 721. To be sure, the Justices in these two opinions differed on the legal consequences of these historical facts, but they still agreed on those facts.

III.

This agreement among the Justices reflects that the weight of scholarly authority in support of this account of the historical meaning and usage of the term “sectarian” is nothing short of crushing. Although these basic facts have long been documented, historians have focused their attention on that narrative much more frequently in recent years. Rather than recite the litany of law review articles⁸ and books⁹ before you now, I have cited some of them in my written testimony for the Committee’s future reference.

⁸ *See, e.g.*, Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 375, 386 (1999) (“From the advent of publicly supported, compulsory education until very recently, aid to sectarian schools primarily meant aid to Catholic schools as an enterprise to rival publicly supported, essentially Protestant schools.”); Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 50 (1997) (“Although there were legitimate arguments made on both sides, the nineteenth century opposition to funding religious schools drew heavily on anti-Catholicism.”). *See generally* DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL’Y 551 (Spring 2003); Duncan, *Secularism’s Laws: State Blaine*

I would only add generally that these are most emphatically *not* revisionist or otherwise marginal works of scholarship. Instead, they represent the very best work available on the topic, including books published by Harvard University Press and the Brookings Institute, and articles published by the Virginia and Michigan Law Reviews. In fact, I would encourage members of the Commission not to take my word for it, but instead to examine these sources for themselves to assess the quality of the scholarship and to assure themselves of this narrative.

I thank you once again for the opportunity to come before you today to discuss this important topic, and I welcome your questions.

Amendments and Religious Persecution, 72 *FORDHAM L. REV.* 493, 508-509 (2003); Green, *The Blaine Amendment Reconsidered*, 36 *AM. J. LEGAL HIST.* 38 (1992); Heytens, Note, *School Choice and State Constitutions*, 86 *VA. L. REV.* 117 (2000); Jeffries & Ryan, *A Political History of the Establishment Clause*, 100 *MICH. L. REV.* 279 (Nov. 2001); Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 *HARV. J. L. & PUB. POL'Y* 657 (1998)

⁹ See, e.g., PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 335 (Harvard Univ. Press, 2002) ("Nativist Protestants also failed to obtain a federal constitutional amendment but, because of the strength of anti-Catholic feeling, managed to secure local versions of the Blaine amendment in the vast majority of the states."). See generally RAY A. BILLINGTON, *THE PROTESTANT CRUSADE, 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* (1938); CHARLES L. GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* (U. Mass. 1988); LLOYD JORGENSON, *THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925* (1987); CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860*, at 3 (1983); PAUL KLEPPNER, *THE CROSS OF CULTURE: A SOCIAL ANALYSIS OF MIDWESTERN POLITICS, 1850-1900* (1970); WARD M. MCAFEE, *RELIGION, RACE AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870S* (S.U.N.Y. 1998); JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM* (2003); DIANE RAVITCH, *THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973*, at 50-52 (1974); WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION 1917-1927* (1994); JOSEPH P. VITERITTI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY* (Brookings 1999).

Supplemental Statement
Anthony R. Picarello, Jr.

I am writing to supplement my written testimony, first submitted on June 1, 2007, in order to respond to issues raised by the other live and written testimony presented on that same day.

First, it bears emphasis that no historical evidence was presented by any witness to contradict the substantial historical evidence in my written testimony (*see, e.g.*, page 10, notes 8 and 9) tending to show that anti-Catholicism was indeed an animating force behind the federal and state Blaine Amendments. Sometimes, this evidence was opposed with bald denials, but never with contrary evidence.

Second, the principal method of avoiding the crushing weight of this evidence was not so much to deny its existence, but to diminish its importance, most often by suggesting that the hostility that is so well documented does not represent the sole motivation for the Amendments. This is true but misleading. Undoubtedly, at least *some* of the various Blaine Amendments were motivated in at least *some* part by factors other than the desire to religiously homogenize immigrants toward nondenominational Protestantism. But to say as much is simply to recognize and avoid the fallacy of the single cause. Those other factors, though surely present, were just as surely dwarfed by the predominating purpose of hostility to Catholicism and other minority faiths of the late 19th and early 20th Centuries.

Third, I would add that this last sentence, though true, represents a far stronger historical claim than is necessary to trigger constitutional concern. Religion-based animus need not be the sole, or even the predominating, purpose of the Blaine Amendments for their application to violate the Equal Protection Clause of the Fourteenth Amendment. Instead, it need only be “a ‘substantial’ or ‘motivating’ factor behind enactment of the law.” *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (quoting *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). That is a relatively low bar that the Blaine Amendments would clear by a large margin – if ever the issue were squarely presented and decided by a court.

Fourth, I would note that it is another common tactic to impute anachronistically to the drafters of the Blaine Amendments the (at least facially) benign motives of those who may implement them in the present day. This is a close cousin of the tactic of anachronistically imputing to those drafters the benign form of separationism associated with the Founding (*e.g.*, the form that would reject special tithes for the religious training of clergy of any faith). In either case, this is simply a method of manufacturing benign factors that were not actually operative at the time of the passage of the laws at issue, as another means of diluting the relative importance of religion-based animus as a motive for those laws. And as *Hunter* teaches, it is the motive at the time of passage that is the constitutionally relevant one. *See Hunter*, 471 U.S. at 232-33 (law violates Equal Protection Clause where “its **original enactment** was motivated by a desire to discriminate [based on a suspect classification] and the section continues to this day

to have that effect.”) (emphasis added).

Finally, I would incorporate by reference into my written testimony the authorities and arguments contained within the briefs hyperlinked in my initial written testimony (*see, e.g.*, pages 3-4, note 1-2), and within the briefs we have filed more recently in the case of *Pucket v. Rounds*, which are hyperlinked here (opening brief at <http://www.becketfund.org/files/63a0c.pdf>; reply brief at <http://www.becketfund.org/files/aed2a.pdf>). In the aggregate, these briefs tend to cover most of the arguments raised through the oral and written testimony on this subject, and do so in more detail than the constraints of the process would otherwise allow.

I would be happy to answer any further questions that the Commission may have, and I would thank you and the Commission once again for its interest in this terribly important (but too often ignored) subject within the realm of civil rights.

K. Hollyn Hollman
General Counsel
Baptist Joint Committee for Religious Liberty

I am K. Hollyn Hollman, General Counsel for the Baptist Joint Committee for Religious Liberty. I am a graduate of Wake Forest University and the University of Tennessee College of Law. Prior to joining the BJC in 2001, I practiced law in the areas of commercial litigation and employment law. Thank you for this opportunity to present testimony, as requested by the Commission’s staff on “Blaine-type” amendments contained in state constitutions and their application in the context of school choice legislation.

The BJC is a seven decades old education and advocacy organization in Washington that is committed to defending and extending religious liberty for all. We do this by championing our Baptist heritage that emphasizes that religion must be free, neither advanced nor inhibited by government. We stand on the shoulders of our Baptist forebears who fought and died defending religious freedom in this country and in Europe.

The BJC opposes tax-funded vouchers to the extent that such programs allow public funding of private religious programs and purposes. For us and for many religious people across a broad spectrum, the principle prohibiting government funding of religion, including government funding of religious education and institutions, is a principle closely related to protecting religious freedom for all. We are deeply invested in the history and development of the principle, as well as its preservation, because it has been a core aspect of ensuring the separation of church and state in ways that benefit both.

I am familiar with arguments coming from those in the voucher movement seeking to eliminate religious liberty provisions that pose a legal barrier for the public funding of private religious purposes, such as the funding of religious schools. Painting such provisions with a broad “anti-Catholic” brush is a flawed tactic that betrays our country’s rich history of religious freedom. It emphasizes an anomalous period of religious conflict and threatens to mislead about the historic origins and contemporaneous importance of concepts of church-state separation.

Overview

Especially since the U.S. Supreme Court’s June 2002 decision in the Cleveland voucher case, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), in which the Court upheld a school funding program that included religious schools against an Establishment Clause challenge, advocates of tax-funded education vouchers (also called school choice programs) have been focused on overcoming other legal barriers to such proposals. In litigation in several states, including Florida, Washington, and South Dakota, voucher proponents have challenged state constitutional provisions that provide additional legal protection against government-sponsored religion on the basis that they are “born of bigotry” and tainted by association with anti-Catholicism. The effort is one that portrays laws that prohibit government funding of religion as sharing a common and pernicious

heritage that has resulted in discrimination against religion. In fact, neither the heritage nor the result of such laws can fairly be equated with religious discrimination.

Most state constitutions have provisions that touch on the issue of public school funding, among other issues, in ways that differ from the federal constitution. Specifically, many states have strong religious liberty provisions (protecting free exercise and no establishment values) that provide more explicit protections than in the First Amendment. For example, many state constitutions have provisions that prohibit the expenditure of public funds in aid of or to support any religious school. While the “no-aid” provisions of state constitutions vary in precise wording, as well as interpretation by state courts, some advocates apply the label “Blaine amendment” to them broadly in an effort to relate them to particular aspects of the national debates over school funding in the late 1800s.

The effort to refer to state constitutional “no-aid” provisions generally as “Blaine amendments” (failing to note that some existed *prior* to the Blaine episode) and to dredge up ugly historical episodes in an effort to discredit these provisions and prevent their enforcement should be viewed with skepticism. Neither the history of these constitutional amendments, much less their effect, can accurately be captured by reference to one set of arguments made at a particular time in history.

While a review of history may be a worthy endeavor in and of itself, and there is no denying that anti-immigrant and anti-Catholic sentiment fueled some of the debates about government funding of religious schools during particular times in U.S. history, we should seek to read history fairly and responsibly. I note here that despite the Commission’s recently expressed interest (May 22, 2007 correspondence with this panelist) in the origin of the federal Blaine amendment, no historians appear as panelists today. If the actual history of the Blaine amendment is a matter to be addressed in a report of the Commission, I would urge that the record should remain open for the purpose of obtaining scholarly contributions from historians that have studied the matter. It does not take a professional historian, however, to see that the history surrounding the Blaine amendment of 1875, much less the history of all of the various state constitutional provisions that pose barriers to school choice programs, is not uniform. Moreover, the relevance of historical animus of some toward immigrants in the late nineteenth century to current debates over funding religious schools is highly questionable since the state constitutional provisions are applied broadly to all religious institutions and do not discriminate based upon particular religious denomination.

The “no-aid to religion” principle reflected in many state constitutions, as in the federal Constitution, developed independently of any bias against a particular religion. Its roots and effects are tied closely to principles embedded in the American tradition of religious liberty. Moreover, the overwhelming effect of the principles embodied in these and other legal provisions has been broad confidence in government neutrality toward religion and a vibrant, free marketplace of religion led by religious institutions, such as houses of worship and religious schools that are largely self-funded and self-regulated. The state constitutional provisions, like the First Amendment, have been interpreted to prohibit the funding of religion broadly, a principle that cannot fairly be seen as discriminatory

toward any particular religion. Whatever the claims about the historical character of public schools and the legal prohibitions that prevented the funding of parochial schools in the nineteenth century, there is no evidence in recent years that these state provisions or the federal Constitution are interpreted as only prohibiting aid to a specific religion. Furthermore, there is no evidence that the effect of such laws has been harmful to religion. Many would argue that they have been good for religion and religious liberty.

1. Laws prohibiting the funding of religious institutions serve core Establishment Clause values.

Like the First Amendment's Establishment Clause, state constitutional amendments that prevent funding of religious institutions, are part of our country's historical commitment to religious freedom and the separation of church and state. It is impossible to discuss the meaning of state constitutional provisions that prohibit aid to religion without discussing the values that have influenced our country's commitment to religious freedom also reflected in the federal Establishment Clause of the First Amendment, as later applied to the states through incorporation, stating: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

State constitutional amendments that bar funding of religious institutions are part of the broad, multi-faceted legal tradition in this country that protects religious freedom. It is a core value of America's tradition of religious freedom that the government does not fund religion. While there are a large number of debates about the precise meaning of the Religion Clauses, the Supreme Court has often cited the importance of avoiding government's financial sponsorship of religion. "It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970). The U.S. Supreme Court has traditionally and continually interpreted the First Amendment as prohibiting government from directing tax funds to religious institutions. It has repeatedly cited "special Establishment Clause dangers" where government makes direct payments to religious schools. See *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 842 (1995) (listing cases). The prohibition on government aid for religion has protected against the corrupting influence of government money on religious bodies and served the interest of government neutrality toward religion. It has also helped to prevent regulation of religious institutions that would otherwise be needed to prevent the diversion of tax funds to religious purposes or other regulatory conditions that generally follow government aid.

In this country, religion has traditionally been a matter of voluntary practice not governmental coercion. The principle that citizens should not be taxed to support religion harkens back to the fights for disestablishment in the states and the passage of the Virginia Act for Establishing Religious Freedom. Writings at the time of our country's founding argue forcefully that government should not promote religion, nor interfere with its practice. These values are deeply rooted in our history and in our current legal standards. See generally, James Madison's Memorial and Remonstrance, which was written in opposition to a bill to levy a general assessment for the support of teachers of

religions (plural establishment). The Supreme Court has recognized a guiding principle in the words of James Madison that "[t]he Religion ... of every man must be left to the conviction and conscience of every man." Memorial and Remonstrance Against Religious Assessments, 2 Writings of James Madison 183, 184 (G. Hunt ed. 1901). See also The Virginia Act for Establishing Religious Freedom in 1779, originally drafted by Thomas Jefferson, and providing that "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."

It is important to note that these writings arose in the context of a proposal that may be considered a "choice" program—taxes were levied but applied to various religions according to the preference of the individual taxpayer. The arguments against such state supported religious education demonstrate a principle concerned with freedom of conscience and other religious liberty interests, not a concern to prohibit government support for any particular disfavored religion. Thus, such arguments are directly applicable to modern debates about the relationship between government and religion and whether government can fund religious education. In short, there is nothing suspicious nor anti-religious or anti-Catholic about the principle that government dollars do not fund religious education.

For Baptists, like those the BJC serves, the principle that citizens should not be taxed to support religion is fundamental, deeply rooted in the struggle against established religions and in the Biblical command to render unto Caesar that which is Caesar's and unto God that which is God's. It goes hand in hand with the principle that the state should not interfere in ecclesiastical affairs. Baptist history is filled with heroes of the faith that advocated for religious freedom and separation of church and state.

Two major contributors to the Baptist legacy that champions religious freedom were noted for their commitment to the principle that citizens should not be taxed to support religion and the government should not interfere in ecclesiastical affairs. Both Isaac Backus (1724-1806), a Massachusetts Baptist preacher known for his evangelical theory of separation of church and state who fought in the movement for disestablishment, and John Leland (1754-1841), a Baptist pastor and advocate for religious freedom in Virginia and for the First Amendment, wrote extensively in the late 1700s about the need for the separation of church and state. These early religious proponents of separation of church and state fought specifically against any religious taxation. For them, the matter was jurisdictional: the state has no legitimate power over religious matters. Taxation to support churches contradicted their belief that religious commitments must be voluntary to be valid.

They did not advocate that all faiths be given tax funds equally. They believed the government lacked legitimate power to tax citizens for the support of religion. The reasons they cited included protection of freedom of conscience, the corrupting effect of establishment on religious integrity, and threats to the vitality of state-supported religion. These arguments did not involve a rejection of the involvement of religious people in politics but a defense of the independence of religious institutions. While historians may

note that these heroes of the faith differed on some aspects of separation and the means by which they advocated them, their focus was against any tax support of religious institutions, along with the equally held commitment that government stay out of religious affairs.

Volumes have been written about these and other contributors to religious freedom. Most significant for purposes of this discussion, however, is that they articulated the principle that religion should not be supported by tax dollars. They did so long before any discussion of a “Blaine amendment” or the anti-Catholic sentiments prevalent in the late nineteenth century. They made a contribution to a school of thought reflected in our laws and popular opinions that is still valid and valued today. Thus, the idea that religious institutions should be self-supported long predates and is tied to the fight for religious freedom for all. It is in no way diminished by some who supported the concept for ill motives in later years.

2. Historical development of no-aid principle in the development of public schools.

A more specific application of the general principle of no government funding for religion developed in the course of the development of the public schools, which began in the late eighteenth century. Though the “no funding” of religion principle was applied in a way that differs from our modern understanding, the prohibition of public funding of private sectarian schools arose independently of anti-religious animus. Long before any period of significant Catholic immigration, the principle of no-aid was established in development of the public schools in this country with the use of the term “sectarian” applied to Protestant entities. Both the gradual development of public schools and the application of the term sectarian in that development and the debates about funding schools counter attempts to reduce state constitutional no-aid provisions to anti-Catholic measures. See Steven K. Green, *‘Blaming Blaine’: Understanding the Blaine Amendment and the ‘No Funding’ Principle*, 2 First Amendment L. Rev. (Winter 2003).

3. The Blaine Amendment and 19th century anti-Catholicism.

The Blaine Amendment, named for the Representative James G. Blaine of Maine, was introduced in 1875. Its text read: "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations." The amendment failed in Congress, but amendments with similar language were later adopted by many states. While the subsequent passage of such amendments in the states has been linked to anti-Catholic sentiment, the history of those amendments and even the federal Blaine Amendment debate cannot be reduced to a single phenomenon. In fact, the historical record on Rep. Blaine (his mother and daughters were Catholic, he argued for the amendment using terms of freedom of

conscience for all, his biographers make only passing mention of it in his political career, etc.) does not support the anti-Catholic label that has been attached to his name.

The introduction of the amendment arose in a historical context that involved more than the question of whether government would fund parochial schools. The debate surrounding the Blaine amendment involved whether funding of religious schools violated principles of religious freedom and no establishment, the nature of public education (whether it would be religious or secular), the extent to which education should be universal, whether the national government should mandate public education, and how best to diffuse religious strife. Even those that have harshly criticized the application of state constitutional amendments admit that it was a much more diverse debate than Catholics vs. nativists and included concerns of liberal Protestants, free-thinkers, and Jews who opposed the nonsectarian, but religious, character of the nation's schools. Many scholars recognize the complexity of the Blaine Amendment as transcending the issue of anti-Catholic animus.

More importantly for today's discussion, these historical events have little relevance to the usage of the concepts in more recent times. Criticism of certain concepts of separation as used in the nineteenth century aside, critics of the state Blaine amendments that charge they are tainted by bigotry lack evidence that these statutes (or the terms used in them) are currently used or interpreted in ways that specifically harm Catholics or religion in general.

4. The no-funding principle, evident in state constitutions and other sources of law, continues to protect religion, religious liberty and the autonomy of religious institutions.

While the Supreme Court has become more permissive toward indirect funding of religious institutions in recent years, changes in Supreme Court jurisprudence are not based on a rejection of the value that government should not fund religion, which remains a significant factor in the current debates over vouchers. *Zelman* was not a rejection of Establishment Clause values and certainly no indication that state prohibitions on funding of religious institutions were invalid as remnants of bigotry. Instead, the Court accepted a theory that under the facts presented in the Cleveland voucher case that the system was one of genuine, private choice that did not violate the federal Establishment Clause.

The Court has not upheld direct government funding of religious institutions without protections for religious liberty or mandated the kind of funding found permissible in *Zelman*. In fact, the Court has recognized the continuing vitality of state constitutional protections that limit such funding. That states may have stronger legal protections for certain religious freedom values than the federal constitution is no cause for alarm or even suspicion. As former Chief Justice Rehnquist noted in his majority opinion in *Locke*, “[W]e have long said that “there is room for play in the joints” between the Religion Clauses. *Locke v. Davey* 540 U.S. 712 (2004).

Following the Supreme Court's decision in *Zelman v. Simmons-Harris*, the Court has made clear that its ruling did not mandate state funding of religion. "There are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke*, 540 U.S. at 718-19. So while the federal Establishment Clause does not bar a voucher proposal that meets the true, private choice criteria set forth in *Zelman*, the Court has never held that the Constitution *requires* funding of religion. That would be a shocking turn of events given the long recognition of Establishment Clause values and the interests of states to protect them.

In *Locke*, the Supreme Court (7-2) upheld a Washington State law that denied use of state funds for the study of theology based upon its state constitutional "no-aid" provision. In doing so, the Court respected the settled tradition of allowing states some discretion to determine what state funding of religious enterprises is allowed under state law where the funding is compatible with the federal Establishment Clause. Just as there has been a long tradition against funding religious institutions, there has been a rejection of any federal constitutional right to state funded private, religious education leaving room for states to have a variety of approaches to protecting religious liberty within the bounds of the Establishment Clause.

A review of Supreme Court decisions upholding certain kinds of aid to religious schools shows that the issue is typically framed as whether the Establishment Clause prevents a state from extending the benefits of state laws to all citizens, not whether such extension is required. Recent Supreme Court cases continue in that mode. State court decisions and congressional action (such as the original charitable choice statute that explicitly does not preempt state constitutional provisions) also recognize the obvious considerations of federalism and debate about where lines should be drawn to best serve interests of protecting religious freedom.

This arrangement was explicitly acknowledged in *Locke v. Davey*, a case involving a strong state constitutional provision protecting against government funded religion. As Justice Rehnquist put it in *Locke*, "Even though the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel." Citing among others works, J. Madison, Memorial and Remonstrance.

The Court rejected the claim that treating religion differently (as in prohibiting the funding of religious education) suggests religious animus. "Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect." *Locke v. Davey* 540 U.S. 712 (2004).

More than two-thirds of the states have constitutional provisions that restrict aid to religious schools more explicitly than does the Establishment Clause. The restrictions vary and can be interpreted (and have been interpreted) differently. See Joint Statement by Church-State Scholars on School Vouchers and the Constitution (Nov. 2002).

Without question, the states have the right to provide greater protection for their citizens, above and beyond the federal Constitution. Just as states can and do often provide greater protection for free exercise values, they may provide greater protection for no establishment clause values. To the extent that states do so through state constitutional provisions dating to the late nineteenth century, they are no less worthy.

Conclusion

Whether characterized as constitutional or policy arguments, the interest in prohibiting public funding of religious institutions has a variety of bases, unrelated to any judgment about the nature of a specific religious tradition that operates private schools and seeks to fund them through general taxation. The principled argument that government should not fund religion, including government funding of religious education and institutions, is the enemy of discrimination, not the product of it. It is part of our country's strong tradition of religious liberty. While debates will certainly continue about the interpretation of particular constitutional and statutory provisions governing the relationship between church and state, we would do well not to denigrate the traditions that have served our country well.

As Justice Sandra Day O'Connor wrote in her concurring opinion in *McCreary County, Kentucky v. ACLU*, 545 U.S. 844 (2005), shortly before her retirement, "Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"

The principal test of the rule against government funding of religion should be its contribution to society, in this case, to religious liberty. The effect of our laws prohibiting government funding of religion has been positive for religion and protected religious liberty. Laws against government aid to religious institutions have helped guard against government support for and interference in religion. They have helped create a system where citizens have tended to have confidence in government neutrality toward religion and where religious choices are many. The absence of government funding for religious institutions has led to the great number and variety of religious options from which those in America choose and the relative peace enjoyed between various religious communities in our country. Such a legacy should not be disregarded or unfairly tainted by broad charges of bigotry.

As Justice O'Connor's successor on the Court, Justice Samuel A. Alito Jr., reportedly noted in a speech at Seton Hall Law School graduation, our Constitution has a strong

record of defending religious liberty and reducing religious intolerance. After stating that "[u]nfortunately, we live in a time in which religious intolerance is growing in many parts of the world," he said this of our Constitution: "It has allowed religion to flourish here and has allowed people to exercise an unprecedented degree of religious liberty; to practice their religion, or not to practice their religion, as they choose."

In summary, while there is broad agreement that anti-Catholicism fueled some debates over the funding of religious schools, that sentiment does not capture the origin or effect of all laws that restrict funding of religious institutions. Efforts to alter the ways our government pays for education or to change the legal and financial relationship between the institutions of religion and government, should not denigrate concepts that support religious freedom. To do so, not only is misleading about history but also disrespectful of our religious liberty.

K. Hollyn Hollman, General Counsel
Baptist Joint Committee for Religious Liberty

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**Ellen Johnson
President
American Atheists**

Good morning.

I would like to thank the Commission for inviting me to comment on a very-misunderstood topic, namely, the role of the so-called “Blaine Amendments.” These provisions are found in nearly three-dozen state constitutions, and identified with James G. Blaine who served as speaker of the U.S. House of Representatives, Secretary of State and was the 1884 Republican presidential nominee. Blaine proposed an amendment to the U.S. Constitution which, in part, barred any state from leveling a tax for the support of all religious schools or institutions. In 1875, this amendment passed the U.S. House of Representatives 180 to 7 but failed to achieve the required two-thirds majority in the Senate.

Versions of the Blaine Amendment were enacted by state legislatures across the country. In some cases, territories seeking admission to the Union included this type of statute in their proposed state constitutions.

Recently, supporters of tax dollars to religious schools and faith-based programs have targeted the Blaine Amendments. They have distorted the history of these amendments. They have misrepresented the life of James G. Blaine, claiming that he was an “anti-Catholic bigot” while ignoring the historical context of this man’s time, and the fact that Mr. Blaine was a distinguished statesman. His own mother was a Catholic. He was a member of the Congregationalist Church. They claim that these amendments are an unpleasant historical residue that we need to expunge from state constitutions across the country, and that they “discriminate” against organized religion.

To understand the 1875 federal and state Blaine Amendments we should note that the idea of having a universal system of free public education was relatively new. There was debate over how this system was to be funded, and religious groups raised the question of whether *their schools* would benefit. Public schools sometimes required Bible readings as part of the curriculum. This led to discord and even violent civil strife. In 1844, there were riots in Philadelphia and elsewhere as Protestants and Roman Catholics battled in the streets. This conflict reflected issues such as class, economic status and ethnic differences – but one of the issues was whether the Roman Catholic or Protestant version of the Bible should be used in public schools. Catholic leaders desperately wanted public funding for their school system; Protestants wanted the same, but didn’t want this government largesse to benefit the Catholics.

The status of religion in the public square was fiercely debated throughout the 19th century. It was a debate that went back to the time of the American Revolution, when churches were “disestablished” and would no longer benefit from government subsidies and privileges. Different religious groups proclaimed that their particular religion should

be the law of the land; in some cases, this took the form of attempts to enact a constitutional amendment declaring that America was a “Christian nation.”

As they had at the time of the Revolution, many Americans did not want to see any form of official religion, and they certainly did not want the institutionalized strife that characterized so much of European history. In the mid-nineteenth century, they also watched the growing rebellion against the Papal States and how the Popes exercised brutal temporal authority. No wonder they were concerned when in 1864 Pope Pius IX boldly declared that Catholicism should be, in effect, the state religion everywhere! This only fueled the divisions and disputatious political climate here in the United States.

The Blaine Amendments are far from a manifestation of narrow, anti-Catholic animus. Critics of these statutes never address why, for instance, the amendments prohibit aid to *any and all* religious schools and other institutions. If they were simply outbursts of, say, Protestant wrath, why wouldn't they call for aid to Protestant groups and simply exclude the Catholics, or the Jews, or other denominations?

Instead, these statutes express the most noble philosophical and political convictions the Founders – men like Jefferson and Madison – enunciated for America.

No one should be compelled to attend a church or join a particular religion.

No one should be burdened with the support, direct or indirect, of religious establishments.

There must be no religious test for holding an office of public trust, or exercising other rights.

The Blaine Amendments echo those very principles. In 1785, James Madison warned of the danger of using the public coin for the financial benefit of **any** and all religious bodies in his “MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS.”

Thomas Jefferson did the same in his historic “VIRGINIA STATUTE FOR RELIGIOUS FREEDOM.” Warning against any form of tax to subsidize religious activities, he urged:

“That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief...”

Over the years, the courts have struggled with the issue of “establishment” of religion. Certain religious groups, though, have been blatantly clear on what they want from lawmakers and, especially from the public treasury! Originally, religious groups demanded what was essentially direct government aide. In the late 19th and early 20th centuries, they introduced schemes like the “Faribault Plan” whereby religious schools –

in this case the Parochial school systems – would be “rented” by local municipalities with the teaching staff (consisting mostly of nuns) on the public payroll.

Today, we are concerned about the tax support of religious schools from taxpayer funded “vouchers.” Some courts, including the U.S. Supreme Court have rendered decisions that appear to uphold the constitutionality of vouchers *in specific cases*. The courts have been less lenient, though, in cases where the beneficiary of a voucher scheme is a specific religion (usually the Catholic Parochial school system), or where there is a clear lack of secular, non-religious schools participating. We find this in case after case throughout the nation.

There is the question of whether public funding of *any* kind – direct or indirect – can stay clear of the blending of government money and a sectarian religious mission. Back in 1897 when territories were still including Blaine Amendments in their constitutions, Pope Leo XIII wrote:

“It is necessary not only that religious instruction be given to the young at certain fixed times, but also that every other subject taught be permeated with Christian piety...”

This may not be as common today in some parochial schools as it was in the late 19th century, but it certainly describes what is going on in many private religious and so-called “charter” school experiments that are operated by Protestant fundamentalist, evangelic, *and yes Islamic groups*. The text books, the curriculum, the whole teaching regimen is often “permeated” by some form of emphatic and sectarian religious teachings. We have seen anti-Catholic and anti-science teachings in religious textbooks.

The problems with vouchers are manifold. Public schools have been “the great leveler,” providing millions of American youngsters over the decades with entry into our competitive society. We often forget that the parents who can *afford* to send youngsters to private institutions were often the direct or indirect beneficiaries of the public school system. Today, with record immigration, globalization and the profound changes in the American economy we need a robust, adequately funded system of public education to train millions of young people in the skills they, and this nation, are going to require. If parents want their children to receive a particular religious education, then it is they who should pay for it.

The question of the Blaine Amendments extends far beyond the narrow issue of vouchers. Government programs – and this includes any financial schemes that have the effect of subsidizing, directly or indirectly, religious activities and institutions – inevitably have “unintended” and often disturbing consequences. Today the debate is focused mostly on vouchers. There are other forms of aide, though, that could easily become public policy if the Blaine Amendments are overturned, and if we continue to lower the bar on how the Establishment Clause of the First Amendment is applied. We have the federal faith-based initiatives, where nearly \$2 billion has been funneled to religion-based social services. We have no idea of how these funds are eventually spent.

We have few adequate, built-in safeguards that this money is not being used to promote religion directly or indirectly.

The courts are barely beginning to examine this. My organization, for instance, is challenging a Detroit program that used \$690,000 in public tax money in grants to churches for refurbishing and façade improvement, all supposedly to help the city better host the 2006 Super Bowl. And it's worth noting – Congressional earmarks aside – that the entire federal faith-based initiatives which President Bush signed into law just weeks after his first inauguration, was the result of his use of Executive Orders. This took place without a vote in the Senate, without approval by Representatives or Senators, without even a congressional hearing.

The history and consequences of the Blaine Amendments have little or nothing to do with anti-Catholic animus. They, and the First Amendment prohibition on the “establishment” of religion, protect us from the disastrous and oppressive consequences of permitting clerical institutions to be given funding and special rights, from our government.

I represent a segment of the United States population who are part of a broader community of non-believers who go by many names – Atheist, Rationalist, Humanist, Freethinker – and we reject, either totally or to a significant degree – religious creeds. Surveys put our numbers as high as 58 million Americans which is larger than most denominations. No issue has galvanized and enraged these Americans more than the question of public funding of religion. And that is what the controversy over the Blaine Amendments is really about.

The opponents of these amendments, or indeed any prohibition on the use of tax money to benefit religious groups and projects, don't want to call their schemes what they really amount to – a “Religion Tax.” Instead, they distort history, or they demonize someone like James T. Blaine. It would be difficult for them to be so blatant when talking about Jefferson or Madison, although these men *were* denounced in their time by many clergy – so they dredge up some charge like “anti-Catholic bias,” or they resort to legal artifice and claim that the Blaine Amendments somehow “discriminate.” It is interesting that in 1982 and 1986, voters in Massachusetts – the state with the second largest Roman Catholic demographic in the country – overwhelmingly turned down a plan to change their state constitution and invite funding for religious schools.

This issue is not really about “discrimination” or “bias” against religion. It's about money. Today in the United States, organized religion is stagnating. The mainstream denominations suffer from “empty pew syndrome.” People are not attending church in large enough numbers, so religious leaders are trying to take their teachings into public schools, athletic events, the halls of government, wherever the people are. This is about money and access to people, which is what the vouchers provide to organized religions.

I don't think I should have to pay for the education of divinity students or programs which subsidize religion-based schools – whether they are Protestant or Catholic or Islamic or operated by any other religion. I don't think I should have my tax money used

to refurbish a church, a mosque, or a temple. I do not believe that *any American* should be compelled to finance, directly or indirectly, religious schools, which are simply *extensions* of churches. Doing so is bad public policy, and invites further erosion of the separation between government and religion. It invites financial abuse because religious groups can and will reject the sort of strict oversight and accountability taxpayers deserve, and demand! And it violates conscience. It compels the citizenry, through their taxes, to fund religion. And saying so isn't being anti-Catholic. It's being a patriotic American.

Let me close with a quote:

“I believe in an America where the separation of church and state is absolute – where no Catholic prelate would tell the President (should he be Catholic) how to act and no Protestant minister would tell his parishioners for whom to vote – where no church or church school is granted any public funds or political preference...”

These are the words of our 35th president, John F. Kennedy, who was a Catholic.

Thank you.

Supplemental Statement
Ellen Johnson

During the hearings, Vice Chair Abigail Thernstrom, responded to my statement that in 1982 and in 1986, in Massachusetts, the state with the second highest population of Catholics, the voters rejected voucher measures.

Vice-Chair Thernstrom said that was because the legislature is mostly Democratic and the Democrats are controlled by the teacher's union.

The votes I referred to were ballot measures voted on directly by the people, not the legislature.

Ms. Thernstrom also altered my introduction. Part of my introduction says that I am an Honorary Board Member of "Scouting For All," a nationwide group that seeks to end discrimination against Atheists and gays within the Boy Scouts of America. She altered that and said, "a nationwide group that seeks to end *the alleged* discrimination..."

Aside from the fact that I think it's inappropriate to alter someone's introduction, the Boy Scouts do discriminate. They do not accept gays or Atheists into their organization, yet homosexuality and Atheism are not in any way related to being a scout. Nor are they a hindrance to participating in, and being an exceptional scout. There are Eagle Scouts who have come -out as Atheists and homosexuals. Exclusions which are not related to the core object of an organization are discriminatory.

I also want to comment on Mr. Dick Komer's (Institute For Justice) statement that, as a Libertarian, he pays to send his children to private school because he thinks that citizens, not the government, should pay for their children's education. But his entire testimony tried to make a case for the *government* to pay for private school tuitions through the use of vouchers. This is clearly a contradiction and undermines his attempt to seem fair and against government funding of education.

The claim by the pro voucher panelists, that religious students are entitled to government financing of "private-religious" school tuitions because they deserve a "choice" from our government or that the current system is failing, is ludicrous. If we concede to this argument then American citizens will be asked to provide choice to citizens in every other government service. They will be able to demand "separate" but equal funding for a separate armed forces, post office, voting system, prison system, Medicare and Medicaid system, library, court system, transportation, social security or welfare systems. This is what they are asking for now when they ask for tax money for a "separate" government education system to accommodate their religion. We do not give funding to citizens to establish new government systems because they don't happen to like the ones that are in place.

If the sole intent of the hearings was to right a perceived injustice based on bigotry, then how could this Commission on *Civil Rights* possibly condone a solution that in and of

itself promotes a far greater and clear-cut system of bigotry? Religious schools are exempt from abiding by our state and federal civil rights laws. They can discriminate in their hiring practices. In 2002, a Roman Catholic boy was asked to leave Sheets Memorial Christian School in North Carolina, affiliated with an independent Baptist congregation, because of his religion. Religious schools may discriminate on the basis of disability, religion, sexual orientation, I.Q. or academic ability.

Some religious textbooks have referred to blacks as Negroes and say that “the Bible does not specifically condemn slavery.” This is true. The Bible doesn’t condemn slavery.

Native Americans have been treated with disdain. One textbook stated that “The concept of sin was foreign to the Indian culture; discipline was intended to teach children to survive rather than to make them moral. This amoral philosophy was often discouraging to Christian missionaries, who found it difficult to teach Indians the difference between right and wrong. . . . The Indian culture typified heathen civilization - lost in darkness without the light of the gospel.”

David A. Fisher’s *World History for Christian Schools* blamed Jews for the crucifixion of Jesus.

Muslims, Buddhists and Hindus have been ridiculed.

Christian fundamentalist textbooks have bashed the Roman Catholic Church. Catholicism is called “a perversion of biblical Christianity.” Catholic leaders are described as being “blinded by superstition and ignorance,” as they control a church “sunk deep in moral corruption.”

These are only a few examples of bigotry that voucher money will fund. Why are voucher proponents silent on all of this?

Finally, the voucher proponents’ attempts to paint the Blaine amendments as anti-Catholic are specious at best. Mr. Picarello argued that the original Blaine Amendment was directed at “sectarian” schools, which he says, was a buzzword for “Catholic.” This, he says, was meant to allow only the Protestant religion to be promoted in the public schools. Regardless of the alleged bigoted intent of the original Blaine Amendment, neither the Protestant nor the Catholic religions belonged in the public schools. The organized Protestant prayers in the public schools in the 1800’s were as unconstitutional then as they would be today. Unfortunately, it wasn’t until 1963 that the US Supreme Court ruled against it.

As for the alleged bigotry of the Blaine Amendment, it denied funding to ALL private religious schools, be they Catholic, Protestant or whatever.

Mr. Picarello quotes Supreme Court Justices’ condemnation of the Blaine Amendment in *Mitchell v. Helms*. But in *Zelman v. Simmons-Harris*, Justice Breyer, with whom Justice Stevens and Justice Souter wrote:

“Justice Breyer has addressed this issue in his own dissenting opinion, which I join, and here it is enough to say that the intensity of the expectable friction can be gauged by realizing that the scramble for money will energize not only contending sectarians, but taxpayers who take their liberty of conscience seriously. Religious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition. Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty. Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines "a nationalistic sentiment" in support of Israel with a "deeply religious" element. Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes, or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention. Views like these, and innumerable others, have been safe in the sectarian pulpits and classrooms of this Nation not only because the Free Exercise Clause protects them directly, but because the ban on supporting religious establishment has protected free exercise, by keeping it relatively private. With the arrival of vouchers in religious schools, that privacy will go, and along with it will go confidence that religious disagreement will stay moderate.

It realized that the status quo favored some religions at the expense of others. And it understood the Establishment Clause to prohibit (among other things) any such favoritism. Yet how did the Clause achieve that objective? Did it simply require the government to give each religion an equal chance to introduce religion into the primary schools--a kind of "equal opportunity" approach to the interpretation of the Establishment Clause? Or, did that Clause avoid government favoritism of some religions by insisting upon "separation"--that the government achieve equal treatment by removing itself from the business of providing religious education for children? This interpretive choice arose in respect both to religious activities in public schools and government aid to private education.

The upshot is the development of constitutional doctrine that reads the Establishment Clause as avoiding religious strife, not by providing every religion with an equal opportunity (say, to secure state funding or to pray in the public schools), but by drawing fairly clear lines of separation between church and state--at least where the heartland of religious belief, such as primary religious education, is at issue.”

In conclusion, the intent behind the original Blaine Amendment was not meant to target the Catholic religion: it was meant to eliminate the divisiveness caused by government support of ANY religion.

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Thank you for the opportunity to address you today on an issue I consider very important to education reform. My name is Richard Komer and I am a senior litigation attorney at the Institute for Justice based in Arlington, Virginia. The Institute for Justice is a non-profit, public interest law firm that litigates in four discreet areas, one of which is school choice. I work exclusively in the area of school choice.

Prior to working at the Institute for Justice, I spent 14 years working as a federal civil rights attorney, the first 12 as a career attorney, and the last two as a political appointee at the U.S. Department of Education. I worked at the Justice Department's Civil Rights Division and at the EEOC, after beginning that career in the Civil Rights Division of the Office of General Counsel of the old Department of Health, Education and Welfare. When the Department of Education was created by Jimmy Carter in 1980, because my primary interest was in education, I opted to go to the new department, rather than stay at what became HHS. When I left government in 1993, it was as Deputy Assistant Secretary for Civil Rights at the Department of Education, to which I returned after five years at the EEOC.

Fourteen years of enforcing federal civil rights laws convinced me of the vital importance of improving educational opportunities for all our people, but most importantly for low-income individuals, who are disproportionately members of minority groups. While prohibited discrimination undoubtedly continues to play a role in inhibiting educational opportunities for minority individuals, that role has been steadily diminishing. It has become more and more apparent that the public education system is failing large segments of our student populations, and fundamental educational reform is necessary to provide minority and other low-income populations the education they deserve and so desperately need if they are to participate fully in the American Dream.

I have now spent roughly the same amount of time promoting school choice programs at the Institute for Justice as I previously spent enforcing civil rights laws as a government lawyer. Together, those 28 years have led me to conclude that the problems with American public education are systemic, and confirm the wisdom of Economics 101 that monopolies really do deliver poor quality services at a high price. They also have confirmed the wisdom of Economics 102, that government monopolies are even worse. Despite colossal increases in spending on public education, the public education system is doing no better a job today than 30 years ago.

As long as we persist in funding the vast majority of our children's educations through the existing public school model, this hideously expensive failure will continue. The system will continue to pursue costly failed "panaceas" and millions of school children will continue to be denied their opportunity for a quality education. Our K through 12 system of education is a disgrace in international comparisons, while our higher education system is the envy of the world. One of the reasons for such a contrasting

record of success and failure is that our higher education system is characterized by a far higher degree of consumer choice.

In K-12 education we generally fund schools and tell students where they're going to go. At the collegiate level, while states fund public colleges and universities as institutions, the state and federal governments also fund student choices to a large extent, through student assistance programs that allow students to use their aid at the college of their choice. As a result, private colleges can compete with public colleges to a far greater extent than private schools can compete with public schools. And because it is a choice – driven system, there is a far greater degree of competition among public colleges than among public schools, which further enhances the consumer orientation of the higher education system.

By now, you're probably asking yourself what all this has to do with state Blaine Amendments. State Blaine Amendments are one of the many ways in which the defenders of the public school monopoly defend their system. With the demise of their ability to use the Establishment Clause of the First Amendment as a legal barrier to properly-constructed school choice programs, state constitutional provisions prohibiting aid to religious schools have attained greater salience as an asserted legal argument against school choice program.

As you may know, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the U.S. Supreme Court rejected the argument of school choice opponents that programs allowing parents to choose religious schools among a spectrum of other schools constituted an establishment of religion. The Institute for Justice litigated that case representing parents who used publicly-funded scholarships to enable their children to escape the truly abysmal Cleveland public schools. Before we were forced to defend the program through the three levels of the federal court system, we had to fend off identical litigation through all three levels of the Ohio court system, which included not just a federal Establishment Clause challenge but a similar challenge under the Ohio constitution's religion clauses. School choice opponents have always preferred to challenge school choice programs in the state courts, because they believe that state constitutions' religion clauses and Blaine Amendment language provides a clearer line of attack than the brief and rather general language of the federal religion clauses.

School choice opponents also recognized that the U.S. Supreme Court had decided a long line of cases distinguishing between religiously-neutral programs aiding students that it held did not violate the Establishment Clause and programs providing institutional aid to religious schools, which it held did violate the clause. The U.S. Supreme Court's recognition of this distinction contrasts sharply with the failure of a number of state supreme courts to recognize a similar distinction in interpreting their own state constitutions' religion clauses. Most of these state clauses are Blaine Amendments.

What exactly are Blaine Amendments? They are provisions found in 37 state constitutions that prohibit state and local governments from providing aid to "sectarian" or religious institutions, particularly schools. They take their name from a failed

constitutional amendment to the U.S. Constitution sponsored in 1875 by first Speaker of the House and then Senator from Maine James G. Blaine. He modeled his amendment on several earlier state constitutional amendments (what I call “proto-Blaine Amendments”) that did at the state level what he hoped to accomplish at the federal level. Because at that time the Fourteenth Amendment had not been held to incorporate the federal religion clauses against the states, he and his supporters hoped to amend the federal Constitution to prohibit aid to sectarian schools by any state.

When his effort fell short in the Senate of the two-thirds majority required to refer the amendment to the states for ratification (having already passed the House overwhelmingly), the Republican majority that had backed the amendment proceeded to incorporate requirements for similar provisions in new state constitutions for the territories that subsequently became states, by requiring such constitutional language in “enabling acts.” As a result, the state constitutions of all states established after 1876 contain Blaine Amendments, as do the proto-Blaine Amendment states and some other earlier states that amended their existing constitutions to add them.

These provisions are often found in the education articles of state constitutions, but just to complicate things further, a number of states have more than one Blaine Amendment, to prohibit aid to more sectarian or religious organizations than just schools, such as religious hospitals, orphanages or other social service institutions (what I call super-Blaine Amendments). Because these broader provisions address more than education, they are usually found elsewhere than in the education articles of state constitutions. These super-Blaine Amendments function like the typical education-specific Blaine Amendments but with a broader scope. Most of what I say about the typical Blaine Amendments is equally applicable to the broader ones.

What then are Blaine Amendments all about? I’ve already mentioned that their language prohibits state and local governments from funding “sectarian schools.” But as with so many other questions, a proper understanding of them requires a detailed understanding of the historical context in which they arose. Without such contextual understanding, constitutional provisions may appear innocuous that are really quite discriminatory. To use an example from the area of racial discrimination, in the case of *Hunter v. Underwood*, 471 U.S. 222 (1985), the U.S. Supreme Court held that a provision of the Alabama constitution that on its face was racially neutral violated the equal protection clause because it disqualified from voting a grossly disproportionate number of African-Americans and was adopted for that reason. Poll taxes were originally adopted for similar reasons, and were prohibited by the Voting Rights Act for that reason.

As a variety of historians have shown, the context in which Blaine Amendments arose encompasses the creation of the state public school systems and the perceived need to “Americanize” immigrants, particularly Catholic immigrants, to the United States in the 19th century. From their inception, the public schools were envisioned by their founders such as Horace Mann and Henry Barnard as “nondenominational” schools open to members of all faiths. But by “nondenominational,” these men and their allies in the state legislatures did not mean that the public schools were non-religious or secular. Today we

are used to dichotomizing schools into “secular public schools” and “religious private schools,” but that was not the dominant paradigm at the time of the creation of the common schools.

By “nondenominational” public schools, the public school advocates meant that the schools would reflect a nondenominational Protestantism, a Protestantism that would not teach the doctrines that separated one Protestant sect from another but would rather reflect a generic Protestant approach. Bible reading without commentary, a distinctly Protestant religious practice unacceptable to Catholics, the singing of Protestant hymns, and textbooks giving a distinctly Protestant view of history were all integral components of the education provided in the public schools. Protestant clergymen were among the most vocal supporters of the common school movement and many of the early superintendents of state departments of education were Protestant clergymen.

These men believed that religion was an essential component of a public school education, provided, of course, that it was generically Protestant in orientation. Catholic children were welcome in the public schools because the Protestant establishment saw public schooling as a way of weaning them from their Catholic religion. Catholic parents and Catholic religious authorities were well aware of the designs underlying the Protestant public school agenda, and a number of controversies arose involving Catholic schoolchildren who refused to read from the Protestant King James Bible. The courts generally backed the public school authorities in insisting upon using the Protestant bible, even when Catholics offered to read from the Catholic bible, upholding corporal punishment of recalcitrant Catholic children and their expulsion from public schools.

Not surprisingly, Catholics began creating their own schools, although as newly arrived immigrants their financial resources were at first negligible. The Catholics sought equal treatment in the form of equal public funding for their schools, arguing that the public schools were Protestant in orientation and that public support for those schools constituted an unfair advantage. Protestants replied that the public schools were “nondenominational” schools, while the Catholic schools were “sectarian.” In their view, nondenominational schools should be funded but sectarian schools should not. They were perfectly willing to refuse to fund those few “sectarian” Protestant private schools that remained after the public schools became “free,” *i.e.*, supported by the population at large from taxation, with “school fees” no longer permitted to be charged.

Needless to say, the majority ruled, and the Protestant establishment rebuffed the Catholic demands for equal funding. Occasional efforts to accommodate Catholic sensibilities largely ended in the mid-1850’s, when the increasing numbers of Catholic immigrants resulted in an anti-Catholic backlash in the form of an outburst of nativist, anti-immigrant sentiment, which led to the formation of a number of social and political groups hostile to Catholics, in particular the Know-Nothing party. This party’s anti-Catholic agenda included efforts to disenfranchise Catholics, prohibit them from holding public office, and create legal barriers to their demands for equal school funds.

For example, after the Know Nothings captured both houses of the Massachusetts legislature and the governorship in 1854, they successfully promoted the passage of a proto-Blaine Amendment to the state constitution. This Amendment prohibited appropriation of public money for the support of sectarian schools, thereby maintaining the Protestant, nondenominational public schools' monopoly on public funding. The Know Nothings also succeeded in prohibiting Catholics from holding state office in Massachusetts. The history of the Know Nothings fully justifies the conclusion of a plurality of the U.S. Supreme Court in *Mitchell v. Helms*, 530 U.S. 793, 829 (2000)(op. of Thomas, J.), that Blaine Amendments were “born of bigotry” towards Catholics and that their use of “sectarian” was a code word for “Catholic.”

Nor was Massachusetts uniquely anti-Catholic during this time period. In 1850 New Hampshire voters rejected a proposed constitutional amendment to eliminate its “religious test” for public office that required representatives, senators, executive councilors, and the governor to be of the Protestant religion. In the same election they rejected an amendment to eliminate constitutional language allowing towns to require support for ‘Protestant’ teachers of “piety, religion and morality,” (*i.e.*, Protestant ministers), and other language providing equal protection only to denominations of “Christians.” (Catholics, by the way, were not considered Christians.) Every constitutional convention between 1850 and 1918 proposed making these provisions religiously-neutral and all failed, to the point where constitutional conventions from 1930 to 1956 did not even propose amending them. It wasn't until 1968 that the New Hampshire voters removed them.

The impending onset of the Civil War caused the dissolution of the Know Nothing Party, and another wave of anti-foreigner, anti-immigrant, and anti-Catholic prejudice did not recur until the mid-1870's. By that time, the burgeoning Catholic minority was voting for the Democratic Party, while the Republican Party largely represented the Protestant establishment. The scandal-ridden Republican Grant administration and its backers were looking for an issue to help them regain public support, and fastened on the issue of Catholic demands for public aid for their parochial schools. James G. Blaine, desiring the Republican presidential nomination, proposed amending the federal Constitution to accomplish what Massachusetts had done in 1855. His amendment would have applied the language of the First Amendment's Free Exercise and Establishment Clauses against the states and prohibited use of public money and property for the support of sectarian schools.

After passing the House by overwhelming margins, it met some resistance in the Senate. By 1875, a small group of individuals were pushing for secularization of the public schools, the vast majority of which continued to be generically Protestant in orientation. Their support for the Blaine Amendment led some of its potential backers to fear that it would be applied non-discriminatorily to remove Protestant influences from the public schools, as well as to prohibit aid to Catholic schools. Accordingly, the Senate version was amended to include language specifically permitting continuation of bible-reading in the public schools.

Despite the change to its language, the Senate version fell just short of the two-thirds majority required to send it to the states for ratification. Nonetheless, the Republican majorities in both houses of Congress continued the effort to require states to adopt the central focus of the Amendment by requiring that new state constitutions drafted for territories becoming states contain Blaine Amendment language. Each such state was required to create public school systems, and to use the proceeds from the federal lands they were given in those states for the exclusive support of that public school system. These schools were to be free of “sectarian” (*i.e.*, Catholic) control, although it was understood that they could continue to be generically Protestant in orientation, and state and local government agencies were prohibited from using state funds and property for aid to sectarian schools. In a number of cases where Republicans dominated the state constitutional conventions, super-Blaine Amendments were also included, to similarly prevent state aid to sectarian institutions other than schools, such as Catholic hospitals and orphanages.

When it became clear that despite their inability to receive public aid the Catholics efforts to establish their own schools was succeeding, the Protestant establishment turned to other means of inhibiting or closing such schools. States sought to regulate private schools, the vast majority of which were Catholic, in ways that would put them out of business. Such efforts in Massachusetts, Wisconsin, and Illinois in the late 1880’s were led by Republicans and resisted by Democrats. When these efforts failed, a new tactic was tried. States were urged to enact compulsory attendance laws requiring attendance at public schools, which everyone knew would have the effect of forcing all private schools to close for want of students.

In 1922, the voters of Oregon passed just such a law through the initiative process. Among its principal backers was the Ku Klux Klan, dedicated to opposition to African-Americans, Catholics, and Jews. Two schools that would be put out of business sued the state in federal court, leading ultimately to victory in the United States Supreme Court in *Pierce v. Society of Sisters of Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). While acknowledging that the state has a legitimate interest in requiring attendance by children at school, the Court resoundingly rejected the idea that the state had the right to require such education take place only in public schools, saying:

The fundamental theory of liberty upon which all the governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right coupled with the high duty to recognize and prepare him for additional obligations.

268 U.S. at 535.

With *Pierce* imposing a constitutional barrier against the Protestant and nativists’ efforts to kill the Catholic schools, a new status quo prevailed, in which the Protestant public schools retained their monopoly over direct government funds, but the Catholic schools

were permitted to co-exist, albeit limited to support from private sources and tuition. It was under this status quo that the various strands of the U.S. Supreme Court's Establishment Clause jurisprudence developed after *Everson* in 1947, including the strand deriving from the recognition that the public schools were not religiously-neutral bastions of secularism, epitomized by the bible-reading and prayer cases, and the strand deriving from state legislative efforts to provide for more equal treatment of parochial school students, epitomized by *Everson* and *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Until very recent times, at least very recent to someone as old as I am, the real dichotomy was between generically Protestant public schools and private, "sectarian" schools. The vast majority of the sectarian schools were Catholic, because of the Catholics continuing recognition that the public schools promoted a form of watered down Protestantism. Some branches of Lutherans have continued to maintain religious schools, and many of the elite prep schools whose clientele could afford expensive private education were religiously-affiliated to various Protestant denominations. My point is that the present dichotomy with which we are currently familiar, the division of almost all schools into the two categories of secular public schools and religious private schools is a modern phenomenon, and should not be projected back in time to apply to earlier eras.

Although some historians and many public school advocates want to believe that the early public schools reflected a Jeffersonian separation of church and state, such a belief is misguided. Well into the 1950's and 60's state supreme courts upheld state statutes requiring bible reading in the public schools, just as such courts did in the 1850's. By current standards many of the states' public school systems violated the federal Establishment Clause, and engaged in what are now considered religious exercises. One has only to recall the U.S. Supreme Court's modern decisions on such topics as released time programs conducted in public schools, school prayer, and bible reading to realize that this is true.

It is one of American history's ironies that the failure to adopt the federal Blaine Amendment in 1876 delayed the application of the federal Establishment Clause to the states until 1947, in *Everson v. Board of Education*, 330 U.S. 1, when the U.S. Supreme Court blithely applied the clause through the incorporation theory of the Fourteenth Amendment. I say "blithely" here for two reasons. First, because the Establishment Clause, as part of the First Amendment, is specifically addressed to Congress, as in "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," and second, because the Fourteenth Amendment was passed shortly before the Blaine Amendment was offered, and if the contemporaneous understanding was that the Fourteenth Amendment made the federal religion clauses applicable to the states there was in fact no reason for the first clauses of the Blaine Amendment to apply those clauses to the states.

With respect to the First Amendment's Religion Clauses there is a very important reason why it was addressed solely to Congress and not the states. At the time of its passage shortly after ratification of the Constitution, roughly half of the original 13 states still had an established state religion, with New England states supporting

Congregationalism, and southern states Anglicanism. The central Atlantic states had generally followed Pennsylvania's lead and disestablished their state religions if they had one. (Pennsylvania, as the most religiously pluralistic of the thirteen British colonies, had never had an established religion.) Thus, the purpose of the Establishment Clause was two-fold: to prevent establishment of a national religion and to preserve the state establishments.

As a result, until 1947 the state supreme courts reigned supreme in matters of religion in their respective states, and while all states eventually disestablished their state religions or never had one, their courts were in fact free to allow their public schools systems to remain nondenominationally Protestant, and many did so. *Everson* changed all that, by applying to the states the federal religion clauses the Blaine Amendment would have applied over 70 years earlier if passed by two-thirds of both houses of Congress and ratified by the states. Of course, Blaine never contemplated that the U.S. Supreme Court would hold that the Establishment Clause required the public schools to be secular or he would never have written it the way he did.

As you know, after *Everson*, the U.S. Supreme Court has decided a long and extensive series of cases removing religion from the public schools. The religion it was removing was the generic, nondenominational Protestantism that had been an intended part of the public schools from their inception. The Catholics, who also believed in the importance of religion as an aspect of a proper education, had continued to maintain their separate schools, so the secularization of the public schools affected them less than the various Protestant denominations that had previously been comfortable in the public schools. The result of conservative Protestants reaction to the removal of religion from the public schools has been the explosive growth of so-called "Christian schools."

So today, the private school sector contains not just a large component made up of Catholic schools but also a large component of schools operated by conservative Protestant denominations. A third component consists of the elite prep schools, many of which have shed any religious identity in substantial part, that serve the wealthy and academic elite. The public sector is now exclusively secular. Consequently, the effect of state Blaine amendments has evolved from its original purpose and effect of preserving a Protestant public school monopoly by excluding Catholic schools from sharing in educational funding to excluding a broader array of religious schools from such funding.

Because, however, the federal Establishment Clause, which now applies to both federal and state governments, is still interpreted to generally prohibit unrestricted public funding of religious institutions such as schools, to the extent that Blaine Amendments prohibit such institutional aid they merely duplicate the federal prohibition. This area of overlap is thus essentially benign from a school choice perspective, because school choice programs do not involve institutional aid, and consequently the overlap does not prohibit anything not already prohibited. A number of states with Blaine Amendments have interpreted them to parallel the requirements of the Establishment Clause, and thus their Blaine amendments do not constitute a barrier to a properly drafted school choice program.

Other states, however, interpret their Blaine amendments far beyond what I regard as their plain language and original purpose of prohibiting institutional aid to religious schools. The breadth of these interpretations often become apparent in cases where a program clearly meets federal standards under the Establishment clause but is held to violate a state's Blaine Amendment. For example, the U.S. Supreme Court ruled in the 1947 *Everson* case that New Jersey could provide free transportation to students in both public and private schools, including in religious schools. The Court went so far as to intimate that to exclude students attending religious schools from an otherwise neutral program aiding families would violate the Free Exercise Clause. Similarly, in 1968 in *Board of Education v. Allen*, 392 U.S. 236, the Court upheld a New York state program providing free secular textbooks to all schoolchildren, including those attending religious schools. In both of those cases the state supreme courts had upheld the programs against a challenge under the respective state constitution's religion clauses.

Both before and after the U.S. Supreme Court ruled on the transportation subsidy and textbook programs of New Jersey and New York, other state supreme courts had ruled their Blaine Amendments precluded such programs. New York's experience is instructive. Roughly ten years before *Everson*, New York's highest court had ruled that a transportation subsidy program similar to New Jersey's violated New York's Blaine Amendment, because it incidentally aided religious schools by making it easier for families to send their children to them. When its textbook program was challenged in *Allen*, the New York court overruled its earlier transportation decision and held that its Blaine amendment was limited to programs providing direct or indirect aid to religious schools, but not incidental aid. Thus, New York's Blaine jurisprudence went from being more prohibitive than the Establishment Clause to being parallel to it.

Many other states, however, have continued to interpret their Blaine Amendment language to prohibit programs permitted by the Establishment Clause. Perhaps the best example of this is Washington State, which has routinely interpreted its Blaine Amendments to exclude students attending religious schools from programs passing muster under the Establishment Clause, including in the areas of transportation and college scholarships. In two separate higher education cases, the U.S. Supreme Court has specifically found that including students attending religious colleges training students for the ministry in Washington scholarship programs did not violate the Establishment Clause, but Washington has continued to exclude those students pursuant to the state's Blaine Amendments.

Essentially, the state courts that interpret their Blaine Amendments to preclude what the Establishment Clause permits are adopting an interpretation of their Amendments similar to that advanced by opponents of school choice under the Establishment Clause and rejected by the Supreme Court in *Zelman*. These opponents argue that any aid that makes it easier for parents to send their children to religious schools is invalid, even if the program involved is religiously-neutral and where the parents are clearly the primary beneficiaries of the program. Under this theory, such programs as the GI Bill, the Pell Grant Program, and a host of other federal programs that aid individuals on a religiously-nondiscriminatory basis are illegal because religious schools might derive some

incidental benefit from such programs. To these opponents, any aid for private school students is aid to the schools they choose to attend.

School choice advocates, on the other hand, argue that Blaine Amendments, like the Establishment Clause, were intended to prevent institutional aid to religious schools, as epitomized by the specific requests for institutional funding of Catholic schools that Blaine Amendments were written to rebuff. Institutional aid defrays costs of the schools themselves, such as teacher salaries, building and maintenance costs, and equipment, but does not include costs customarily borne by the parents/consumers, such as tuition, textbooks, and transportation. Tuition in particular is obviously a consumer cost, as any parent of a private school or college student knows. In this view, a scholarship program that enables or empowers parents to pick and pay for an education at an array of schools is aid to the parents, rather than the schools they choose. Those schools provide to the parents and children their educational services in exchange for tuition, which is a contractual relationship, an exchange of value for value.

Space and your patience does not permit us to go state-by-state through the gamut of how the 50 states have interpreted their religion clauses. Fortunately, the Institute for Justice and the American Legislative Exchange Council have recently published a survey entitled “School Choice and State Constitutions: A Guide To Designing School Choice Programs.” With this testimony I am providing copies of that survey for your information. That publication identifies relevant constitutional language and cases in each state, and recommends what sort of school choice program would be consistent with that language and case law. Theoretically, almost every state could implement some form of tax benefit program, providing either state tax credits or deductions for individuals to use on their children’s education or as incentives for individuals and/or corporations to donate to non-profit organizations granting scholarships.

The situation is quite different with respect to scholarship/voucher programs themselves, where state court interpretations of constitutional provisions including Blaine Amendments appear to preclude such programs in a number of states. It is in those states that the pernicious effects of the Blaine Amendments continue to inhibit educational opportunity. These are the states where the anti-Catholic discrimination inherent in the Blaine Amendments’ original purpose of preserving a Protestant monopoly over public education dollars continues to manifest itself as discrimination against parents preferring a religious element in their children’s education.

Let me be clear that we are not advocating elimination of prohibitions on unrestricted, institutional aid to religious schools. Such aid is still prohibited by the Establishment Clause. But school choice programs are not properly viewed as aid to schools. They are aid to families that enable them to have a choice of where to send their kids to school. Such programs give families purchasing power they did not have previously, and do not steer families to choose religious schools. The cheapest (completely free!) and usually most convenient choice for families is almost always the neighborhood public school, even where a scholarship makes other choices available.

And well-designed school choice programs allow for the creation of new private schools to appeal to the variety of parental preferences, so one should not think only in terms of the often relatively limited range of options available before a school choice program is initiated. One has only to look at the blossoming of the private school marketplace in Milwaukee that has occurred since that program was expanded in 1995. In the 2006-07 school year there were 124 private schools participating in the program, with a large portion of them being secular, and with the vast majority of them having been created since the program began.

In summary, the Blaine Amendments were intended to preserve a Protestant monopoly on public education funds and to rebuff the efforts of Catholics to acquire equivalent funding for their schools. As such, the Amendments were intended to favor one religion or group of religious sects over another, reflecting favoritism towards those Protestant sects for whom the nondenominational Protestantism of the public schools was acceptable and reflecting animus towards the Catholic religion and its adherents' pleas for equal treatment. While not discriminatory on its face, viewed in a proper historical context the conclusion is well nigh inescapable that religious discrimination motivated their creation and adoption.

Because the language of the Amendments is neutral on its face vis-à-vis particular religions, always bearing in mind that "sectarian" was understood to be a code word for Catholic, with the de-religification of the formerly Protestant public schools, the language originally aimed at Catholics now sweeps in all religious schools. This includes the large number of Protestant religious schools created in response to the removal of religion from the public schools. Thus, provisions intended to favor one religion and disfavor another have transformed into provisions that discriminate against religion in general. Of course, it is legitimate to discriminate against all religion institutions in terms of direct aid programs, but when such provisions are extended to treat programs aiding individuals the discrimination becomes one of discriminating against persons preferring religious educational options to non-religious options. This, one would suppose the Free Exercise, Free Speech and even Establishment Clauses to prohibit, but it is currently an open question with the Supreme Court, except where training for religious professions is concerned. In that limited area, the Court has permitted a state Blaine Amendment to prohibit what the Establishment Clause would permit, in *Locke v. Davey*, 540 U.S. 712 (2004).

Whether the discriminatory motivation that underlay adoption of the Blaine Amendments continues to "taint" them and render them illegitimate is another question not yet addressed by the Supreme Court as a whole. As previously noted, four members of the Court recognized the discriminatory motivation behind the Amendments in Justice Thomas' plurality opinion in *Mitchell v. Helms*. The Arizona Supreme Court declined to give an expansive reading to Arizona's Blaine Amendment in a school choice case in part because it recognized the discriminatory origins of the provision, in *Kotterman v. Killian*, 972 P.2d 606, *cert. denied*, 528 U.S. 921 (1999). The fact, however, that in states interpreting their Amendments more broadly than the Establishment Clause the effect of the Amendments is to place religious individuals at a disadvantage suggests that far from

dissipating the original “taint” has in fact spread. This suggests that such interpretations are vulnerable to challenge.

For example, in *Hunter v. Underwood*, discussed previously, the facially-neutral Alabama constitutional provision voided for racial animus dated from 1901 and was voided by the Supreme Court in 1985. Nor has the Court hesitated to find discriminatory religious animus behind facially-neutral classifications as well. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court held that a city’s facially-neutral ordinances were intended to discriminate against the Santeria religion by banning the slaughter of animals in certain circumstances. While showing discriminatory motivation is difficult at the best of times, the standard requires only that one show that discriminatory animus was at least one of several motivating factors, whereupon the burden shifts to the state to show the same provision would have been enacted regardless of the discriminatory motivation.

In this situation, opponents of school choice like to gloss over or ignore the fact that the public schools were not secular institutions at the time Blaine Amendments rebuffed Catholic demands for equal treatment. They want to portray the argument as a rejection of Catholic demands for aid to their religious schools in favor of preserving secular public schools. But the fact of the matter is that the public schools were generically Protestant by design, and continued to be so in most places well into the 20th century. The Jeffersonian image of a separation of church and state did not prevail in the nation’s public schools until quite recent years. Viewed in the proper historical perspective, Blaine Amendments reek of religious discrimination. As such, they are illegitimate relics of a shameful past we have neither adequately acknowledged nor effectively remedied.

I thank you for inviting me to appear before you and to offer this testimony. Because I received very short notice of this hearing and due to the press of urgent business, I have not been able to appropriately footnote my assertions, but in partial mitigation I offer the following sources that inform my understanding of this issue.

Sources

1. Charles Glenn, The Myth of the Common School (1987).
2. Philip Hamburger, Separation of Church and State (2002).
3. John Higham, Strangers in the Land: Patterns of American Nativism 1860-1925 (1955).
4. Lloyd Jorgenson, The State and the Non-Public School 1825-1925 (1987).
5. Susan Marshall, The New Hampshire State Constitution: A Reference Guide (2004).
6. Diane Ravitch, The Great School Wars: A History of the New York City Public Schools (1974).
7. Joseph Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society (1999).
8. Steven Green, “The Blaine Amendment Reconsidered,” 36 Am. J. Legal Hist. 38 (1992).

Supplemental Statement

Richard D. Komer

Because Friday's hearing started so late, the question and answer session following the testimony of the witnesses had to be cut short, and the Vice Chairman offered that the witnesses could submit additional testimony responding to the truncated discussion. With the indulgence of the commissioners, I'd like to make a couple of points that respond to questions of the commissioners and the answers given by other members of the panel. I will try and keep these brief, although the issues involved in this hearing are quite complex. Except where absolutely necessary to do so, I will avoid repeating information contained in my original written or oral testimony.

First, I would like to respond to Ms. Hollman's assertion in responding to a question in which she characterized the efforts to pass the federal Blaine amendment as "an anomalous period of American history." As both Mr. Picarello and I demonstrated in our testimony, the federal Blaine Amendment was part and parcel of a long-lasting and recurrent anti-Catholic current in American history, a current present from the founding of the original English colonies in America shortly after the religious wars between Protestant and Catholic powers that convulsed Europe, and which was repeatedly triggered by fears of a growing Catholic presence in America.

This deep-seated anti-Catholicism is demonstrated in the particular history of the state Blaine Amendments themselves, which neither began with the federal effort to pass such an amendment nor ended with its narrow failure to obtain the two-thirds majorities required for transmission to the states for ratification. As both Mr. Picarello pointed out, a number of states had already passed "proto-Blaine Amendments" more than two decades before Blaine proposed his federal version. As the sources we both cite make clear, these early Blaine Amendments derived from the same anti-Catholic motivation as underlay the federal effort. Thus, for example, Massachusetts' Blaine Amendment was added to the state constitution in 1855, when the Know-Nothing party took command of the Massachusetts' state government in the 1854 election.

Nor is Ms. Johnson's complaint that we are slandering James G. Blaine valid. While it is true his mother was Catholic, he was a politician and an ambitious one. His pursuit of the 1876 Republican nomination led him to take advantage of the nativist, anti-Catholic sentiment in the Republican party, an approach whose utility had been demonstrated by Rutherford B. Hayes, who had recently won the gubernatorial election in Ohio by taking a strong anti-Catholic position on the "school question," triggered by Catholic efforts to remove bible reading from the Cincinnati public schools. While Blaine may not have been a religious bigot himself, he was at least a political opportunist willing to pander to the religious bigotry of a substantial portion of his party. Ironically, he lost the 1876 Republican nomination to none other than Rutherford B. Hayes.

Nor is Ms. Hollman's version of the history of religious liberty in the early years of the Republic accurate. While there were principled exponents of religious neutrality and separation, including Thomas Jefferson and James Madison, theirs were not the

prevailing views, or there would have been no need for the plain language of the Establishment Clause limiting its sway to prohibition of a national religion, while maintaining the existing state establishments. The Remonstrance written by Madison of which so much (too much!) has been made over the years addressed a very concrete legislative proposal made by governor Patrick Henry during the efforts to disestablish the Virginia state church. Henry proposed that the state collect taxes from all taxpayers and provide the proceeds to the church of choice of those taxpayers, to replace the prior system whereby the state collected taxes to support exclusively the established Anglican church. In other words, what Madison was objecting to was the state acting as tax or rather tithe collector for all the churches, which he viewed as an improper role for government.

A recent Madison scholar, Vincent Philip Munoz, has argued in several recent articles that the U.S. Supreme Court, like Ms. Hollman, has failed to properly understand Madison's principle of "noncognizance" that he articulated in the Remonstrance. Particularly noteworthy is his conclusion that "A Madisonian interpretation of the Establishment Clause would allow a general program of school vouchers, including vouchers to private schools, so long as religious schools are in no way singled out for special privileges or particular penalties. See "Madison's Principle of Religious Liberty," 97 *Am. Pol. Sci. Rev.* 17, 31 (2003). Similarly, as I mentioned in my oral testimony, the Virginia public schools I attended in the 1950's and 60's routinely sponsored prayer and hymn singing, notwithstanding Virginia's statute on religious liberty written by Thomas Jefferson, of which he was so proud that it is one of only three accomplishments he asked be placed on his tombstone (the others being authorship of the Declaration of Independence and the founding of the University of Virginia).

Speaking of the University of Virginia, or "Mr. Jefferson's University" as it is known to those like Mr. Picarello and myself who have attended it, Commissioner Yaki questioned a statement made by Mr. Picarello that sometimes the Free Exercise Clause requires equal treatment of religious perspectives, with the Commissioner suggesting that while the Clause can be a shield protecting religious perspectives it cannot also be a sword mandating equal treatment. A case involving the University of Virginia (UVA) actually illustrates Mr. Picarello's point nicely. Sometimes, a state's actions can violate the Free Exercise, Establishment, Free Speech and Equal Protection Clauses all at the same time, because in certain circumstances they all prohibit discrimination.

UVA collects student activities fees from its students and uses a portion of those fees to subsidize student publications. It has no obligation to collect these fees but once it does and starts distributing them to subsidize speech, it cannot discriminate against religious viewpoints. This is the holding of *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). A student-run publication challenged its exclusion from the subsidy program based on its presenting articles taking a religious viewpoint, and the Court found a violation of the Free Speech and Free Exercise Clauses.

Note that the effect of the decision is that the state agency (UVA) was forced to subsidize an explicitly religious viewpoint, because this was necessary to ensure religious

neutrality. Also noteworthy is the fact that this wasn't the sort of incidental aid to religion represented by a scholarship or voucher program where the aid is given to families to choose the schools they prefer. This was aid to the publications as institutions, i.e., institutional aid. The *Rosenberger* dissenters correctly pointed this out in rejecting the majority's characterization of this aid as "indirect" because the subsidies weren't sent directly to the student publishers but rather to the printers with whom they contracted.¹⁰ The point is that the aid defrayed an institutional cost of the publisher, not of the readers.

This brings me to another point, the distinction between "incidental aid" and "institutional aid." The plain language of Blaine amendments is directed at institutional aid, whether provided directly to the institution or indirectly by defraying institutional costs. This is because the Blaine Amendments were designed to rebuff Catholic efforts to obtain the same aid for their schools that the Protestant establishment was providing to its nondenominational Protestant public schools. Even where such aid is based on a per capita formula similar to that used to distribute state education aid to local public school districts, it is institutional aid if used to defray institutional costs.

Voucher/scholarship programs do not distribute institutional aid. They provide aid to families, and if some of those families use the aid to buy an education for their children from religious schools the benefit those schools derive from the program is incidental, an incident of the family having picked that school. This is because the aid subsidizes tuition, which as any parent of a child in either private school or a public university knows is a family responsibility and not a responsibility of the school selected. It offends me when advocates such as Ms. Johnson so eagerly describe parents as mere conduits for state aid to religious schools, because that denigrates the role that parents play in choosing what they regard as the best education for their child. These programs allow less well-off parents to make the sorts of educational choices better-off parents make every day, without their being characterized as no better than passive money-launderers for legislators intent on subsidizing religious education.

Because the Commission is a federal agency, it may interest the Commissioners to know that the federal civil rights laws recognize the distinction between "aid" and "incidental aid." The laws and their implementing regulations that prohibit various forms of discrimination in programs receiving federal financial assistance (Title VI, Title IX, Section 504) recognize the distinction between "assistance" (which contains an element of gift) and buying something or procurement. Thus, a contractor supplying goods or services to the federal government or to a recipient of federal financial assistance is not a recipient of federal funds for coverage purposes, because a contract of procurement is involved. When the ultimate beneficiary of federal assistance chooses to procure a service from a provider with his federal assistance the provider also does not thereby become a recipient of federal assistance. This has been so from the beginning, when the

¹⁰ The publication subsidies were sent directly to the printers rather than the student organizations publishing the pieces for the same reason Pell Grants are sent to the grantees' colleges and food stamp recipients receive script rather than cash. As any alumnus of UVA knows, giving a student organization money for a particular purpose does not guarantee it will be spent on that purpose rather than the ubiquitous grain alcohol.

issue of whether farmers receiving farm subsidies could discriminate in their hiring decisions was addressed in the affirmative.

My point is that federal law recognizes that empowering families to choose the best school for their children by giving them the money to buy it from that school does not “aid” the school, even where that school is religious. It aids the family and at most incidentally the school, which after all has to provide an education to the student in exchange for the tuition payments. This isn’t some new idea either; a unanimous U.S. Supreme Court adopted this reasoning under the Establishment Clause in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, in 1986 in an opinion by Justice Marshall.

Let me close by saying that far from violating “core Establishment Clause values” as suggested by several participants at the hearing, school choice programs utilizing scholarships and vouchers are plainly consistent with the federal constitution. They are also consistent with the language of state Blaine Amendments, when those amendments are limited to their original meaning of prohibiting direct and indirect aid to religious schools. It is only when those Amendments are expanded to apply to scholarships and voucher programs aiding parents and possibly incidentally aiding religious schools that they become an impediment to school choice and offend concepts of religious neutrality.

Thank you for the opportunity to supplement my presentations, and I also thank you for tackling this complex and very important issue. Meaningful education reform that will benefit those groups most ill-served by our monopolistic public education system depends on limiting state Blaine Amendments to their original purpose of preventing aid to religious schools and allowing aid to students and their families.

Additional Statements

Statement of the Anti-Defamation League

Introduction

We write today to share our position that the so-called “Blaine Amendments” to state constitutions further the interest of religious liberty in America because they ensure that government does not provide financial support to religious institutions. Moreover, we write to share our perspective that school vouchers are bad policy and do harm to religious liberty in America.

Blaine Amendments prohibit states from using public money to support sectarian purposes. One key argument against Blaine Amendments has been that they were motivated by anti-Catholic bigotry and should not be seen as legitimate laws. However, these Amendments do not reflect any present-day anti-Catholic animus. Whatever Senator Blaine’s biases may have been, subsequent developments – including the review, amendment, re-ratification and renewal of the relevant parts of well over half of the state Constitutions in question – have long purged these amendments of the taint of bias. As will be demonstrated below, four out of five states can no longer be fairly said to have a Blaine Amendment that reflects any anti-Catholic animus. These Amendments reflect subsequent legitimate motivations, devoid of bias, and have no anti-Catholic bias in their language or in their purpose.

This statement will also address school vouchers. It is our position that vouchers harm religious liberty and public education, and that their effectiveness at accomplishing their stated goals is questionable.

About the Anti-Defamation League

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League (“ADL”) is today one of the world’s leading civil rights/human relations organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL’s core beliefs is adherence to the separation of church and state. We believe that separation preserves religious freedom and protects our democracy. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can attest that the more government and religion become entangled, the more threatening the environment becomes for each.

The Blaine Amendments

1. Anti-Catholic Animus Long Purged

To the extent that there was anti-Catholic animus behind the passage of Blaine Amendments in the mid to late 1800's, the taint of such animus has long been removed both by the passage of time and by the affirmative steps of the majority of states. In fact, most of the states have either amended or reconsidered the portion of their constitutions containing their Blaine Amendment long after the 1870's (and long after Senator Blaine's influence waned). Moreover, several states were required to include the provision in their constitutions in order to be admitted to the Union.

Specifically, there are 38 states that actively preserve Blaine Amendments.¹ Of those 38:

- 21 states have either re-endorsed their Blaine Amendment specifically or have re-ratified their constitutions as a whole since 1950, and 23 since 1900.²
- 6 states (24%) were compelled to include a Blaine Amendment as a condition of admission to the Union after 1889. These six state legislatures cannot be said to have had an anti-Catholic animus.
- 9 states have taken no significant actions relating to their Blaine Amendments since their enactment.³ Of these nine, two, Delaware and Mississippi, enacted their Blaine Amendments in 1897 and 1890 respectively.

By 1900, almost twenty years after Blaine left the Senate, his influence had waned. It is reasonable to assume that any state that re-endorsed its Blaine Amendment specifically or has re-ratified its constitution since that time was not motivated by his bigotry when they affirmatively left the Blaine Amendment intact. In fact, since that time, 76% of the states that had Blaine Amendments have undergone such reviews and left the Amendment untouched, or have issued a new constitution containing a Blaine Amendment. It is reasonable to conclude that these Amendments contain none of the anti-Catholic animus found in the original Blaine Amendments.⁴

Given this, it is simply unfair and inaccurate to ascribe any kind of anti-Catholic animus to the legislators and citizens who voted for these changes. While it is important to acknowledge and come to terms with the bigotry that was prevalent in the United States when some of these acts were passed, it is equally important for our society to understand that any taint which may have existed regarding these Amendments has long since been removed.

Finally, it is worth noting that, unlike the federal Constitution, state constitutions can be amended relatively easily. In fact, voters and legislators have frequently acted to amend

¹ AL, AK, AZ, CA, CO, DE, FL, GA, HI, ID, IL, IN, KS, KY, MA, MI, MN, MS, MO, MT, NE, NJ, NV, NH, NM, NY, ND, OH, OK, OR, PA, TX, VA, WA, WI, WY, SD, UT. For details, see Appendix One.

² This includes any state that, since 1900, amended the section of the Constitution in which Blaine Amendments are located or which created new Constitutions.

³ Of course, this number excludes those states that were compelled to include Blaine as a condition of admission.

⁴ If we combine the "compelled states" and the no-action states, there are 15 states that have taken no action. This is roughly 40% of all Blaine states, leaving 60% having modified or reviewed their Blaine Amendments. However, again, if the amendment was forced from without, no animus can be attributed to the state legislature which adopted it.

state constitutions. While the United States Constitution has only been amended sixteen times since the Bill of Rights was adopted in 1791, in 1996-97 alone, forty-two states sought to amend their constitutions a total of 233 times. Seventy-six percent of these amendments -- 178 in total -- were approved, an average of over four amendments per amending state in that period.⁵ In short, the failure to amend a state constitution provision which has been the subject of scrutiny can be fairly said, over the course of 125 years, to be a conscious choice by the people and legislature.

2. Blaine Amendments: Not Discriminatory on Their Face nor in their Impact

Even if the remaining nine states' Blaine Amendments arose in a crucible of anti-Catholic bigotry, it does not mean that the Amendments are fatally flawed. While it is critical to acknowledge and reconcile that history, the amendments themselves are not discriminatory on their face nor do they have a discriminatory impact. Each amendment is facially neutral. No state's version of the Blaine Amendment targets Catholics or Catholic schools. In fact, they target all aid to sectarian institutions. In addition, no evidence exists that these amendments have any current unlawful discriminatory impact on Catholic schools or Catholics.

3. Legislative Intent is Not Dispositive or Relevant For Blaine Amendments

Because there is no discrimination or ambiguity present in the language of Blaine Amendments, their legislative history is largely irrelevant. The bigotry that may have been in the hearts of some legislators at the time of the passage of the bill is of little consequence today, beyond the important need to recognize and acknowledge a sad chapter in the history of religion in America.

The use of legislative history is relevant only when seeking to resolve an ambiguity in a statute relating to its purpose or language:

A court will look to statements by legislators for guidance as to the purpose of the legislature, [but] [i]t is an entirely different matter [when] asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.⁶

See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in judgment) (declaring legislative history to be illegitimate as basis for statutory interpretation). See generally Michael H. Koby, "The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique." 36

⁵ Robert Fitzpatrick, "Neither Icarus Nor Ostrich: State Constitutions As An Independent Source Of Individual Rights," 79 N.Y.U. L. Rev. 1833, 1852-1853 (2004).

⁶ *United States v. O'Brien*, 391 U.S. 367, 384 (1968).

HARV. J. ON LEGIS. 361 (1999) (finding sharp decline in Supreme Court reliance on legislative history).

The argument made by Blaine Amendment opponents is that these Amendments were borne out of the anti-Catholic bias of certain legislators and should consequently be rejected. This is an unwarranted and unprecedented expansion of the legitimate role of the use of legislative history. Courts do not analyze the origin of a statute to decide whether they like it or not; they look at the impact, meaning and effect of the statute. If there is ambiguity, then the history is relevant. However, the words and phrasing of Blaine Amendments are crystal clear, and nothing in their language suggests any anti-Catholic animus.

4. Conclusion

If the Commission is considering the history of Blaine Amendments, it must examine the record not only in light of what occurred in 1875, but also the continuous process of constitutional creation, amendment, and re-ratification that marks the history of state constitutions in America. That record will show Blaine Amendments that have shed their dark past by their renewal in the service of religious liberty.

Vouchers: Bad For Religious Liberty

1. Vouchers Are Bad Public Policy

Most Americans believe that improving our education system should be a top priority for our government. In an attempt to rescue children from failing school systems, some champion voucher programs. The standard proposed voucher program distributes monetary vouchers to parents of school-age children who can use the vouchers towards the cost of tuition at private schools – including pervasively sectarian schools. At first glance, school vouchers might appear a benign way to increase the options of poor parents. However, vouchers pose a real and serious threat to values that are vital to the health of American democracy. These programs subvert the constitutional principle of separation of church and state and threaten to undermine our system of public education.

2. Vouchers undermine separation of church and state

Voucher programs force citizens – of any or of no religion – to pay for the religious indoctrination of children at schools with narrow parochial agendas. Channeling public funds to these institutions directly contradicts the constitutional mandate of separation of church and state.

While the Supreme Court has upheld school vouchers in the *Zelman v. Simmons-Harris* case, vouchers have not been given a green light by the Court beyond the narrow facts of that specific case. Indeed, Cleveland's voucher program was upheld in a close (5-4) ruling that required a voucher program to, among other things: (i) be a part of a much wider program of multiple educational options, such as magnet schools and after-school

tutorial assistance, (ii) offer parents a “true private” choice between religious and non-religious education (perhaps even providing incentives for non-religious education), and (iii) not only address private schools, but ensure that benefits go to schools regardless of whether they are public or private, religious or not.

More importantly, this decision did not disturb the bedrock idea that no government program may be designed to advance religious institutions over non-religious institutions.

3. A voucher system may be abused

Voucher systems allow for various ways in which public funds will be used in an abusive manner – without government oversight. For instance, some private schools may promote agendas antithetical to the American ideal; it may be difficult to prevent schools run by the Nation of Islam or the Ku Klux Klan from receiving public funds to subsidize their racist and anti-Semitic agendas. Further, private schools are allowed to discriminate on a variety of grounds, regularly rejecting applicants because of low achievement, discipline problems, and sometimes for no reason at all. Indeed, the proud legacy of *Brown v. Board of Education* may be tossed away as tax dollars are siphoned off to deliberately segregated schools.

4. Vouchers do not accomplish what they aspire to do

Proponents of vouchers argue that these programs would allow poor students to attend good schools. However, there is no income cap for vouchers, so while a voucher supplement may make the difference for some families, giving them just enough to cover the tuition at a private school -- ie., giving \$2500 towards a tuition of \$10,000 -- voucher programs offer nothing to families who cannot come up with the rest of the money to cover tuition costs. For example, in 2001, nearly one in three voucher recipients in Cleveland was already attending private school.

In some cases, voucher programs offer students the choice between their current public school or school operated by the church. Not all students benefit from a religious school atmosphere -- even when the religion being taught is their own. For these students, voucher programs offer only one option: to remain in a public school that is likely to deteriorate even further.

As an empirical matter, reports on the effectiveness of voucher programs have been mixed. In fact, a study by the American Federation of Teachers suggests that the data of independent researchers shows that vouchers have been less effective than proponents argue in Milwaukee, Florida and Cleveland.⁷ For example, in Cleveland, the data shows that public school children made better gains than did voucher school students. In Milwaukee, the data shows that students made no gains in reading or math and that participants in other programs – such as smaller class size and an enrichment program – “significantly outperformed” their voucher peers in reading and equaled them in math.

⁷ <http://www.aft.org/pubs-reports/teachers/VoucherTrackRecord2005.pdf>

In addition, just because a student is given a voucher does not mean a school is required to accept that student. Private schools, by their very nature, retain control over who they admit. Other data shows that most voucher programs do not accommodate students with disabilities and with other special educational needs.⁸

As our country becomes increasingly diverse, the public school system stands out as an institution that unifies Americans. With the help of taxpayers' dollars, private schools would be filled with well-to-do and middle-class students and a handful of the best, most motivated students from inner cities. This would leave public schools with fewer dollars to teach the poorest of the poor and other students who, for one reason or another, were not private school material. Such a scenario can hardly benefit public education or our broader society.

Implementation of voucher programs sends a clear message that we are giving up on public education. Undoubtedly, vouchers would help some students. But the glory of the American system of public education is that it is for *all* children, regardless of their religion, their academic talents or their ability to pay a fee. This policy of inclusiveness has made public schools the backbone of American democracy.

⁸ <http://www.aft.org/topics/vouchers/downloads/VouchersMythsFacts.pdf>

**APPENDIX:
STATE BLAINE AMENDMENTS AND POST-RATIFICATION ACTON**

| <u>State</u> | <u>Date of Adoption</u> | <u>Most Recent Ratification or Amendment</u> | <u>Comments</u> |
|---------------|-------------------------|--|--|
| Alabama | 1875 | 1901 | Post - 1900 revision |
| Alaska | 1956 | | Post - 1950 revision (included in new state Constitution). |
| Arizona | 1912 | | Compelled. |
| California | 1879 | 1966 | Post - 1950 revision |
| Colorado | 1876 | 1977 | Post - 1950 revision |
| Delaware | 1897 | | |
| Florida | 1838 | 1968 | Post - 1950 revision |
| Georgia | 1877 | 1983 | Post - 1950 revision |
| Hawaii | 1959 | 2002 | Post - 1950 revision (included in new state Constitution). |
| Idaho | 1890 | 1980 | Post - 1950 revision |
| Illinois | 1870 | 1970 | Post - 1950 revision |
| Indiana | 1851 | | |
| Kansas | 1859 | 1966 | Post - 1950 revision |
| Kentucky | 1891 | 1953 | Post - 1950 revision |
| Massachusetts | 1855 | 1974 | Post - 1950 revision |
| Michigan | 1835 | 1963 | Post - 1950 revision (Re-ratified state constitution in 1963). |
| Minnesota | 1858 | 1974 | Post - 1950 revision (Re-ratified state constitution in 1974). |
| Mississippi | 1890 | | |
| Missouri | 1875 | | |
| Montana | 1889 | 1972 | Post-1950 revision |
| Nebraska | 1875 | 1976 | Post-1950 revision |
| Nevada | 1864 | 1938 | Post-1900 revision |
| New Hampshire | 1877 | | |
| New Jersey | 1875 | 1958 | Post – 1950 revision |
| New Mexico | 1911 | | Compelled. |
| New York | 1894 | 1962 | Post - 1950 revision |
| North Dakota | 1889 | | Compelled. |
| Ohio | 1851 | | |
| Oklahoma | 1907 | | Compelled. |
| Oregon | 1857 | | |
| Pennsylvania | 1874 | 1963 | Post-1950 revision |

| | | | |
|--------------|------|------|--|
| South Dakota | 1889 | | Compelled. |
| Texas | 1876 | 1983 | Post-1950 revision |
| Virginia | 1870 | 1971 | Post - 1950 revision (Re-ratified state constitution in 1971). |
| Washington | 1889 | | Compelled |
| Wisconsin | 1848 | | |
| Wyoming | 1889 | | |
| Utah | 1895 | 1986 | Post - 1950 revision (also, Compelled). |

There are 38 states that actively preserve Blaine Amendments. Of those 38:

- 21 states have either re-endorsed their Blaine Amendment specifically or have re-ratified their constitutions as a whole since 1950, and 23 since 1900.⁹
- 6 states (24%) were compelled to include a Blaine Amendment as a condition of admission to the Union after 1889. These six state legislatures cannot be said to have had an anti-Catholic animus.
- 9 states have taken no significant actions relating to their Blaine Amendments since their enactment.¹⁰ Of these nine, two, Delaware and Mississippi, enacted their Blaine Amendments in 1897 and 1890 respectively.

KEY:

Blank = The section remains the same from the original text of the constitution

Post- 1900 revision = Amendment to section; the particular pertinent section has been amended since 1900.

Post – 1950 revision = Amendment to section; the particular pertinent section has been amended since 1950. Also includes state constitutions ratified after 1950 (Hawaii and Alaska).

Re-ratified = The constitution in its entirety has been re-ratified

Compelled: Compelled by Congress to incorporate amendment as prerequisite to joining the Union; no animus attributable to state legislature.

⁹ This includes any state that, since 1900, amended the section of the Constitution in which Blaine Amendments are located or which created new Constitutions.

¹⁰ Of course, this number excludes those states that were compelled to include Blaine as a condition of admission.

Transcript of Briefing

U.S. COMMISSION ON CIVIL RIGHTS

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COMMISSION BRIEFING

SCHOOL CHOICE, THE BLAINE AMENDMENTS AND
ANTI-CATHOLICISM

+ + + + +

FRIDAY, JUNE 1, 2007

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The meeting convened in Room 540 at 624 Ninth Street, N.W., Washington, D.C. at 9:30 a.m., Abigail Thernstrom, Vice Chairman, presiding.

PRESENT:

ABIGAIL THERNSTROM, Vice Chairman
JENNIFER C. BRACERAS, COMMISSIONER (via telephone)
GAIL L. HERIOT, COMMISSIONER
PETER N. KIRSANOW, COMMISSIONER
ARLAN D. MELENDEZ, COMMISSIONER
ASHLEY L. TAYLOR, JR., COMMISSIONER
MICHAEL YAKI, COMMISSIONER

KENNETH L. MARCUS, Staff Director

STAFF PRESENT:

TYRO BEATTY, Director, Human Resources Division
DAVID BLACKWOOD, General Counsel
MARGARET BUTLER
TERESA BROOKS
CHRISTOPHER BYRNES, Attorney Advisor to the OSD &
Acting Deputy General Counsel, OGC
DEBRA CARR, Associate Deputy Staff Director, OSD
RANITA CARTER
PAMELA A. DUNSTON, Chief, ASCD
BARBARA FONTANA
LATRICE FOSHEE
MAHA JWEIED
SOCK FOON MacDOUGALL
EMMA MONROIG, Solicitor/Parliamentarian
EILEEN RUDERT
KARA SILVERSTEIN

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STAFF PRESENT (Continued):

KIMBERLY TOLHURST
AUDREY WRIGHT
MICHELLE YORKMAN

COMMISSIONER ASSISTANTS PRESENT:

DOMINIQUE LUDVIGSON
LISA NEUDER
RICHARD SCHMELCHEL

PANELISTS:

ELLEN JOHNSON
RICHARD D. KOMER
K. HOLLYN HOLLMAN
ANTHONY R. PICARELLO, JR.

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I-N-D-E-X

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P-R-O-C-E-E-D-I-N-G-S

(11:30 a.m.)

INTRODUCTORY REMARKS BY CHAIRMAN

VICE CHAIR THERNSTROM: On behalf of the U.S. Commission on Civil Rights, I welcome everybody to this briefing on school choice: the Blaine amendments and anti-Catholicism. And once again I apologize for the delay. Maybe it should have been predictable, and maybe we should have arranged things a little better.

But, in any case, I am delighted to see all four of you. At this briefing, the U.S. Commission on Civil Rights has assembled a panel of experts to discuss the Blaine-type amendments contained in the state constitution named after the congressman who proposed the initial amendment to the United States constitution, Blaine amendments as adopted by the individual states typically prohibits the use of funds raised for public schools to directly or indirectly support private religious schools. Currently at least 37 states have some version of a Blaine amendment.

These state constitutional provisions place unique obstacles to the implementation of those school choice programs that involve vouchers to

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1 parents who may wish to use the funds to send their
2 children to religiously affiliated schools.

3 Advocates of religious liberties, some
4 supporters of school vouchers allege that these
5 constitutional restrictions were developed in the
6 1870s to stop the growth of the Catholic schools.
7 Supporters of the Blaine amendments argue they serve
8 other purposes.

9 This briefing will address the origins of
10 the original federal Blaine amendment and whether any
11 of the anti-Catholic sentiment behind the original
12 amendment continues to taint the existing amendments
13 or baby Blaines in a manner that renders them
14 unconstitutional or illegal.

15 The record of this briefing will be open
16 for 30 days. Public comments may be mailed to the
17 U.S. Commission on Civil Rights Office of the Civil
18 Rights Evaluation, room 740, 624 9th Street,
19 Northwest, Washington, D.C. 20425.

20 We are pleased this morning to welcome
21 Anthony Picarello, Vice President and General Counsel
22 of the Becket Fund; Hollyn Hollman, General Counsel,
23 Baptist Joint Committee for Religious Liberty; Ellen
24 Johnson, President, American Atheists; and Richard
25 Komer, senior litigation attorney at the Institute for

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1 Justice.

2 Anthony Picarello has worked at the Becket
3 Fund for over six years. He joined the fund after a
4 three and a half-year tour of duty at Covington and
5 Burling in Washington, D.C.

6 The Becket Fund for Religious Liberty is a
7 nonprofit, nonpartisan, interfaith legal and
8 educational institution dedicated to protecting the
9 free speech of all religious traditions. The Becket
10 Fund operates in three arenas: litigation, media, and
11 scholarship.

12 While in law school at the University of
13 Virginia, Mr. Picarello served as essays editor of the
14 Virginia Law Review and won the UV's Jessup
15 international law moot court competition. He went on
16 to clerk at the Federal District Court in Portland,
17 Maine. He earned his A.M. in religious studies from
18 the University of Chicago, his A.B. magna cum laude in
19 social anthropology and comparative religion from
20 Harvard University.

21 Hollyn Hollman is General Counsel of the
22 Baptist Joint Committee for Religious Liberty. As
23 General Counsel, Ms. Hollman has provided legal
24 analysis of church-state issues that arise before
25 Congress, the courts, and administrative agencies.

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1 The Baptist Joint Committee is a nonprofit
2 501(c)(3) education and advocacy organization that
3 serves 14 Baptist bodies, has worked for nearly 70
4 years promoting religious liberty for all and
5 upholding the principle of church-state separation.

6 Her work includes preparing friend of the
7 court submissions, presentations for research
8 institutions and religious organizations, and issue
9 briefings for congressional staff.

10 She writes a regular column for the BJC's
11 monthly publication, "Report from the Capital." In
12 addition, she consults with national print media on
13 matters related to church-state relations and has
14 appeared in leading publications, including the
15 Washington Post, USA Today, the Christian Science
16 Monitor, and Christian Century. Hollman has also
17 appeared on National Public Radio, CNN, C-Span, Fox
18 News Channel, NBC Nightly News, and PBS Religion and
19 Ethics News Weekly.

20 Ellen Johnson, President of American
21 Atheists, Ms. Johnson has been president of that
22 organization for nearly a decade. In 1998, she met
23 with the Office of Public Liaison for the Clinton
24 White House to discuss the subject of giving atheists
25 a "place at the table and discussion of issues of

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1 concern to the nation's atheists."

2 She has testified before the U.S.
3 Commission on Civil Rights on unconstitutional
4 expression of religion in public schools. In 2001,
5 she met with the Minister of Foreign Affairs at the
6 Pakistan Embassy in Washington, D.C. to discuss the
7 unlawful imprisonment of Dr. Younis Shaikh, I believe
8 the name is, a rationalist, on the charge of
9 blasphemy. He has now been released from prison.

10 That same year she was made an honorary
11 associate of the Rationalist International. She also
12 serves as an honorary board member of Scouting for
13 All, a nationwide group that seeks an alleged
14 discrimination against atheists and gays within the
15 Boy Scouts of America.

16 Ms. Johnson has co-hosted the cable
17 television program the Atheist Viewpoint since 1994,
18 now airs on 45 cable stations throughout the United
19 States. She is also a frequent guest on national
20 radio and TV shows, including Fox Network's Hannity &
21 Colmes; Heartland with John Kasich; the O'Reilly
22 Factor; MSNBC's Scarborough Country; the Larry King
23 Show; the Barbara Walters specials; CNN Paula Zahn's
24 Now; and C-Span's prestigious public affairs program,
25 Washington Journal.

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1 Johnson was chairperson of the Godless
2 Americans March on Washington task force, which on
3 November 2nd, 2002 brought together thousands of
4 atheists, freethinkers, secular humanists, and other
5 nonbelievers for an unprecedented display of unity in
6 our nation's capital.

7 She also serves as Executive Director of
8 the Godless Americans Political Action Committee, a
9 nationwide initiative to support and elect atheists to
10 public office.

11 And last, but not least, Richard Komer, as
12 the nation's only libertarian public interest law
13 firm, the Institute for Justice, pursues cutting-edge
14 litigation in the courts and in the court of public
15 opinion on behalf of individuals whose most basic
16 rights are denied by the government, the right to earn
17 an honest living, private property rights, the right
18 to free speech, especially in the areas of commercial
19 and internet speech. As Wired magazine has said, the
20 Institute for Justice "helps individuals subject to
21 wacky government regulations."

22 Dick Komer serves as senior litigation
23 attorney at the Institute for Justice. He litigates
24 school choice cases in both federal and state courts.
25 Several of his current cases involve the

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1 constitutional of allowing school choice programs
2 to include religious schools among the private schools
3 that can participate.

4 Prior to his work at the institute, Dick
5 Komer worked as a civil rights attorney for the
6 federal government. He held positions at the
7 Department of Justice as well and at the Equal
8 Employment Opportunity Commission, where he was
9 Special Assistant to the Chairman, now Justice
10 Clarence Thomas. His most recent government employ
11 was as Deputy Assistant Secretary for Civil Rights at
12 the Department of Education.

13 Also contacted by the Commission unable to
14 attend were People for the American Way, Professor
15 Steven Green; Barry Lynn, Americans United for
16 Separation of Church and State; Aaron Schohan,
17 Americans United for Separation of Church and State;
18 Rabbi David Saperstein, Union for Reformed Judaism;
19 Professor Daniel Dreisbach; Ryan Messmore, the
20 Heritage Foundation. Again, those were people we
21 contacted who could not come, but we have a splendid
22 group. And I welcome all of you on behalf of the
23 Commission.

24 First please raise your right hand so I
25 may swear you in.

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1 COMMISSIONER YAKI: Just don't use "under
2 God."

3 (Laughter.)

4 VICE CHAIR THERNSTROM: I'm not going to
5 use "under God."

6 COMMISSIONER YAKI: Version 2.

7 VICE CHAIR THERNSTROM: I already thought
8 of that.

9 (Laughter.)

10 (Whereupon, all speakers were duly sworn.)

11 VICE CHAIR THERNSTROM: I'll call on you
12 in the order that you have been given for the record.

13 So, Mr. Picarello, will you speak for ten minutes?

14 Thank you very much.

15 **SPEAKERS' PRESENTATION**

16 MR. PICARELLO: Good morning. My name is
17 Anthony Picarello. And I am Vice President and
18 General Counsel of the Becket Fund for Religious
19 Liberty. And I thank you for the opportunity to come
20 before you today to discuss the history of the Blaine
21 Amendments and particularly their connection to
22 anti-Catholicism.

23 This issue has been a special concern of
24 the Becket Fund for many years. And, as you have
25 noted, the Becket Fund is a nonpartisan, interfaith

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1 public interest law firm dedicated to protecting the
2 free speech of all religious traditions.

3 That mission includes opposition to
4 government discrimination based on religion, including
5 the government's exclusion of religious people or
6 groups from public life or public benefits.

7 The Becket Fund litigates in support of
8 these principles in state and federal courts
9 throughout the United States as both primary counsel
10 and amicus curiae.

11 Accordingly, the Becket Fund has been
12 actively involved in litigation challenging Blaine
13 Amendments as violations of the First and Fourteenth
14 Amendments to the United States Constitution.

15 As you know, Blaine Amendments are state
16 constitutional amendments that were passed in the
17 latter half of the Nineteenth Century that expressed
18 the sentiment prevalent in the United States. They
19 expressed and implemented that sentiment by excluding
20 from government funding schools that taught
21 "sectarian" faiths, mainly Catholicism, while allowing
22 those funds to be common schools, which taught the
23 common or "non-sectarian faith," which at the time was
24 a form of non-denominational Protestantism.

25 The first of these amendments at the state

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1 level was passed. The first of these were passed in
2 New York and Massachusetts corresponding to waves of
3 Catholic immigration in that region, in the Northeast.

4 But amendments like these gradually spread
5 throughout the Midwest until in 1875 James G. Blaine,
6 a congressman and presidential candidate, came to be
7 associated with the amendments by proposing one at the
8 federal level.

9 Although Blaine's amendment narrowly
10 failed, it triggered a broader movement to add similar
11 amendments to state constitutions that did not already
12 have them, especially on the Western states then in
13 the process of being admitted to the Union. Some of
14 those states were required by Congress to adopt these
15 amendments. Some states just thought it was a good
16 idea that were already part of the union.

17 The last Blaine Amendment was added in the
18 early Twentieth Century, leaving the current total at
19 approximately 35. There is some dispute as to the
20 precise number, sort of depending upon how you count.

21 In short, Blaine Amendments were not, not,
22 designed to implement benign concerns for the
23 separation of church and state traceable to the
24 founding but, instead, to target for special
25 disadvantaged the faiths of immigrants, especially

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1 Catholicism.

2 For years, the Becket Fund has worked to
3 create the historical revisionism that would have
4 erased this shameful chapter in our nation's history
5 in order or protect state Blaine Amendments for use as
6 the last constitutional weapon available to attack
7 democratically enabled religion-neutral school voucher
8 programs or social service programs that contract with
9 faith-based providers.

10 We have filed three amicus briefs before
11 the U.S. Supreme Court to document in detail the
12 history of the federal and state Blaine Amendments.

13 We pursue lower court litigation on behalf
14 of students and their parents, who have suffered
15 exclusion from educational benefits based on religion
16 because of it. And we maintain a Web site dedicated
17 exclusively to the history and current effects of
18 Blaine Amendments at blaineamendments.org and
19 variants.

20 I realize that I only have a short time
21 for my prepared remarks. So I feel constrained to
22 paint in relatively broad strokes in hopes of
23 addressing the details in the course of our discussion
24 later. So I will limit myself to three broader
25 points.

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1 First I want to identify the watermark of
2 a true Blaine Amendment, which is the use of the term
3 "sectarian" to identify those who should be excluded
4 from government aid.

5 Second, I want to describe briefly how a
6 majority of justices currently sitting on the Supreme
7 Court have already acknowledged the historical
8 connection between the Blaine Amendments and
9 anti-Catholicism.

10 Third, I would like to highlight some of
11 the growing body of historical scholarship that
12 focused on and traced out in detail those same
13 connections.

14 So on to the first point. One of the
15 surest ways to spot a Blaine Amendment in a state
16 constitution is to look for the use of the term
17 "sectarian" to describe the kind of entity, such as
18 school, society, or institution, that bears the
19 special legal disadvantage of being excluded from
20 government aid.

21 The term "sectarian" is not synonymous
22 with "religious" but, instead, refers to a narrower
23 subcategory connoting one or more sects or
24 denominations of religion. For example, non-sectarian
25 prayer is unmistakably religious, on the one hand, but

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1 is not tied to any one sect or denomination, on the
2 other.

3 The term "sectarian," moreover, usually
4 bears a pejorative meaning. Webster's Dictionary, for
5 example, defines sectarian to mean "of or relating to
6 a sect or sects narrow-minded and ready to quarrel
7 over petty differences of opinion."

8 Along the same lines, linguist William
9 Safire recently noted that "sectarian" is a word long
10 associated with religion that has a nastier
11 connotation than its synonym "denominational."

12 Thus, standing alone, the bare term
13 "sectarian" in the state constitution both draws a
14 religion-based distinction between those who receive
15 and do not receive government aid and indicates a
16 government purpose to deny government aid to some
17 disfavorite subset of all religious persons or groups.

18 Although the distinction between sectarian
19 and religious may occasionally be blurred in common
20 usage today, it was not when the Blaine Amendments
21 first became law. Indeed, their historical context
22 makes clear their use of the term "sectarian" was not
23 an oversight for a matter of mere semantics but,
24 instead, a common legal device to target for special
25 disadvantage those who resisted the "common" religion

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1 than taught in the "common" schools.

2 In other words, the meaning of sectarian
3 can best be understood by reference to the
4 non-sectarian religion to which it was opposed at the
5 time. Specifically, the term "sectarian" both
6 expressed and implemented hostility to the faiths of
7 those immigrants especially but not only Catholics who
8 resisted assimilation to the non-sectarian
9 Protestantism then taught as the common faith in the
10 common schools.

11 Denying aid only to sectarian schools
12 allowed the government to continue funding the
13 teaching of the government's preferred non-sectarian
14 faith through the public schools while penalizing
15 financially those who resisted that faith.

16 In other words, state constitutional
17 provisions that defunded sectarian groups were not
18 designed to implement the nine concerns for the
19 separation of church and state traceable to the
20 founding but, instead, to target for special
21 disadvantage the faiths of the religious minorities of
22 the late Nineteenth Century, especially the religions
23 in immigrants and especially Catholicism.

24 The second point, the basic history of the
25 meaning of sectarian is a legal term that has been

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1 confirmed in the opinions of the U.S. Supreme Court
2 written or joined by six current justices.

3 In Mitchell v. Helms in 2000, a plurality
4 of four acknowledged and condemned the religious
5 bigotry that gave rise to the state laws that targeted
6 sectarian faiths commonly called Blaine Amendments, as
7 we discussed.

8 The opinion criticized the court's prior
9 use of the term "sectarian" in establishing clause of
10 jurisprudence because "Hostility to aid to pervasively
11 sectarian schools has a shameful pedigree that we do
12 not hesitate to disavow."

13 And the opinion continued, once again
14 quoting from it, "Opposition to aid to sectarian
15 schools acquired prominence in the 1870s with
16 Congress' consideration and near passage of Blaine
17 Amendment which would have amended the Constitution to
18 bar any aid to sectarian institutions."

19 Consideration of the amendment arose at a
20 time of pervasive hostility to the Catholic church and
21 to Catholics in general. And it was generally an open
22 secret that sectarian was code for Catholic.

23 How much time do I have left?

24 VICE CHAIR THERNSTROM: You have 2 minutes
25 and 33 seconds.

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1 MR. PICARELLO: All right. Well, I'm
2 going to power through the rest. The plurality --

3 VICE CHAIR THERNSTROM: We are sticking to
4 time here.

5 MR. PICARELLO: The plurality continued
6 that the exclusion of pervasive sectarian schools from
7 otherwise permissible aid programs. The very purpose
8 and effect of the state constitutional provisions
9 represented a doctrine point of bigotry that should be
10 buried now.

11 In *Zelman* against *Simmons-Harris* a few
12 years later, 2002, three other justices provided a
13 detailed account of the relevant history of dissent.
14 Not only do they recognize that the Blaine Amendment
15 movement was a form of backlash against "political
16 efforts to right the wrong of discrimination against
17 religious minorities in public education," they
18 explained how the term "sectarian" functioned within
19 that movement.

20 And, again, I'm quoting from Justice
21 Breyer's opinion. This is an opinion by Justice
22 Breyer joined by Stevens and Souter, "Historians point
23 out that during the early years of the republic,
24 American schools, including the first public schools,
25 were Protestant in character. Their students recited

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1 Protestant prayers, read the King James Version of the
2 Bible, and learned Protestant religious ideas. Those
3 practices may have wrongly discriminated against
4 members of minority religions, but given the small
5 number of such individuals, the teaching of Protestant
6 religions in schools did not threaten serious social
7 conflict."

8 The justices recounted how "The wave of
9 immigration starting in the mid Nineteenth Century
10 increased the number of those suffering from this
11 discrimination and, correspondingly, the intensity of
12 religious hostility surrounding the school question,"
13 once again quoting from Justice Breyer.

14 "Not surprisingly with this increase in
15 numbers, the members of non-Protestant religions,
16 particularly the Catholics, began to resist the
17 Protestant denomination of public schools. Scholars
18 report that by the mid Nineteenth Century, religious
19 conflict over matters such as Bible reading drew
20 intense as scholars resisted and Protestant fought
21 back to preserve their domination.

22 "In some states, Catholic students
23 suffered beatings or expulsions for refusing to read
24 from the Catholic Bible. And crowds rioted over
25 whether Catholic children could be released from the

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1 classroom during Bible reading."

2 Finally, the justices detailed how
3 Catholic efforts to correct this increasingly severe
4 discrimination elicited a reaction from the form of
5 the proposed federal Blaine Amendment and its
6 successful state prodigy.

7 And again I quote from Justice Breyer,
8 "Catholics sought equal government support for their
9 education, for the education of their children in the
10 form of aid for private Catholic schools. But the
11 Protestant position on this matter, scholars report,
12 was that public schools must be non-sectarian, which
13 was usually understood to allow Bible readings and
14 other Protestant observances. And public money must
15 not support 'sectarian' schools, which in practical
16 terms meant Catholic."

17 Here is the punch line, "And this
18 sentiment played a significant role in creating a
19 movement that sought to amend several state
20 constitutions, often successfully, and to amend the
21 United States Constitution, unsuccessfully, to make
22 certain that government would not help pay for
23 sectarian; that is, Catholic, schooling for children."

24 To be sure, justices in these two
25 opinions differed on the legal consequences of these

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1 historical facts, but they still agreed on those
2 facts.

3 And, actually, the third point that I have
4 has to do with the extent of the scholarship
5 supporting this. And rather than read through my
6 laundry list since I have run out of time, I will,
7 instead, just refer you to my testimony on that point.

8 And I thank you.

9 VICE CHAIR THERNSTROM: And I thank you
10 very much.

11 Ms. Hollman?

12 MS. HOLLMAN: Thank you. I am Hollyn
13 Hollman. I am General Counsel for the Baptist Joint
14 Committee. And I won't go through any more of those
15 introductory remarks that you read into the record.

16 Thank you very much for inviting me here
17 today. I will start with just a few observations and
18 notes on my perspective, though. I am familiar with
19 the arguments coming from those in the voucher
20 movement or school choice movement seeking to
21 eliminate religious liberty provisions that pose a
22 legal barrier to their proposals, such as those that
23 prevent the funding of religious schools.

24 Painting such provisions, however, with a
25 broad anti-Catholic brush is a very flawed tactic that

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1 betrays our country's rich history of religious
2 freedom. It emphasizes an anomalous period in our
3 country's history and threatens to mislead us about
4 the historic origins and the contemporaneous
5 importance of concepts of church-state separation.

6 The Baptist Joint Committee opposes
7 tax-funded vouchers to the extent that such programs
8 allow public funding of private religious programs and
9 purposes. For us and for many religious people across
10 a broad spectrum, the principle that government should
11 not fund religion, including that government should
12 not fund religious education and religious
13 institutions, is a principle closely related to
14 religious freedom.

15 We are deeply invested from a historical
16 and theological basis in the history and development
17 of the principle as well as its preservation because
18 it has been a core concept of the church-state
19 separation that has served our country very well, both
20 religion and government.

21 Our commitment comes from a belief that
22 freedom of conscience is God-given, that we are
23 created in a way to choose religion. It should be
24 voluntary. It should be protected by our legal
25 system. And the separation of church and state has

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1 done that well.

2 When we oppose government funding of
3 religious institutions, religious education, we do not
4 single out any particular religious views. We act,
5 instead, not out of any hostility or animus but we
6 believe out of respect for the way we are created and
7 respect for religious freedom in our tradition in this
8 country.

9 This briefing I understand is to talk
10 about the state constitutional provisions that play a
11 role in the school funding debates. Many state
12 constitutions have provisions that touch on public
13 school funding in many ways that differ from the
14 federal Constitution, no surprise there. Specifically
15 many state constitutions have religious liberty
16 protections, protecting through the exercise of
17 religion and no establishment values in ways more
18 explicit than the federal First Amendment, including
19 those that say no aid to religious institutions.

20 While some advocates in the voucher
21 movement and many others very innocently might apply
22 broadly to these state constitution provisions as
23 Blaine Amendments, I would like to say at the outset
24 that that is not actually correct. Many of the state
25 constitutional provisions that provide a stronger

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1 barrier to government funding of religion pre-existed
2 the whole Blaine Amendment and I say are in no way
3 diminished or should be tainted by the Blaine chapter.

4 The effort to refer to state constitution
5 provisions such broadly, as I said, I believe is
6 misguided. The no aid to religion principle that you
7 find in these state constitutions as well as in other
8 areas of American law protects the tradition of
9 religious freedom.

10 Moreover, the overwhelming effect of these
11 laws and these principles has been a broad confidence
12 that we have in America about the government
13 neutrality toward religion that has also led to a free
14 marketplace of religion led by religious institutions
15 that are largely self-funded and self-regulated.

16 State constitutional provisions like the
17 First Amendment have been interpreted to prohibit the
18 funding of religion broadly. And that cannot fairly
19 be seen as discriminatory toward religion. Whatever
20 the claims about the historical nature of some of
21 these provisions, there is no evidence that in recent
22 years, these state provisions or the word "sect" has
23 been interpreted as only prohibiting aid or any kind
24 of benefit, particular to Catholics or any other
25 religious group. State constitutional amendments that

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1 bar funding are part of our broad legal tradition for
2 religious liberty.

3 The Supreme Court has often cited the
4 importance of awarding government funding, financial
5 sponsorship of religion as it protects religious
6 liberty. Quoting from one Supreme Court decision, "it
7 is sufficient to note that for the men who wrote the
8 religion clauses of the First Amendment, the
9 'establishment' of a religion connoted sponsorship,
10 financial support, and active involvement in the
11 sovereign of religious activities." So it's a core
12 establishment clause principle.

13 You see this throughout Supreme Court
14 jurisprudence. The Court, noting special
15 establishment clause dangers when we talk about
16 funding, when money is given directly to religious
17 schools, "These are deeply held values that remain as
18 part of our Supreme Court tradition, our American
19 tradition."

20 The Court often cites James Madison's
21 Memorial and Monstrance -- and maybe I should have
22 appended that to my testimony -- saying things like
23 that "Religion of every man must be left to the
24 conviction and conscience of every man."

25 Of course, the Memorial and Monstrance

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1 along with Thomas Jefferson's Virginia act for
2 establishing religious freedom came at a very
3 important debate in our country about the relationship
4 between government and religion. It, in fact, was
5 sort of a choice program.

6 The Patrick Henry was being debated, in
7 which taxes were levied but not for any one current
8 religion. You could actually apply them to your own
9 religion. So it's a very applicable historical
10 chapter to what we are talking about today. So I
11 encourage us to continue to look at those important
12 historical arguments that predated the discussion of
13 Blaine.

14 For Baptists, as I have said already,
15 there are strong, historical, and theological reasons
16 that we hold these principles dear. Two of our great
17 leaders, Isaac Backus and John Leland, wrote about
18 these principles long before the Blaine. And for
19 them, the matter was jurisdictional.

20 The state has no legitimate power of
21 religious matters. Taxation to support churches
22 contradicted their belief that religious commitments
23 must be voluntary to be valid.

24 Note they did not advocate this only for
25 themselves but for all faiths. They did not ask for

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1 taxes to be supported to all religions but to nine.
2 And they held that deeply along with a held commitment
3 that governments stay out of religious affairs. Often
4 these things go together.

5 The specific application of this general
6 principle of no government funding of religion
7 developing in the development of public schools is a
8 much more complicated nuance, has many other factors
9 than this idea of anti-religion animus, which no doubt
10 definitely fueled some of the debates about the Blaine
11 Amendment and the state amendments that followed.

12 But long before any period of significant
13 Catholic immigration, the word "sectarian" was used to
14 mean specific denominations, not only Catholics. I
15 think that takes away some from this idea that
16 sectarian only means either historically or in today's
17 language a specific anti-Catholic kind of bias.

18 The introduction of the Blaine Amendment
19 arose in an historical context that involved more than
20 whether government would fund parochial schools. The
21 debate involved questions of whether funding of
22 religious schools violated principles of religious
23 freedom and no establishment, the nature of public
24 education, which was new at the time, and how
25 universal it would be, how religious or secular it

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1 would be, and whether the national government should
2 mandate public education and how best to diffuse
3 religious strife that was foreseen and growing at the
4 time.

5 But, more importantly for today, these
6 historical events have little relevance to the usage
7 of these concepts in more recent times. Criticism of
8 certain concepts of separation assumed in the
9 Nineteenth Century aside, critics of the Blaine
10 Amendment charge they are tainted, lack evidence.
11 These statutes are used today to specifically harm
12 them.

13 The no funding principle is everywhere.
14 It is lots of places in the law. And the Supreme
15 Court, of course, after the Zelman decision, there was
16 the emphasis on the state constitutional amendments as
17 a barrier for voucher programs.

18 And the Supreme Court has specifically
19 noted them and said it should come as no surprise or
20 it's hardly remarkable, I think Justice Rehnquist
21 said, in noting that state constitutions might treat
22 the issues of no establishment and free exercise
23 differently from the federal Constitution.

24 The court has never held that there was
25 any right to a government-funded education, nor has

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1 there been any idea that states were not able to
2 protect religious liberty interests in a way that is
3 different and more aggressive than the federal
4 Constitution did.

5 He said it was scarcely novel. Let me get
6 that correct. And the Washington Constitution that
7 draws a more stringent line than the U.S. Constitution
8 in the interest of religious liberty is scarcely
9 novel.

10 The court rejected the claim that treating
11 religion differently suggests animus. Without
12 question, the states have the right to provide greater
13 protection for their citizens above and beyond the
14 federal Constitution. Just as states can and do often
15 provide greater protection for free exercise values,
16 they may provide greater protection for no
17 establishment clause values.

18 To the extent that states do so through
19 state constitutional provisions, dating to the late
20 Nineteenth Century, they are no less worthy.

21 In conclusion, I would say the interest in
22 prohibiting public funding of religious institutions
23 has a variety of bases, many of which we could not go
24 into today but many unrelated to any judgment about
25 the nature of a specific religious tradition that

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1 operates private schools and seeks to fund them
2 through general taxation.

3 The principled argument the government
4 should not fund religion, including government funding
5 of religious educational institution, is the enemy of
6 discrimination, not the product of it. It is part of
7 our country's strong tradition of religious liberty.

8 And, as Justice O'Connor recently noted
9 and Justice Alito just in the last week, we have a
10 proud tradition of religious liberty. And when we
11 look around the world and see the religious strife
12 elsewhere, we should be more proactive of the
13 traditions that we have that have been so good for
14 religious liberty.

15 In conclusion, the principal test of the
16 rule against government funding of religion should be
17 its contribution to society and in this case religious
18 liberty. The effect of our laws prohibiting
19 government funding of religion has been positive for
20 religion and protected religious liberty.

21 Laws against government aid to religious
22 institutions have helped guard against government
23 support for and interference in religion. They have
24 helped create a system where citizens intended to have
25 confidence in government neutrality toward religion

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1 and where our religious choices are many.

2 The absence of government funding for
3 religious institutions has led to the great number and
4 variety of religious options from which those in
5 America can choose and the relative peace enjoyed
6 between various religious communities in our country.

7 Such a legacy should not be disregarded or unfairly
8 tainted.

9 Thank you.

10 VICE CHAIR THERNSTROM: And thank you for
11 coming in once again, the second person to come in
12 under the ten minutes. And I turn to Ellen Johnson.

13 MS. JOHNSON: Sorry. I thought Mr. Komer
14 was going next.

15 VICE CHAIR THERNSTROM: I believe you were
16 next. Yes, I am right on that. Let's see. It was
17 the order.

18 MS. JOHNSON: Thank you.

19 Recently supporters of tax dollars to
20 religious schools and faith-based programs have
21 targeted the Blaine Amendments. They have distorted
22 the history of these amendments. They have
23 misrepresented the life of James G. Blaine, claiming
24 that he was an anti-Catholic bigot while ignoring the
25 historical context of this man's time and the fact

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1 that Mr. Blaine was a distinguished statesman. His
2 own mother was a Catholic, and he was a member of the
3 Congregationalist Church.

4 They claim that the amendments are an
5 unpleasant historical residue that we need to expunge
6 from state constitutions across the country and that
7 they discriminate against organized religion. To
8 understand the 1875 federal and state Blaine
9 Amendments, we should note that the idea of having a
10 universal system of free public education was
11 relatively new.

12 There was debate over how this system was
13 to be funded. And religious groups raised the
14 question of whether their schools would benefit.
15 Public schools sometimes required Protestant Bible
16 readings as part of the curriculum. This led to
17 discord and even violent civil strife.

18 In 1844, there were riots in Philadelphia
19 and elsewhere as Protestants and Roman Catholics
20 battled in the streets. This conflict reflected
21 issues such as class, economic status, and ethnic
22 differences, but one of the issues is whether the
23 Roman Catholic or Protestant version of the Bible
24 should be used in public schools.

25 Catholic leaders desperately wanted public

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1 funding for their school system. Protestants wanted
2 the same but didn't want this government largess to
3 benefit the Catholics.

4 The status of religion in the public
5 square was fiercely debated throughout the Nineteenth
6 Century. It was a debate that went back to the time
7 of the American Revolution, where churches were
8 disestablished and would no longer benefit from
9 government subsidies and privileges.

10 Different religious groups proclaimed that
11 their particular religion should be the law of the
12 land. In some cases, this took the form of attempts
13 to enact a constitutional amendment declaring that
14 America was a Christian nation.

15 As they had at the time of the Revolution,
16 many Americans did not want to see any form of
17 official religion. And they certainly did not want
18 the institutionalized strife that characterized so
19 much of European history.

20 In the mid Nineteenth Century, they also
21 watched the growing rebellion against the papal states
22 and how the popes exercised brutal temporal authority.

23 No wonder they were concerned when an 1864 Pope Pius
24 IX boldly declared that Catholicism should be, in
25 effect, the state religion everywhere. This only

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1 fueled the divisions and disputatious political crime
2 here in the United States.

3 The Blaine Amendments are far from a
4 manifestation of narrow anti-Catholic animus. Critics
5 of these statutes never address why, for instance, the
6 amendments prohibit aid to any and all religious
7 schools and other institutions.

8 If they were simply outbursts of, say,
9 Protestant wrath, why wouldn't they call for aid to
10 Protestant groups and simply exclude the Catholics or
11 the Jews or other denominations? Instead, these
12 statutes express the most noble philosophical and
13 political convictions of the founders.

14 Men like Jefferson and Madison enunciated
15 for America no one should be compelled to attend a
16 church or join a particular religion; no one should be
17 burdened with the support, direct or indirect, of
18 religious establishments; and that there must be no
19 religious test for holding an office of public trust
20 or exercising other rights.

21 The Blaine Amendments echo those very
22 principles. In 1785, James Madison warned of the
23 danger of using the public coin for the financial
24 benefit of any and all religious bodies in his
25 Memorial and Remonstrance against religious

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1 assessments.

2 Thomas Jefferson did the same in his
3 historic Virginia statute for religious freedom.
4 Warning against any form of tax to subsidize religious
5 activities, he urged that no man should be compelled
6 to frequent or support any religious worship place or
7 ministry whatsoever where should be enforced,
8 restrained, molested, or burdened in his body nor
9 goods nor shall otherwise suffer on account of his
10 religious opinions or beliefs.

11 Over the years, the courts have struggled
12 with the issue of establishment of religion. Certain
13 religious groups, though, have been blatantly clear on
14 what they want from lawmakers, especially from the
15 public treasury.

16 Originally the religious groups demanded
17 what was essentially direct government aid. In the
18 late Nineteenth and early Twentieth Centuries, they
19 introduced schemes like the Faribault plan, whereby
20 religious schools, in this case the parochial school
21 systems, would be rented by local municipalities with
22 the teaching staff, consisting mostly of nuns on the
23 public payroll.

24 Today we are concerned about tax-supported
25 religious schools from taxpayer-funded vouchers. Some

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1 courts, including the U.S. Supreme Court, have
2 rendered decisions that appear to uphold the
3 constitutionality of vouchers in specific cases.

4 The courts have been less lenient, though,
5 in cases where the beneficiary of a voucher scheme is
6 of a specific religion, usually the Catholic parochial
7 school system or where there is a clear lack of
8 secular non-religious schools participating. We find
9 this in case after case throughout the nation.

10 There is a question of whether public
11 funding of any kind, direct or indirect, can stay
12 clear of the blending of government money in sectarian
13 religious missions.

14 Back in 1897, when territories were still
15 including Blaine Amendments in their constitutions.
16 Pope Leo XIII wrote, "It is necessary not only that
17 religious instruction be given to the young at certain
18 fixed times but also that every other subject taught
19 be permeated with Christian piety."

20 This may not be as common today in some
21 parochial schools as it was in the late Nineteenth
22 Century, but it certainly describes what is going on
23 in many private, religious, and so-called charter
24 school experiments that are operated by Protestant;
25 fundamentalists; evangelic; and yes, Islamic groups.

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1 The textbooks, the curriculum, and the
2 whole teaching regimen are often permeated by some
3 form of emphatic and sectarian religious teachings.
4 We have even seen anti-Catholic and anti-science
5 teachings in religious and other textbooks.

6 The question of the Blaine Amendments
7 extends far beyond the narrow issue of vouchers.
8 Government programs -- and this includes any financial
9 schemes that have the effect of subsidizing directly
10 or indirectly religious activities and institutions --
11 inevitably have unintended and often disturbing
12 consequences.

13 Today the debate is focused mainly on
14 vouchers. There are other forms of aid, though, that
15 could easily become public policy if the Blaine
16 Amendments are overturned and if we continue to lower
17 the bar on how the establishment clause of the First
18 Amendment is applied.

19 We have the federal faith-based
20 initiatives, where nearly \$2 billion has been funded
21 to religion-based social services. We have no idea
22 how these funds are eventually spent. We have few
23 adequate built-in safeguards that this money is not
24 being used to promote religion, directly or
25 indirectly.

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1 The history and consequences of the Blaine
2 Amendments have little or nothing to do with
3 anti-Catholic animus. They and the First Amendment
4 prohibition on the establishment of religion protect
5 us from the disastrous and oppressive consequences of
6 permitting clerical institutions to be given funding
7 and special rights from our government.

8 I represent a segment of the United States
9 population who are part of a broader community of
10 nonbelievers who go by many names: atheist,
11 rationalist, humanist, free thinker. And we reject,
12 either totally or to a significant degree, religious
13 creeds. Surveys put our numbers as high as 58 million
14 Americans, which is larger than most religious
15 denominations.

16 No issue has galvanized and enraged these
17 Americans more than the question of public funding of
18 religion. And that is what this controversy of a
19 Blaine Amendment is really about.

20 The opponents of these amendments or,
21 indeed, any prohibition on the use of tax money to
22 benefit religious groups and projects don't want to
23 call what their schemes really amount to: a religion
24 tax. Instead, they distort history or they demonize
25 someone like James G. Blaine.

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1 It would be difficult for them to be so
2 blatant when talking about Jefferson or Madison,
3 although these men were denounced in their time by
4 many clergy. So they dredge up some charge like
5 anti-Catholic bias or they resort to legal artifice
6 and claim that the Blaine Amendments somehow
7 discriminate.

8 It is interesting that in 1982 and 1986
9 voters in Massachusetts, the state with the second
10 largest Roman Catholic demographic in the country,
11 overwhelmingly turned down a plan to change their
12 state constitution and invite funding for religious
13 schools.

14 This issue is not really about
15 discrimination or a bias against religion. It's about
16 money. Today in the United States, organized religion
17 is stagnating. The mainstream denominations suffer
18 from empty pew syndrome. People are not attending
19 church in large enough numbers.

20 So religious leaders have to go to where
21 the people are: the public schools, athletic events,
22 the workplace, halls of governments, prisons, et
23 cetera. This is about money and access to people,
24 which is what the vouchers provide to organized
25 religions.

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1 I don't think that I should have to pay
2 for the education of divinity students or programs
3 which subsidize religion-based schools. Whether they
4 are Protestant or Catholic or Islamic or operated by
5 any other religion, I don't think I should have my tax
6 money used to refurbish a church or a mosque or a
7 temple.

8 I do not believe that any American should
9 be compelled to finance, directly or indirectly,
10 religious schools, which are simply extensions of
11 churches.

12 Doing so is bad public policy and invites
13 further erosion of the separation between government
14 and religion. It invites financial abuse because
15 religious groups can and will reject the sort of
16 strict oversight and accountability taxpayers deserve
17 and demand. And it violates conscience. It compels
18 the citizenry through their taxes to fund religion.
19 And saying so isn't being anti-Catholic. It's being a
20 patriotic American.

21 Let me close with a quote. "I believe in
22 America, where the separation of church and state is
23 absolute, where no Catholic prolate would tell the
24 President should he be Catholic how to act and no
25 Protestant minister would tell his parishioners for

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1 whom to vote, where no church or church school is
2 granted any public funds or political preference."
3 These are the words of our 35th president, John F.
4 Kennedy, who was a Catholic.

5 Thank you.

6 VICE CHAIR THERNSTROM: Thank you very
7 much.

8 Dick Komer?

9 MR. KOMER: Thank you. I was supposed to
10 start by saying "Good morning," but I guess I will say
11 good afternoon.

12 (Laughter.)

13 VICE CHAIR THERNSTROM: Sorry about that.

14 MR. KOMER: I feel at a huge disadvantage
15 today I guess, in part, because I am from Virginia. I
16 talk about half the speed of everybody else on this
17 panel.

18 (Laughter.)

19 MR. KOMER: So I am going to have half the
20 words to tell you what I think of some of these
21 things. I have, however, written the longest
22 testimony of anybody. So to some extent, I am going
23 to rely on that.

24 And I am going to also sort of attach
25 myself to Anthony Picarello's comments because

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1 everything that Anthony said, he has said better that
2 I could.

3 Instead, what I would like to do is
4 elaborate on this through my own personal experience.

5 And first I would like to say how flabbergasted and
6 pleased I am that the U.S. Commission on Civil Rights
7 is actually addressing this topic because, as you can
8 see from my background, my first career was in civil
9 rights.

10 And I regard school choice as a critical
11 civil rights issue. It is, however, both a civil
12 rights issue primarily affecting minority Americans
13 and a civil rights issue regarding religious
14 discrimination, which is not, I don't believe, the
15 typical focus on the Commission on Civil Rights.

16 I came to this issue from frustrating
17 enforcing federal civil rights laws when it became
18 apparent to me that the real problems were not so much
19 overt racial and ethnic national origin discrimination
20 but, rather, that the public school system in the
21 United States was failing minority Americans in a
22 colossal fashion.

23 The first thing that I would like you to
24 just sort of think about or even to do is to
25 understand the importance of this issue, you need to

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1 go to typical inner city urban schools, say in New
2 Jersey, like in Newark, Trenton, Jersey City, Camden.

3 These school districts are now almost exclusively
4 minority.

5 And the public schools there are wretched.

6 It is not a funding problem. Because of school
7 equity decisions in New Jersey, almost as old as those
8 in California, that have been going on since 1972,
9 they are funding the inner city school districts of
10 New Jersey at a rate far in excess of anywhere else in
11 the country.

12 Perhaps as a result of this, public school
13 teachers in New Jersey are the highest paid in the
14 nation. However, the results from the public schools
15 in New Jersey are, in a word, excreble.

16 Now, in all of these cities, there are, as
17 in most American urban areas, Catholic schools. Those
18 Catholic schools have a far superior track record of
19 providing the same kinds of kids a far superior
20 education. And while most, nearly a majority of,
21 public school students drop out before graduation in
22 New Jersey, the Catholic schools of New Jersey are
23 graduating almost all of their students. And an
24 enormous proportion are going on to post-secondary
25 education.

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1 Now, that system arose out of the events
2 that Mr. Picarello discussed and that we discuss in
3 our written testimony, the parallel Catholic school
4 system.

5 However, today what I would also urge you
6 all to do is to visit the schools in Milwaukee,
7 Wisconsin, where the longest running modern experiment
8 with school choice has been going on, which includes
9 religious schools since 1995. So we have 12 years of
10 experience there.

11 There are now more than 16,000 students
12 attending private schools on public vouchers. You can
13 call them scholarships. You can call them vouchers.
14 I don't care. Those students are getting an excellent
15 education in approximately 120 private schools, many
16 of which are nonsectarian, and by which
17 "nonsectarian," I mean non-religious. I don't mean
18 that in the historical sense of nonsectarian, which
19 was generically Protestant. I mean in terms of
20 completely non-religious the way we expect public
21 schools to be today.

22 Those students are getting a fine
23 education in these schools. And the students who have
24 opted to remain in the public schools of Milwaukee are
25 experiencing improvements in their education that are

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1 unheard of elsewhere.

2 In particular, as just an example of
3 changes that the public school system in Milwaukee has
4 made in response to the competition, they have
5 modified their teachers' union contract in a way I
6 don't believe has happened in any other urban
7 environment in the United States, where the norm is
8 the more seniority you have as a teacher, the more
9 choice you have of which school you will teach in and
10 where you typically you then teach in the best schools
11 in the district and your less than experienced senior
12 colleagues are assigned to the worst schools in the
13 district.

14 In Milwaukee, under the teachers'
15 contract, the administration can assign the best
16 teachers in the system to the worst schools, where
17 they are most needed. That only came about because
18 there was school choice in Milwaukee.

19 There is a huge difference between the
20 sort of imagined history of the United States that we
21 are taught in school and the reality. And to some
22 extent I would like to relate that through my own
23 personal experience. I seem to be older than all of
24 you commissioners with one exception.

25 VICE CHAIR THERNSTROM: I was going to

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1 say.

2 MR. KOMER: And I'm sorry, Vice Chairman.

3 I grew up in Virginia. I grew up in
4 Virginia and went to Virginia public schools from
5 first grade through eighth grade, in the '50s and mid
6 '60s.

7 The first two things that I memorized in
8 school were the Pledge of Allegiance and the Lord's
9 prayer. I come from a non-religious Jewish
10 background. And it was amusing to me to be learning
11 to recite the Lord's prayer. And we celebrated
12 Christmas in a pretty thorough fashion in the Virginia
13 public schools.

14 As all of you know and as Ms. Hollman
15 pointed out, Virginia is supposed the cradle of
16 American religious liberties, which is largely a crock
17 in reality.

18 Fortunately, we had Jefferson and Madison.
19 And they wrote good stuff. But the reality is that
20 in Virginia, as throughout the country, the public
21 schools were largely and generically Protestant.
22 Nonsectarian meant that they did not teach doctrines
23 that separated Baptists from Presbyterians, both sects
24 of Protestantism, but that they taught sort of
25 Protestant, a watered-down Protestantism that was okay

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1 for members of all sects.

2 It was because the public schools were, in
3 fact, Protestant and they remained Protestant, even in
4 Virginia, in my lifetime that they Catholics created
5 their separate school system. And the Blaine
6 Amendments, both before, during, and after the federal
7 effort to amend the Constitution, were, in fact, an
8 effort to get direct funding for Catholic schools
9 equal to that being provided to the Protestant public
10 schools. It was not non-religious schools versus
11 religious schools. It was an argument about whose
12 religion should be funded. And the Protestants
13 because they were more numerous won.

14 Now, that is why the language of these
15 propositions of these Blaine Amendments specifically
16 address no aid to religious schools. What the
17 Catholics wanted was direct aid.

18 What we are talking about today is
19 something very different. We are talking about school
20 choice that is religiously neutral and allows the
21 families to choose schools. That is entirely
22 different than funding religious schools as
23 institutions.

24 That is exactly what we do in the higher
25 education system. We provide Pell grants, et cetera,

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1 to everyone, regardless of the institution that they
2 select.

3 I see my time is up.

4 VICE CHAIR THERNSTROM: Your time is up.

5 MR. KOMER: I could go on forever. Thank
6 you.

7 (Laughter.)

8 **QUESTIONS BY COMMISSIONERS AND STAFF DIRECTOR**

9 VICE CHAIR THERNSTROM: Well, we now turn
10 to questioning by the commissioners. And I think I
11 will exercise the privilege of the Chair at this
12 meeting and ask the first question but first just a
13 comment in response, I think it was, to Ms. Johnson.

14 Were you the one who mentioned the
15 Massachusetts vote?

16 MS. JOHNSON: Yes.

17 VICE CHAIR THERNSTROM: Yes. Well, I am a
18 Massachusetts resident. So I just want to make one
19 comment on this. The state, as you must know, is the
20 bluest of all blue states. And the Catholics in
21 Massachusetts are Democrats first and Catholics a very
22 distant second.

23 The legislature is 88 percent Democratic.

24 That, in great part, reflects the enormous power of
25 the teachers' union in the state, who basically own

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1 those Democratic legislators.

2 And so what you saw in that vote was not a
3 vote for religious liberty. It was a vote for the
4 teachers' union. I promise you that is the case.

5 MS. JOHNSON: But the American people are
6 opposed to vouchers in general.

7 VICE CHAIR THERNSTROM: Well, that is a
8 separate point. We can talk about the polling data.
9 And I'm sure that everybody has got their own version
10 of what the polling data shows because, of course, it
11 in many ways depends on how the question is asked.

12 MS. JOHNSON: Yes.

13 VICE CHAIR THERNSTROM: But that is a
14 separate question from what happened in Massachusetts.

15 To both Ms. Johnson and Ms. Hollman, I
16 mean, as Mr. Komer suggested here, isn't the bottom
17 line how much kids are learning in school systems like
18 Newark? I happen to know Newark as well because I
19 have done a lot of visiting in schools there.

20 I mean, you look at a city like Newark and
21 you look at a city like D.C. D.C. now has got a
22 limited voucher program. And you have an educational
23 emergency on your hands.

24 What stops you from saying to yourselves
25 -- I mean, this is literally a question I have never

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1 understood from saying to yourselves, "Look, these
2 kids have got to get educated." And that is number
3 one. They've got to learn to read and write. They're
4 going to sink in this society if they don't.

5 If they learn to read and write in a
6 Catholic school, which, by the way, I mean, I think --
7 I mean, having visited the Catholic schools, they
8 aren't very religious. And they aren't filled with
9 Catholic kids or Catholic teachers, by and large.

10 I mean, isn't that the bottom line? Are
11 the kids learning something when they are learning
12 nothing practically in the regular public schools in
13 an awful lot of urban school systems?

14 MS. JOHNSON: Who do you want to go first?
15 Go ahead, Hollyn.

16 MS. HOLLMAN: I'll just say, of course,
17 the concern about public education and how schools are
18 doing is very important. And it's a huge issue that
19 our country needs to be focused on addressing.

20 I am very surprised, I think, if I heard
21 Mr. Komer correctly, that somehow the state of the
22 public schools in Newark related to the history that
23 Mr. Picarello -- I think we are getting a little bit
24 far as far as cause and effect about this big
25 educational problem I think you are getting to.

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1 What I would question is why we would
2 sacrifice important principles of religious liberty
3 and how we treat the relationship between government
4 and religion in our country to address another
5 important problem. I don't think that's necessary.

6 And what I often wonder, kind of along the
7 lines of what you're thinking, is why we're not
8 talking about public school choice. If that were just
9 the concern, I'm trying here to avoid again this
10 conflict that you're pointing out between two
11 important concerns.

12 I am not willing to sacrifice the one for
13 the other. And that in no way I think impinges or
14 threatens my commitment or my interest in the
15 education of children.

16 VICE CHAIR THERNSTROM: You give families,
17 public school choice in Newark, New Jersey and there
18 is no choice. I mean, it is a sham. It's a fiction.

19 You know, which school that is not educating its kids
20 would you like to go to? And, as Mr. Komer said, I
21 mean, I think it, frankly, is the most important
22 point.

23 We're not giving this money directly to
24 schools. You're giving it to the parents if it's a
25 voucher program. But I will let somebody else ask

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1 questions.

2 MS. JOHNSON: Vice Chair, may I please
3 address that?

4 VICE CHAIR THERNSTROM: Yes.

5 MS. JOHNSON: I have to say that it's just
6 money laundering. It's laundering the money through
7 the parents to give it to the religious schools. And
8 when it comes to the issue of choice, the parents
9 don't have the choice.

10 The schools have the choice. Religious
11 schools are the ones who choose. They do not have to
12 accept the handicapped. They do not have to accept a
13 student based on IQ.

14 VICE CHAIR THERNSTROM: It depends on how
15 a voucher works.

16 MS. JOHNSON: That's right, but they get
17 to choose, not the parents.

18 VICE CHAIR THERNSTROM: No, not with
19 voucher programs. A randomized selection is not the
20 same at --

21 MS. JOHNSON: And I would be surprised
22 that a Civil Rights Commission would not recognize the
23 fact that there are schools, like Bob Jones
24 University, who teach bad science, if not science at
25 all. They distort science. And they put theology in

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1 science textbooks.

2 They have anti-Catholic teachings, sexist
3 teachings. There are the Kiryas Joel school systems
4 of the Orthodox conservative Jews in New York that
5 segregate the girls and the boys. This is
6 segregation.

7 And it's also amazing to me how religion
8 is given credit for solving problems that oftentimes
9 it creates in the first place. Religious groups in
10 America, the single institution in America that is
11 allowed to discriminate are religious groups.

12 If you are religious, you are allowed to
13 discriminate on who you rent your apartment to. You
14 can discriminate if the couple is not married. You
15 can discriminate against other people because you are
16 religious and it violates your religious principles.

17 Organized religion is not the savior for
18 the problem of discrimination. Oftentimes they are a
19 part of the problem. So I don't think this is it.
20 And I don't think that yes, we want to solve the
21 problem of education in America. No one wants to do
22 that more than America's atheists. But you can't
23 violate the United States Constitution to do it.

24 VICE CHAIR THERNSTROM: Well, you don't
25 know that you would be violating --

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1 COMMISSIONER KIRSANOW: Thank you, Madam
2 Chair.

3 VICE CHAIR THERNSTROM: Commissioner
4 Kirsanow?

5 COMMISSIONER KIRSANOW: I also want to
6 thank the panelists for a splendid presentation and
7 their patience.

8 I have a number of questions, but I will
9 just limit it for a moment to give an opportunity for
10 others. Ms. Johnson, you just indicated, well, a
11 couple of things.

12 First, in your testimony, you made a
13 reference to Madison and the public coin not being
14 conveyed to religious institutions. And I guess this
15 all comes down to what is the public coin?

16 And you indicated that it may be money
17 laundering to tax dollars and send it to another
18 location that may be religious in connotation. Should
19 it be done to furbish a mosque, a temple, or a church?

20 In the current incarnation of voucher
21 programs, that is what Mr. Komer is talking about.
22 The aid is indirect, which you still oppose. I just
23 want to flesh that out. And maybe I'm not drawing
24 appropriate analogies, but if you oppose council or an
25 individual making a decision to use funds, which may

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1 be tax dollars initially when conveyed to the parents
2 to select which schools they go to, would you then
3 also, for example, oppose a Social Security recipient
4 who has his tax money and he decides to refurbish a
5 mosque, he makes a donation to his mosque or to his
6 temple or to his church or what if someone who --

7 MS. JOHNSON: No because there's no
8 program set up. If the program was set up to do that
9 with Social Security money, I probably would, but
10 that's not a program we're referring to where programs
11 are set up to give money to people to refurbish their
12 churches.

13 COMMISSIONER KIRSANOW: But the issue of
14 the voucher programs is it's not a program to give it
15 to the particular institution. It's a program to give
16 it to the particular individual to make a decision,
17 whether or not they want to go to this institution or
18 that institution, one of which may be a Catholic
19 institution, an Islamic institution, or a Jewish
20 institution or other. I fail to see the program --

21 MS. JOHNSON: I know what you are saying,
22 Commissioner, but I think the parents are just
23 conduits. The money is supposed to go to a school,
24 the majority of which are religious schools.

25 And I think that if parents want their

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1 children to have a religious education, if you want
2 your children to have an education that teaches you a
3 particular religion, we have always, always thought it
4 was important that all children receive an education
5 in comparative religion. But if you want a particular
6 religious education, you should pay for it.

7 COMMISSIONER KIRSANOW: Mr. Picarello,
8 really quickly. I don't mean to cut you off.

9 MR. PICARELLO: Sure.

10 COMMISSIONER KIRSANOW: This goes to the
11 question of parents being conduits. Under Zelman, if
12 a neutral program gives money to parents, who make a
13 decision but let's say, for example, in Cleveland,
14 where I'm from, or in Wisconsin, the vast majority of
15 the available schools that are outside the public
16 schools are Catholic or have some other kind of
17 affiliation, in your reading of Zelman, would that be
18 violative of the establishment clause?

19 MR. PICARELLO: The answer is no. And
20 Zelman actually specifically addressed that question
21 because there was a relatively high percentage of
22 Catholic schools among particularly the private
23 schools that were available as choices for parents.
24 That was one of the bases for the challenge, and it
25 was rejected.

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1 And the theory of it is precisely that so
2 long as there is a genuine and independent private
3 choice on the part of non-state actors, the parents
4 themselves and the children, then they have a role
5 but, in any event, not the government. Then that is
6 the relevant decision that should be evaluated. And
7 that is precisely -- to dismiss it as laundering is to
8 trivialize the importance of the decision of parents
9 in that regard.

10 It's not a all a question of, as Mr. Komer
11 put it, just having government set up a line of cash
12 that goes directly to any kind of religious school
13 because it could well turn out that those schools get
14 zero dollars. And they will only get as many dollars
15 greater than zero as parents see fit to send there.

16 And that it seems to me is quite a
17 significant constitutional difference under the
18 establishment clause. And it is on that basis that
19 the Supreme Court has upheld voucher programs when
20 they have been challenged in the establishment clause.

21 It seems to me, though, that there is a broader issue
22 here, which has to do with the risk under the free
23 exercise clause of having barriers put in the way that
24 are religiously discriminatory.

25 It's true -- and I agree with Hollyn --

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1 that states can effectuate a greater separation of
2 church and state than the federal government does, but
3 states are still subject to federal constitutional
4 limitations on how broadly they expand that.

5 And if their view of separationism becomes
6 religious discrimination, if they treat everybody the
7 same except for religious folks and specially penalize
8 them, then there is a free exercise problem. And that
9 it seems to me is the principal concern associated
10 with the Blaine Amendments.

11 There is an additional layer of, as it
12 were, bad animus with respect to a Blaine Amendment --

13 COMMISSIONER YAKI: How do schools become
14 an expression of free exercise?

15 MR. PICARELLO: Oh, my gosh. Religious
16 education is right at the heart of religious exercise.

17 Religious worship is one of the things that goes on
18 in religious instruction.

19 But the ability of parents to guide the
20 religious upbringing and education of their children
21 is a fundamental right that's even been extracted, as
22 it were, from the due process clause of the Fourteenth
23 Amendment, not to mention the free exercise clause.
24 So it's right in the wheel house. There's no question
25 about the ability of parents to be --

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1 MS. JOHNSON: But no one is stopping you
2 from giving your children a religious education.

3 MR. PICARELLO: Education. Yes, I know.

4 MS. JOHNSON: You can do that on your own
5 in your churches. Your churches are tax-free. You
6 can do that all you want. You want the government to
7 pay for that.

8 COMMISSIONER KIRSANOW: But what about the
9 Fourteenth Amendment?

10 MR. PICARELLO: I wouldn't want the
11 government to take my money away and then kind of make
12 me essentially pay twice for that education. Again,
13 the government can discriminate in various ways that
14 are not limited to sheer discriminatory --

15 COMMISSIONER YAKI: So you're saying that
16 free exercise necessarily always entails money, that
17 my ability to pray to God has a personal monetary
18 consequence to myself?

19 MR. PICARELLO: Of course not.

20 COMMISSIONER YAKI: So, therefore, if I'm
21 taxed --

22 MR. PICARELLO: No, but --

23 COMMISSIONER YAKI: -- I am not able and
24 that money does not come back to me to light a candle
25 at my Catholic parish, that somehow I have been

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1 deprived of my ability to exercise my Catholic
2 religion?

3 MR. PICARELLO: What I would say is --

4 COMMISSIONER YAKI: I don't see that
5 connection.

6 MR. PICARELLO: -- the free exercise
7 protection entails a protection against religious
8 discrimination. The government can discriminate based
9 on religion in a variety of ways. It can flat out
10 tell you you can't engage in a religious exercise.
11 That's one way. But it's not the only way.

12 The other way it can discriminate is by
13 providing everybody a government benefit and then
14 specially withdrawing it for religious people. And
15 that's one of the things that's gone on broadly
16 speaking with respect to religious education or
17 education generally. We're talking about general
18 education.

19 This is money that parents are presumably
20 paying in as taxes. And they should be able to --

21 COMMISSIONER YAKI: Well, see --

22 MR. PICARELLO: -- in the exercise of
23 their control over the religious --

24 COMMISSIONER YAKI: Well, see, this is --

25 MR. PICARELLO: Of their children direct

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1 those funds at the --

2 COMMISSIONER YAKI: Let me say this
3 because the Vice Chair brought the point about isn't
4 this about education for kids. When the question
5 becomes, if there is a school that says that we may
6 produce 99 percent National Merit scholars, people who
7 test in the top one percent, whatever, the only
8 problem is they don't let blacks into their school,
9 that can't possibly be the standard by which we
10 measure whether or not something is good for our kids
11 or not because now all of the kids are going to
12 equally benefit from it because how people admit
13 whether it's on -- you know, depending on what those
14 standards are.

15 When we talk about free exercise, I just
16 do not -- at least in my survey of the jurisprudence
17 out there, the free exercise is not a sword, right?

18 MR. PICARELLO: Well, sometimes it is.

19 COMMISSIONER YAKI: It shouldn't be, but
20 you want it to be the source. But it usually has
21 always been referred to as a shield against which the
22 government cannot tell you how to worship or how to
23 behave in terms of your worship, but you would want to
24 make it a sword to say, well, let's simply cut
25 everything out and basically if my religion -- I mean,

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1 we can start down the road. And that road leads
2 inevitably to those things that Justice O'Connor
3 talked about, which is why would we start now
4 tampering with a system that has served us so well
5 when we look elsewhere in the world and realize it has
6 served people within?

7 MR. PICARELLO: Well, it is certainly a
8 shield and not a sword. It is a shield against
9 religious discrimination in all its forms.

10 COMMISSIONER YAKI: Right.

11 MR. PICARELLO: And, as I mentioned,
12 discrimination can happen in the form of funding or
13 other provision of in-kind benefits by government.
14 For example, it --

15 COMMISSIONER YAKI: No, but it doesn't
16 stop you from --

17 MR. PICARELLO: -- is not permitted --

18 COMMISSIONER YAKI: -- worshipping. I
19 mean, for example --

20 MR. PICARELLO: That is true. It's a
21 different kind of problem.

22 COMMISSIONER YAKI: -- as Ms. Johnson
23 said, churches are tax-exempt. The places in which
24 you wish to worship is tax-exempt. We know that
25 through the enactment of -- that a lot of communities

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1 can't selectively zone to prevent houses of worship
2 from appearing in neighbors because people don't want
3 that kind of church or this kind of church or whatever
4 to appear.

5 But that is a far different cry from the
6 next step, which is saying, "Okay. Now I am going to
7 construct a taxpayer model by which my tax dollars to
8 the United States government, which go for many other
9 things" -- and we really shouldn't go down that path
10 because all of us know that the way the money gets
11 redistributed, whether it is at the state level or at
12 the federal level, really has no bearing whatsoever to
13 what you really pay in in terms of proportion. Those
14 are what the need is of the overall government. Is it
15 education? Is it defense? Is it health?

16 People don't get to say, "Well, I want
17 part of my tax dollars to go only toward this amount
18 of money to the CDC and not for anything else."

19 I mean, people try and do that. God knows
20 we do that at an international level with the UN. But
21 here, at least in the United States, we don't do that.

22 MR. KOMER: If I could just suggest one
23 way of thinking about this?

24 MR. PICARELLO: I finished my high school
25 in Virginia, by the way.

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1 MR. KOMER: All right.

2 MR. PICARELLO: But I was thinking a
3 different kind of high school that --

4 COMMISSIONER KIRSANOW: They talk really
5 fast.

6 MR. PICARELLO: These northern Virginia
7 schools.

8 MR. KOMER: But by then I'm sure that
9 religion had been removed because in my lifetime, it
10 was being removed from the Virginia public schools.

11 My point is simply this, which is that
12 what we are proposing is that flying school choice as
13 a solution based upon the success we have had using
14 state aid to students, student assistance programs, at
15 the post-secondary level that we have never tried at
16 the elementary and secondary levels.

17 The Pell grant programs, the GSLs all have
18 parallels in every state in the union. And those
19 programs are not viewed as conduits to Baylor
20 University, a Baptist school; to Brigham Young
21 University in Salt Lake City, a Mormon school; to
22 Catholic University here in the District of Columbia;
23 to any religious college you can name.

24 COMMISSIONER YAKI: So you find no
25 distinction between the post-secondary system and the

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1 elementary school system?

2 MR. KOMER: Absolutely none.

3 COMMISSIONER YAKI: How can that possibly
4 be? How can that possibly be, seriously?

5 MR. KOMER: Seriously it's exactly how it
6 could be.

7 COMMISSIONER YAKI: You have mandatory
8 school --

9 MR. KOMER: No. The difference is we have
10 created a compulsory education system at the
11 elementary and secondary levels, --

12 COMMISSIONER YAKI: Correct.

13 MR. KOMER: -- which we have made entirely
14 free to the parents. As a libertarian, frankly, I
15 object to educating everybody else's kids. I view
16 that as my responsibility. And that's why I send my
17 kids to private school, so that they don't have to
18 support my kid. I support my kid. But I --

19 COMMISSIONER YAKI: So we should get away
20 from compulsory education for K through 12?

21 MR. KOMER: No. Compulsory education is
22 fine. The problem is when you make public education
23 publicly funded and free, you create a monopoly
24 situation, which is it's not religious discrimination
25 that created the problems in Newark. It is the fact

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1 that it is a public monopoly, which provides poor
2 service at high cost.

3 COMMISSIONER YAKI: But what you --

4 MR. KOMER: And the answer is --

5 COMMISSIONER YAKI: The answer, though,
6 the question I have to you before you give your answer
7 is we can all talk about how 10 schools versus 1,000
8 schools do a better job because of how kids get in,
9 whatever, whatever programs they use. We won't get
10 into it because Jennifer will start yelling at me.

11 But the question is and the one that goes
12 into the whole question of the whole public school
13 system is and one that I have yet to find an answer
14 to, quite frankly, from private school advocates is if
15 your system is so great, do you have the capacity to
16 teach all those kids all at one time if every one of
17 them popped up in your doors and said, "Here is our
18 voucher. Let us in"?

19 MR. PICARELLO: If the money followed
20 them, sure.

21 COMMISSIONER YAKI: No, there is no way.

22 MR. KOMER: Not immediately, but --

23 COMMISSIONER YAKI: There is just no way,
24 not even not immediately.

25 MR. KOMER: Let's talk about Milwaukee.

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1 All right? It's got 100,000 school kids.

2 VICE CHAIR THERNSTROM: Or talk about
3 Newark and the charter schools.

4 MS. JOHNSON: May I just -- I'm sorry.
5 But is this a topic? I'm not an educator. I am not
6 an expert on vouchers per se. I am here to talk about
7 the constitutional issues and anti-Catholicism. But I
8 can't engage in a discussion about improving the
9 educational system in America. Is that where this
10 conversation --

11 COMMISSIONER KIRSANOW: Well, it's
12 actually a combination of both. One of the reasons
13 we're addressing it is the civil rights component in
14 terms of racial disparities in terms of education.

15 MS. JOHNSON: No. We're talking --

16 COMMISSIONER KIRSANOW: We're got 90
17 percent of black high school students who read below
18 the average white high school student. Ninety percent
19 score below the average white high school student in
20 math, more than 90 percent in science. And the
21 average black high school graduate has the educational
22 achievement level of a white eighth grader --

23 MS. JOHNSON: There is a lady here from
24 the National --

25 COMMISSIONER KIRSANOW: -- who has

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1 combined both of them.

2 MS. JOHNSON: -- Education Association who
3 should --

4 COMMISSIONER KIRSANOW: But let's bring it
5 back to Blaine for a second, which I want to do with
6 Mr. --

7 MS. JOHNSON: Yes.

8 VICE CHAIR THERNSTROM: But wait a minute.
9 Mr. Komer was in the middle of saying something. I
10 think he should be able to finish the rest.

11 COMMISSIONER KIRSANOW: Go ahead.

12 MR. KOMER: My point is that in Milwaukee,
13 we have gone the furthest towards providing school
14 choice to people. It actually involves 20,000 kids in
15 charter schools, which is a form of public school
16 choice, 15,000 kids in private schools, over 120 of
17 them Milwaukee in the beginning looked a lot like
18 Cleveland.

19 The program involved in Zelman consisted
20 of kids in public schools being given an opportunity
21 to select from among existing private schools, most of
22 which were religious. And most of those were
23 Catholic.

24 Milwaukee was very similar. It had this
25 parallel Catholic school system, which arose as a

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1 function of religious discrimination by the Protestant
2 majority against the Catholic minority. That is why
3 they are there, but it doesn't have to stay that way.

4 In Milwaukee, 40 percent at least of those
5 120 private schools, all of which with the exception
6 of I think 12, are new schools since 1994 reacting to
7 the market, as Mr. Picarello has pointed out.

8 Those schools have been created. Forty
9 percent of them are non-religious. The ones that are
10 religious are a wide array of different denominations.

11 All of them satisfy the legitimate interests of the
12 state in providing an adequate education K through 12.

13 That is the legitimate interest of the state. It is
14 not in compelling them to receive a non-religious
15 education.

16 The Supreme Court rejected that when the
17 Protestant majority tried to impose that on an entire
18 state in the State of Oregon by initiative. They
19 passed the law to require all parents to send their
20 kids to public schools.

21 And those public schools were generically
22 Protestant. It would have killed off all of the
23 Catholic schools in Oregon. It was deliberately aimed
24 against Catholics, among others. It was promoted in
25 large part by the Oregon Ku Klux Klan. Why? Because

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1 they wanted the kids in the public schools because the
2 Klan opposed blacks, Catholics, and Jews.

3 This is racial discrimination, and it is
4 religious discrimination. That is where the Catholic
5 school system came. That is where the Protestant
6 reaction was passing these Blaine Amendments. They
7 remain a barrier. But I don't believe today it's a
8 barrier to Catholics only. It's a barrier to anyone
9 who takes their religion seriously, which does not, by
10 the way, include me.

11 MS. JOHNSON: The problem with Catholic
12 schools and religious schools in general is I would
13 like to see accountability. And when we look at test
14 scores and everything, we are not taking into account
15 the dropouts, those people who are kicked out or the
16 dropouts, the fact that the schools are selective on
17 the students that they take. They don't have to take
18 the handicapped students. They don't have to require
19 teachers to have college degrees.

20 There is no level playing field. You
21 cannot compare the one with the other unless they are
22 both required to meet the same academic standards and
23 accept all the children, the public schools of our
24 nation accept all the children, of this nation. And
25 that's one reason why I have a problem.

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1 VICE CHAIR THERNSTROM: Mr. Picarello?

2 MR. PICARELLO: That may well be an
3 appropriate suggestion for a good voucher program in
4 terms of something that will help you evaluate
5 relative performance. That may well be.

6 But it seems to me the question on the
7 floor is whether or not excluding religious schools
8 from generalized or I should say education funds,
9 government funds for general education K through 12 is
10 something that represents a problem of religious
11 discrimination in some instances.

12 And it seems to me again -- this is one of
13 the reasons why I was changing gears before -- the
14 establishment clause question has been resolved. The
15 Supreme Court has resolved that finally. There is no
16 establishment clause barrier to a religion-neutral
17 voucher program. And I'm not sure that it does any of
18 us much good to sort of rehash those arguments,
19 whether it is a good idea under the establishment
20 clause.

21 It seems to me that separate --

22 MS. JOHNSON: Excuse me. A
23 religion-neutral voucher?

24 MR. PICARELLO: Yes.

25 MS. JOHNSON: Meaning?

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1 MR. PICARELLO: Meaning that it is a
2 program that provides vouchers to parents, who can use
3 the vouchers at religious and non-religious schools
4 alike. And that is what religion-neutral is defined
5 by the Supreme Court to be.

6 Again, it may well be, perhaps even
7 depending upon the next election, whether that gets
8 revisited. But at least for now, that question is
9 settled.

10 The question of religious discrimination,
11 however, is a separate one. And that's where the
12 Blaine Amendments come in. The Blaine Amendments,
13 they facially discriminate based on religion. They
14 have a history associated with religious
15 discrimination. They are distinct. They represent a
16 different kind of prohibition on funds than the no aid
17 principle that has been referred to as traced back to
18 the founding.

19 I agree that there is a legitimate no aid
20 principle that's traceable back to the founding. And
21 I think the decision of Lock v. Davey represents one
22 of the places where that no aid principle has
23 appropriate application.

24 But that is a different principle than the
25 one that was established, as it were, 125 years later,

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1 as the common schools were emerging, as immigrants
2 were pouring into the country, as that wave of
3 immigration brought with it a wave of hostility to
4 Catholicism, but not just Catholics.

5 Again, even then sectarian was code for
6 Catholic, but that wasn't all that it referred to. It
7 referred to the religion of immigrants, religion of,
8 as it were, religious outsiders, religious minorities.

9 And that's discrimination that I think is
10 legitimately and appropriately before the Commission,
11 in addition to the kinds of discrimination that are
12 racial.

13 But I would encourage the Commission to
14 focus on the questions of religious discrimination
15 that the Blaine Amendments particularly; that is to
16 say, those things that were passed 125 years after the
17 founding or so, represent.

18 COMMISSIONER KIRSANOW: Madam Chair?

19 VICE CHAIR THERNSTROM: Yes?

20 COMMISSIONER YAKI: No. Peter hadn't
21 finished his questions.

22 VICE CHAIR THERNSTROM: Oh, you hadn't
23 finished? I'm sorry.

24 COMMISSIONER KIRSANOW: A long time ago.

25 MR. PICARELLO: Sorry.

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1 COMMISSIONER KIRSANOW: My question is to
2 Ms. Hollman. And anyone else can chime in if they
3 have a thought on this. You testified -- and this
4 goes to something that Mr. Picarello just indicated.
5 You testified that at least the recent application --
6 and by that, I mean probably for decades -- of the
7 Blaine Amendments have not been motivated by
8 discriminatory animus toward religion.

9 Now, in Fourteenth Amendment
10 jurisprudence, First Amendment jurisprudence, there is
11 a long history of facially neutral statutes that might
12 be still applied in a neutral fashion but that an
13 origin that was discriminatory, *Hunter v. Underwood*
14 and a whole line of cases that indicate that,
15 nonetheless, original animus would serve to strike
16 down that statute.

17 I'm not sure. I thought you had conceded
18 -- but I'm not sure, and I don't want to put words in
19 your mouth -- that Blaine, at least in part, had a
20 discriminatory origin. And if, in fact, it does, do
21 you think that Blaine could be rendered
22 unconstitutional as a result, despite the fact that
23 currently it may have a nondiscriminatory application.

24 MS. HOLLMAN: Thank you. You asked a good
25 question. Let's see if I can keep up with it to

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1 follow because I do have an answer to it.

2 COMMISSIONER KIRSANOW: I'm sure you do.

3 MS. HOLLMAN: And one thing I didn't say
4 as I heard through my remarks but I did say it in my
5 written testimony is that it was late in this game,
6 this briefing invitation that I was told that we would
7 touch on the original of the Blaine Amendment, the
8 federal Blaine Amendment, because I understood
9 generally I know what we're talking about.

10 We're talking about state and
11 constitutional provisions that are a barrier to school
12 choice program. And when I saw that, I wanted to urge
13 the Commission. If we are very interested in actually
14 what happened and what were the motivations and the
15 complexities of the debate at that time, I would urge
16 you all to have a panel of historians or leave the
17 record open to have that because from my reading, it
18 is a very complex, rich history that, of course,
19 includes some of the anti-Catholic sentiments we have
20 talked about and have been brought up very well in the
21 testimony of my panelists here. But it also has a lot
22 of other debates that I at least touched on in my
23 testimony.

24 So that is the first part. Secondly --

25 COMMISSIONER YAKI: So just to clarify, so

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1 what Blaine may have said may not have control or
2 legislative intent behind all of the other --

3 MS. HOLLMAN: Or even his or even the
4 federal one. Not only does it not capture fully the
5 Blaine Amendment episode itself, much less the many --

6 COMMISSIONER KIRSANOW: Sure. I read your
7 written testimony and that of others. And I've got a
8 little bit of background in that also. But maybe if I
9 could truncate this?

10 Just for the sake of argument, let's
11 presume that Mr. Picarello's and Mr. Komer's rendition
12 is accurate, that at founding of the Blaine and all
13 the correlatives, that there was discriminatory intent
14 or discriminatory animus.

15 If in the last 80 years, however, the
16 application, continued application, of Blaine has done
17 so in a neutral manner and it is, let's say, in some
18 state constitutions at least facially neutrally as
19 best can be written, would that then insulate Blaine
20 from constitutional attack?

21 MS. HOLLMAN: That's a big if, but your
22 big if is if that's -- I think Hunter v. Underwood is
23 where there may be a difference in the sole
24 motivational versus other aspects that were evident in
25 the record, too. And so that is one distinction I

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1 want to make.

2 The way I see this is I do not see how --
3 well, first of all, the legal point. The court, the
4 Supreme Court, has certainly never held that there is
5 a free exercise right for a paid religious education
6 or an equal protection right to have your parochial
7 school or whatever school paid for with public
8 funding. So that is not the law, as I understand it,
9 at that level.

10 Lock v. Davey is a seven to two decision
11 by Chief Justice Rehnquist that upholds a statute
12 based upon a state constitution that provides a
13 greater protection for religious liberty concerns if
14 that's what causes concerns than the establish clause.

15 And in doing so, the subject of religion
16 is one that both the United States and state
17 constitutions embody distinct views. And that is the
18 crux of my work every day in favor of free exercise,
19 which would work hard for that, but opposed to
20 establishment. And together that is what protects
21 religious freedom. And so that it's not surprising
22 that a state would do so differently.

23 There is recognition of that very value
24 throughout the law and, actually, the design of the
25 First Amendment that makes your hypothetical a little

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1 bit hard to apply.

2 It seems to me, though, even if we could
3 say that things were largely motivated, the Blaine
4 Amendment, a state constitutional Blaine Amendment,
5 was largely motivated by anti-Catholic bigotry because
6 it does not serve that purpose today. And I would say
7 that it serves the opposite purpose, that maybe
8 religious freedom is flourishing because we have not
9 funded religious schools and we have avoided some
10 strife in that area.

11 I would think that it's not discredited
12 because of that history. And the example I could
13 throw out are about the public schools in general.
14 Should they be thrown out because some people
15 supported them because they didn't like Catholics or
16 in the very interesting U.S. Commission on Civil
17 Rights -- maybe of you probably know this chapter much
18 better than I do, but I kind of recall that Title VII,
19 the addition of gender or sex discrimination there was
20 actually added as an effort to kill the bill by
21 segregationists who did not want Title VII to pass to
22 protect blacks.

23 I don't think we would use that history to
24 now say that we don't defend and protect and uphold
25 Title VII's protection of gender discrimination.

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1 MS. JOHNSON: And, Commissioner, I can't
2 accept that the premise of this was based on that
3 anti-Catholic bigotry.

4 COMMISSIONER KIRSANOW: Well, I am not
5 saying that. I am agnostic, no pun intended, on that
6 issue. I mean, I think there is a considerable amount
7 of evidence.

8 MS. JOHNSON: The evidence is not --

9 COMMISSIONER KIRSANOW: In fact, it was
10 motivated. But I think that --

11 MS. JOHNSON: No, I don't think it was.

12 COMMISSIONER KIRSANOW: I think Ms.
13 Hollman makes a point that, you know, at least
14 historians can debate -- and we will bring some
15 historians in -- as to whether or not it was a
16 principal motivation, a partial motivation, but
17 clearly there was a considerable amount of
18 anti-Catholicism in that debate during that era --

19 MS. JOHNSON: And the Catholics were --

20 COMMISSIONER KIRSANOW: -- that refused
21 the motivation.

22 MS. JOHNSON: And the Catholics were
23 anti-Protestant just as vehemently. And all of the
24 legislation is neutral. None of the legislation that
25 came out said anything about singling out any

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1 particular religion. There is no anti-Catholicism.

2 COMMISSIONER KIRSANOW: But then how do
3 you --

4 MS. JOHNSON: It's all the --

5 COMMISSIONER KIRSANOW: Some of the
6 amendments in the legislative history talk about
7 sectarian. Sectarian is --

8 MS. JOHNSON: It's not a buzz word.

9 COMMISSIONER KIRSANOW: But wait a minute,
10 though. Let's just take a look at the language. And,
11 again, I haven't drawn any conclusions. I want to
12 share the debate here.

13 When I look at the legislation and the
14 legislative history, they use the term "sectarian" and
15 then also use the term -- they talked about the King
16 James Bible, for example, and not necessarily
17 excluding doing certain things with respect to reading
18 King James, which is not a Catholic Bible, which would
19 seem to suggest that they meant sectarian to mean
20 something discrete; that is, it was either Catholic or
21 someone else, because they are permitting the
22 Protestant inculcation but they have used sectarian as
23 kind of a -- just as when you could talk to Bull
24 Conner in 1963 about a poll tax, it was a poll tax,
25 which applies to everybody, but, you know, it has a

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1 certain connotation that dealt with the fact that
2 certain ancestors of certain people hadn't voted
3 earlier. And so that was the operative effect. So
4 sectarian, that legislative history --

5 VICE CHAIR THERNSTROM: That's a
6 grandfather clause. I don't want to go --

7 COMMISSIONER KIRSANOW: That use of the
8 term "sectarian" seems to me could have a kind of Cold
9 War effect, just as grandfather clauses, voting
10 prohibitions, or poll taxes did.

11 MS. JOHNSON: I don't see it,
12 Commissioner. We are really reaching. We are trying
13 to so hard to find this anti-Catholic bigotry. I'm
14 not seeing it. I am absolutely not --

15 COMMISSIONER KIRSANOW: But isn't that one
16 of the reasons why --

17 MR. KOMER: I'm sorry.

18 VICE CHAIR THERNSTROM: Let Mr. Komer --

19 COMMISSIONER KIRSANOW: -- you made the
20 point, because to thwart the --

21 MS. JOHNSON: That is a different issue,
22 Commissioner. I'm sorry. That is completely --

23 COMMISSIONER KIRSANOW: In 1960 --

24 MS. JOHNSON: No, no. It has nothing to
25 do with the Blaine --

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1 VICE CHAIR THERNSTROM: Commissioner
2 Kirsanow, let me Komer --

3 MR. KOMER: Ms. Johnson?

4 MS. JOHNSON: Yes?

5 MR. KOMER: Your organization and similar
6 organizations have been engaged in what I regard is an
7 appropriate exercise for the past 50 years of removing
8 religion from the public schools.

9 What religion were you removing? It
10 wasn't Catholicism. It was protestantism. That was
11 what was there in the public schools. Any law
12 published in that period that exclusively saves money
13 for the public schools is money for Protestant public
14 schools. That's why the Catholics set up their own
15 system and wanted their share.

16 MS. JOHNSON: We have never --

17 MR. KOMER: Now the public schools are not
18 religious.

19 MS. JOHNSON: Oh, my God. Oh, my God.

20 MR. KOMER: But we still --

21 (Laughter.)

22 MS. JOHNSON: That is so absolutely just
23 the opposite. The public schools say there are 10,000
24 Bible clubs in the public schools. There are
25 organized prayers going on in the public schools.

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1 Every student anywhere in the public school --

2 VICE CHAIR THERNSTROM: Wait a minute.

3 MS. JOHNSON: -- can now pray on their own
4 all they want. There's the Student Fellowship of
5 Christian Athletes in the public schools. That's why
6 I testified the last time before this Commission,
7 because of all the religiosity, constitutional,
8 unconstitutional, going on in the public schools.

9 We have not tried to remove religion. We
10 have tried to remove government endorsements and
11 organized religious rituals from the public schools.

12 COMMISSIONER TAYLOR: Ms. Johnson?

13 MS. JOHNSON: Yes, Commissioner?

14 COMMISSIONER TAYLOR: If I may, Madam Vice
15 Chair? All of the clubs you have identified there are
16 the clubs that I put in the category of the government
17 approaching religion and religious groups with an
18 approach of neutrality; that is, you can have a school
19 club if you meet these objective criteria.

20 MS. JOHNSON: I agree, Commissioner.

21 COMMISSIONER TAYLOR: And the Fellowship
22 of Christian Athletes meets that criteria. But you
23 cited them as an example of religiosity.

24 MS. JOHNSON: No. They violate the rules
25 when they get in the schools, Commissioner.

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1 COMMISSIONER TAYLOR: I guess --

2 MS. JOHNSON: There are problems with
3 them.

4 COMMISSIONER TAYLOR: Just as a broader
5 question --

6 MS. JOHNSON: Okay.

7 COMMISSIONER TAYLOR: -- I haven't heard
8 neutrality discussed.

9 MS. JOHNSON: Okay.

10 COMMISSIONER TAYLOR: I am wondering what
11 your position would be on neutrality.

12 MR. KOMER: Our position is we favor
13 neutrality.

14 MR. PICARELLO: Sure. I think the devil
15 is in the details about what constitutes neutrality.

16 COMMISSIONER TAYLOR: But is the panel of
17 one mind that neutrality is what we should be shooting
18 for?

19 MS. JOHNSON: No. It depends.

20 MS. HOLLMAN: Neutrality has a lot of
21 different meanings. That's probably why we have
22 avoided it to be as clear as we can about what we each
23 are arguing for.

24 But I do affirm -- and you are trying to
25 get through this little path we took there about

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1 religion. And yes, we helped. Our organization
2 helped worked to get Protestantism out of the schools.

3 And, therefore, I think you are kind of
4 making my point in that we have started living up to
5 the principles. And today the principle about
6 government neutrality in the public schools is one
7 that is fair to all people, Ms. Johnson's children as
8 well as my children or Mr. Picarello's, I mean, from
9 different denominations and different beliefs.

10 COMMISSIONER TAYLOR: Is neutrality a core
11 element of religious liberty? I don't hear it
12 discussed as if it's a core element.

13 MR. PICARELLO: If I may, I would say it
14 most certainly is. It has many aspects, as Hollyn was
15 suggesting. What I would add is that one of the
16 things that is at the heart of neutrality is the
17 anti-discrimination principle; that is to say, a
18 prohibition on discrimination against religion by
19 government.

20 You cannot be specially disadvantaged by
21 government based on religion. And that hangs
22 intention with historic prohibitions against
23 government not funding certain religious activities,
24 especially directly.

25 Now, there are some historical precedents

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1 obviously. And the Lock v. Davey case entails that
2 specifically. It involves a situation where the
3 Government of Washington wanted to exclude what was
4 essentially clergy training from what it was funding.

5 And because that is, on the one hand, traceable back
6 to the founding, it didn't bring with it the
7 historical animus that Commissioner Kirsanow has
8 referred to.

9 Now, one of the things that the Lock
10 opinion also said was, "This is not a Blaine
11 Amendment." There's a footnote that specifically
12 carved it out and said, "This is not a Blaine
13 Amendment."

14 Now, what that is saying is that the case
15 is essentially saying, "Well, yes, there are these
16 general principles prohibiting non-neutral laws, but
17 essentially for this clergy training situation, we are
18 going to essentially allow that because of the
19 historical precedent, rather than because it's
20 perfectly neutral."

21 I mean, on its face, it's something that
22 treats people differently where it's based on
23 religion. Now, you could say that the establishment
24 clause does that on its face.

25 COMMISSIONER TAYLOR: Right.

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1 MR. PICARELLO: Right? So there's some
2 sense in which neutrality cannot be an absolute rule.

3 And then, correspondingly, the devil, you know, comes
4 in the details about debating what exactly neutrality
5 consists of.

6 There's other thing, if I may add?
7 Commissioner Kirsanow, you mentioned the question of
8 under the equal protection clause as a sort of
9 distinct aspect, as opposed to the free exercise
10 clause, and what discrimination consists of there.

11 I agree with you that it is meaningfully
12 different. And especially in the historical aspect,
13 one of the things that's important to keep in mind in
14 that regard is that as a matter of Fourteenth
15 Amendment law, the question is not whether
16 anti-Catholicism or any kind of impermissible animus
17 was the sole motivation for those laws but, instead,
18 whether it was "the substantial or motivating factor"
19 and not a substantial motivating factor. And so
20 that's the standard.

21 In other words, for someone to make out a
22 claim under Hunter against Underwood, they don't need
23 to show that the only thing that went into that law
24 was "We hate Catholics" or "We hate those religious
25 outsiders, which are mostly Catholic these days" or

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1 "We hate those sectarians" who back in the earliest
2 Nineteenth Century were Baptists if you were
3 Presbyterians or Presbyterian if you were Baptist.
4 The idea is sectarian is less than all religious
5 people. And it's the ones you don't like.

6 VICE CHAIR THERNSTROM: I am going to have
7 to stop it here because I know that Ms. Johnson is
8 looking at her watch, Michael Yaki is looking at his
9 watch.

10 Please, again, it shouldn't have worked
11 out this way. I'm so sorry it did. But please do
12 feel free on the basis of this discussion to add to
13 your statements and say some of the things that you
14 feel at this very moment frustrated about.

15 COMMISSIONER KIRSANOW: Madam Chair? If
16 you will indulge me? One question. This is an
17 over-arching question. Anyone can chime in. Public
18 funding. What is your --

19 VICE CHAIR THERNSTROM: It's not fair
20 because Commissioner Melendez really wanted to have a
21 question, and I am stopping him.

22 COMMISSIONER KIRSANOW: Oh, I'm sorry.
23 I'm sorry.

24 VICE CHAIR THERNSTROM: And so it's not
25 fair, but, you know, I don't see why you can't address

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1 your question to every one of these panels for them to
2 answer in written form supplementing their statements.

3 I really don't want to be unfair.

4 COMMISSIONER MELENDEZ: Mine is partially
5 answered. I just see that there needs to be more
6 history as to the specific history within each state
7 basically. And I think that if we do get more people
8 adding to this discussion, I would like to gain more
9 history on it.

10 VICE CHAIR THERNSTROM: We can talk about
11 whether we can fill it out, but we really do need to
12 adjourn this briefing. And I thank you so much.

13 (Whereupon, the foregoing matter was
14 concluded at 1:07 p.m.)

15

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