

**THE COLORADO CONSTITUTION'S
NO AID TO SECTARIAN INSTITUTIONS CLAUSE
AND ITS IMPACT ON CIVIL RIGHTS**



Report of the
Colorado Advisory Committee to the
U.S. Commission on Civil Rights

September 2018

Advisory Committees to the U.S. Commission on Civil Rights

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. 42 U.S.C. § 1975a(d). The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

Letter of Transmittal

**Colorado Advisory Committee to the
U.S. Commission on Civil Rights**

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The Colorado Advisory Committee to the U.S. Commission on Civil Rights submits this report regarding religious discrimination in Colorado, and its impact on targeted communities.

The Committee submits this report as part of its responsibility to study and report on civil rights issues in the state of Colorado. The contents of this report are informed by testimony the Committee heard during a public hearing held in Denver, Colorado, on July 18, 2017, a public teleconference hearing on Jan. 25, 2018, and documents submitted in relation to those public hearings.

This report details civil rights concerns relating to religious discrimination in Colorado, as based on the anti-“sectarian” clause in the Colorado Constitution, article IX, § 7.

The Colorado Advisory Committee, as part of its responsibility to advise the Commission on civil rights issues within the state, submits this report, “No Aid Report.” The report was adopted by the Advisory Committee by a vote of 7 to 1.

Sincerely,

Alvina Earnhart, *Chairperson*
Colorado Advisory Committee

Colorado Advisory Committee

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Colorado Advisory Committee to the U.S. Commission on Civil Rights

The Colorado Advisory Committee is composed of members appointed by the U.S. Commission on Civil Rights. They are serving a term from Oct. 21, 2016 to October 20, 2020. Members are: Alvina L. Earnhart (Chair), David B. Kopel (Vice-Chair), Christine M. Alonzo, Ming H. Chen, Shawn L. Coleman, Kyle R. Conrad, Robert P. Detrick, Vernard T. Gant, Nancy N. Morehead, William P. Pendly, Qiang (Helen) Z. Raleigh, Cleveland A. Thompson, William E. Trachman,¹ and Eva Muniz Valdez.

Acknowledgements

The Colorado Advisory Committee would like to thank each of the panelists who presented to the Committee during the July 18, 2017, public hearing. The Committee is also grateful to members of the public who either submitted written testimony or who spoke during the selected periods of public comment.

¹ Mr. Trachman previously represented the Douglas County School District in litigation challenging the School District's voucher program. He has recused himself from all Advisory Committee work on the No Sectarian Aid project.

Contents

I. Introduction.....	6
A. Topics addressed.....	6
B. Topics not addressed.....	6
C. Sources of information.....	6
II. Origins of the Colorado Constitution’s No Aid Clause	8
A. Why the term “Blaine Amendment” is incorrect	8
B. Political and Social Background of Colorado’s No Sectarian Aid Clause	10
C. The Colorado Constitutional Convention and Ratification.....	11
III. Historical Application of the No Aid Clause	18
IV. Modern Application.....	21
A. Civil Rights and Education	22
B. Students with Disabilities.....	24
C. Civil Rights Violations in Higher Education Scholarships.....	27
D. Current Colorado voucher programs.....	30
V. Findings.....	34
VI. Appendix.....	35

I. Introduction

A. Topics addressed

The Colorado Advisory Committee to the U.S. Commission on Civil Rights has investigated the past and present of a clause in the Colorado Constitution that prohibits any state aid to “sectarian” institutions. The jurisdiction of the U.S. Commission, and thus of the Advisory Committee, encompasses deliberate discrimination or disparate impact that affects civil rights; this includes discrimination based on race, national origin, religion, or disability. This report addresses discrimination issues.

B. Topics not addressed

It is important to note some topics that this report does *not* address. We draw no conclusions about whether the No Sectarian Aid Clause does or does not conflict with the First Amendment to the United States Constitution, which prohibits government establishment of religion and government interference in the free exercise of religion.

We also do not address whether the No Sectarian Aid Clause might or might not violate the Equal Protection Clause of the U.S. Fourteenth Amendment.

We draw no conclusions about whether K-12 school vouchers are or are not good educational policy. Determinations about vouchers are for education experts, school boards, legislatures, and voters. Such determinations are outside the expertise of the Committee and the scope of our jurisdiction.

C. Sources of information

The Committee held a public hearing on July 18, 2017, at the University of Denver. Five experts with diverse viewpoints testified and presented written reports. Members of the public also testified.

The experts were:

- Andrew L. Seidel, Staff Attorney, Freedom From Religion Foundation
- L. Martin Nussbaum, Co-Chair, Religious Institutions Group, Lewis Roca Rothgerber Christie LLP
- Sarah E. LaCour, PhD Candidate, School of Education, CU Boulder
- Ross IZard, Senior Education Policy Analyst, Independence Institute²
- Mark Silverstein, Legal Director, ACLU Colorado

² Now employed by ACE Scholarships, in Denver, Colorado.

Two of the experts (Nussbaum and Izard) were generally in favor of expanded school choice that includes non-government schools. Three of the experts (Seidel, LaCour, and Silverstein) were generally opposed.

Some of the experts were involved (on different sides) in a recent Colorado Supreme Court involving a Douglas County School District's Choice Scholarship Program for vouchers.³

After the hearing, the Committee's record remained open for 30 days for written comments. The Committee invited the experts and the public to present additional information via the Committee's website. We have reviewed all submissions to the website.⁴

The vast majority of post-hearing comments were short letters, many of them form letters, expressing opposition to the Blaine Amendment.

The Anti-Defamation League submitted a detailed memorandum arguing that the U.S. Supreme Court's recent *Trinity Lutheran* decision, involving a Missouri version of the No Sectarian Aid Clause, does not cast doubt on the general constitutionality of No Sectarian Aid Clauses. The memorandum also summarized some recent social science studies that are critical of vouchers.

Andrew Seidel, one of the experts who testified at the hearing, filed a supplemental written report. He described the experience of several voucher-funded schools in Wisconsin with shoddy operations, some of which closed during a school year. The supplemental report also included other critiques of school vouchers, and a policy paper criticizing a proposal for federal vouchers.⁵

In December 2017, a draft report was published, and made available to the public. Members of the public were invited to submit written comments. On January 24, 2018, the Colorado Advisory Committee held a public teleconference to discuss the public comments. Closely examining all of the written comments, the Committee agreed on steps to integrate the comments into a revised draft.⁶

A revised draft was published in early March 2018 and further public comments were solicited.⁷ The Advisory Committee met again by public teleconference on April 13, 2018. No members of

³ Mr. Silverstein represented the plaintiffs, and Mr. Nussbaum was one of the defendant's lawyers.

⁴ The record of the hearing and the public comments is available at: <https://www.facadatabase.gov/committee/meetingdocuments.aspx?flr=147928&cid=238>. Because the federal fiscal year ends on Oct. 31, the above link to the U.S. Civil Rights Commission's database will eventually be changed, by being replaced by a new link for the new fiscal year.

⁵ Mr. Seidel's supplement also included a lengthy argument against the late Justice Scalia's claim that the First Amendment's Establishment Clause does not prohibit the government from favoring religion over non-religion. This is an interesting argument, which has been the subject of much back-and-forth among the Supreme Court for decades. However, the Committee is not aware of any Colorado educational program that has ever favored religion over non-religion, such as a voucher that could *only* be used at religious schools. Thus, the Committee will not wade into the contested issue about Supreme Court precedents and the original meaning of the Establishment Clause.

⁶ For both rounds of the Report, Advisory Committee members were also urged to submit written comments. The adopted version of this Report reflects all such comments.

From the public, written comments for the first draft Report were received from: Freedom From Religion Foundation (detailed letter with many suggestions); Disability Law Colorado (reiterating concerns raised at the July 2017 public hearing); John Rea (criticizing the Advisory Committee for studying the issue).

⁷ Following the January teleconference, the Advisory Committee received a comment from Mr. Seidel, correcting a typographic error in the first draft. The Committee also received a letter from Disability Law Colorado. The letter reiterated the group's concerns about the effects of vouchers on students with disabilities; these concerns had been raised at the July 2017 public hearing and are incorporated in the discussion below. The letter also stated that "the Report concludes the Blaine Amendment is unconstitutional." However, the draft Report (and this revised Report) has always expressly stated that the Advisory Committee makes no findings on the constitutionality of Colorado's No Aid Clause.

the public chose to present comments in the April teleconference. The Advisory Committee then voted to adopt the revised draft, including certain revisions suggested during the April 13 meeting.

II. Origins of the Colorado Constitution’s No Aid Clause

Article IX, Section 7, is part of the original 1876 Constitution, and its text has never been altered. It provides:

Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

Thirty-eight states have similar clauses in their State Constitutions. At the time of the 1875-76 Colorado Constitutional Convention, 17 states had such clauses. The Colorado text copies nearly verbatim the text of the 1870 Illinois Constitution.⁸

A. Why the term “Blaine Amendment” is incorrect

No Sectarian Aid Clauses are sometimes called “Blaine Amendments,” but the term is a misnomer as applied to the Colorado clause. First of all, Art. IX, § 7, is not an amendment; it is part of Colorado’s original constitution.

The letter also noted that as a matter of law, federal statutes, such as the Individuals with Disabilities Education Act (IDEA) and the Rehabilitation Act, would trump the Colorado Constitution, if there were a conflict. This is certainly true. *See* U.S. Const., art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”). No version of this Report has ever suggested otherwise.

⁸ The delegates of the Colorado Constitutional Convention drew extensively from new state constitutions in Illinois (1870), Missouri (1875), Nebraska (1875), and Pennsylvania (1873). Donald Wayne Hensel, *A History of the Colorado Constitution in the Nineteenth Century 105–06*, 220 (Ph.D. thesis in History, U. of Colo., 1957). The Illinois anti-sectarian clause was Ill. Const., art. X, § 3 (1870). The Colorado delegates revised the Illinois model by adding the phrases “or moneys whatever” and “sectarian society”, and by changing “sectarian denomination whatever” to “sectarian denomination whatsoever.”

The issue of religious discrimination in Blaine Amendments has previously been studied by the U.S. Commission on Civil Rights. *See* U.S. Commission on Civil Rights, *School Choice: The Blaine Amendments and Anti-Catholicism*, 2007. Oral and written presentations from that hearing were published by the Commission and are available on the Commission’s website. <http://www.usccr.gov/pubs/BlaineReport.pdf>. The 2007 hearing did not lead to any findings by the Commission.

In contrast, the Colorado Advisory Committee has produced findings, which may be found in the final section of this Report. Because we are the Colorado Advisory Committee, we focused our attention on the history and effects of the No Aid Clause in Colorado.

We believe that this report is the first state-specific examination of a No Sectarian Aid Clause conducted by a State Advisory Committee. Some legal scholars have conducted state-specific studies. *See, e.g.*, Jay S. Bybee & David W. Newton “Of Orphans and Vouchers: Nevada’s ‘Little Blaine Amendment’ and the Future of Religious Participation in Public Programs,” 2 *Nev. L.J.* 551 (2002); Scott Slater, “Florida’s ‘Blaine Amendment’ and its Effect on Educational Opportunities,” 33 *Stetson L. Rev.* 581 (2004). The Colorado State Advisory Committee respectfully suggests that other State Advisory Committees might consider studying the No Sectarian Aid Clauses in their own states. The studies would be helpful for better understanding of whether such clauses have or have not contributed to religious discrimination.

In September 1875, President Ulysses Grant, who was considering running for another term, called for a U.S. constitutional amendment banning all government aid to sectarian schools. The President's speech implicitly attacked Catholic schools, which he said taught "superstition, ambition, and ignorance."⁹ In his December 7, 1875, State of the Union report to Congress, Grant called for a constitutional amendment to protect America from the dangers of "priestcraft."¹⁰

A week later, Representative James G. Blaine, who also had presidential ambitions, proposed an amendment to the U.S. Constitution that would bar any federal, state, or local aid to any "religious sect or denomination."¹¹ Although the Blaine Amendment was not adopted in the U.S. Constitution, many states did adopt a version of it.¹²

During 1875–76, when the people of the Colorado Territory were seeking statehood, it would have been foolhardy for them to fail to consider the wishes of the President of the United States and of

⁹ Martin Nussbaum, Testimony before the Colorado State Advisory Committee to the U.S. Commission on Civil Rights, Denver, CO, July 18, 2017, p. 20; Martin Nussbaum, written testimony before the Colorado State Advisory Committee to the U.S. Commission on Civil Rights, hearing, Denver, CO, July 18, 2017, *The Unconstitutional Blaine Amendment in Colorado and Beyond*, p. 2 n.2. For the full text, see Ulysses Grant, President of the United States, *Speech to the Society of the Army of Tennessee* (Des Moines, Iowa, Sept. 29, 1875) (no taxpayer "support of any sectarian" "a good common school education, unmixd with sectarian, Pagan, or Atheistical tenets"), reprinted in *Words of Our Hero, U.S. Grant* (D. Lothrop & Co., Jeremiah Chapin ed., 1885?), p. 31, <https://archive.org/details/wordsofourherou00gran>.

President Grant did not specifically mention "Catholic" schools, but the language was an unmistakable reference to them, in the cultural context of the time. Since the early Reformation, and continuing through the nineteenth century, a classic Protestant attack on Catholicism was that it was "superstitious." "The speech clearly aligned the Republican Party with the Protestant cause." Steven K. Green, "The Blaine Amendment Reconsidered," 36 *Am. J. Leg. Hist.* 38, 48 (1992). *The Catholic World*, an official publication of the Catholic Church, construed Grant's facially-neutral words as "a veiled attack on Catholicism." *Id.* The subsequent "The Blaine Amendment was the direct result of Republican attempts to gain political mileage from a growing public concern over Catholic and immigrant inroads into American culture. The Democrats were no less culpable through their use of the amendment to garner Catholic support." *Id.*, p. 69.

¹⁰ Nussbaum, *Unconstitutional Blaine Amendment*, p. 2 n.2. The full text of the 1875 State of the Union is available at <http://stateoftheunion.onetwothree.net/texts/18751207.html>:

"We are a republic whereof one man is as good as another before the law. Under such a form of government it is of the greatest importance that all should be possessed of education and intelligence enough to cast a vote with a right understanding of its meaning. A large association of ignorant men can not for any considerable period oppose a successful resistance to tyranny and oppression from the educated few, but will inevitably sink into acquiescence to the will of intelligence, whether directed by the demagogue or by priestcraft....[Therefore Congress should consider a constitutional amendment] forbidding the teaching in said [public] schools of religious, atheistic, or pagan tenets; and prohibiting the granting of any school funds or school taxes, or any part thereof, either by legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination, or in aid or for the benefit of any other object of any nature or kind whatever."

As was standard at the time, the State of the Union was delivered in writing, rather than as a speech to a joint session of Congress.

¹¹ Ross Izard, written testimony before the Colorado State Advisory Committee to the U.S. Commission on Civil Rights, hearing, Denver, CO, July 18, 2017, *Blaine's Shadow: Politics, Discrimination, and School Choice*, Independence Institute Issue Paper no. 2-2017, pp. 8–9 (Mar. 2017) (submitted to the Advisory Committee as Izard's written report). As the Issue Paper notes, Advisory Committee member David Kopel is Research Director of the Independence Institute.

Blaine served as Speaker of the House 1869–1875, and as U.S. Senator from Maine 1876–1881. Because the Democrats had won a majority of the U.S. House in the 1874 elections, by December 1875 the Republican Blaine was no longer Speaker of the House. Blaine was a candidate for the Republican nomination for U.S. President in 1876 and 1880 and secured the nomination in 1884. That year, Blaine narrowly lost to Democrat Grover Cleveland.

The proposed Blaine Amendment had three clauses: The first clause copied the Free Exercise and Establishment Clauses of the First Amendment and applied them to the states. The second and third clauses were: "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." Izard, *Blaine's Shadow*, p. 3. Blaine's amendment passed the U.S. House nearly unanimously but came up barely short of the necessary 2/3 vote in the U.S. Senate. *Id.*

¹² *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2037 n.10 (2017) (Sotomayor, J., dissenting) (39 states).

Blaine's mother was Catholic, and his daughter later married a Catholic in a ceremony officiated by a priest. The Blaine Amendment's pandering to anti-Catholicism was apparently more a matter of political strategy than of personal conviction, partly to counter suspicions raised by Blaine having a Catholic mother. Neil Rolde, *Continental Liar from the State of Maine: James G. Blaine* (Tilbury House, 2007), pp. 164–66, 254–55, 271.

a powerful leader of House Republicans. Nevertheless, we will not refer to the Colorado provision as “the Blaine Amendment.” After all, Colorado’s 1876 provision was copied from Illinois’s of 1870, and Illinois, like 16 other states, had enacted its clause before President Grant and Rep. Blaine attempted to nationalize the issue.¹³

B. Political and Social Background of Colorado’s No Sectarian Aid Clause

In 1861, Congress created the Colorado Territory from portions of the Kansas, Nebraska, Utah, and New Mexico Territories.

The southernmost counties of central and eastern Colorado had once been part of the New Mexico Territory. The former New Mexico counties were the residence of most of Colorado’s Hispanic population in the 1870s.¹⁴

Regarding the No Sectarian Aid Clauses nationally, nine U.S. Supreme Court Justices have stated that the motivation was in part anti-Catholic.¹⁵

As for Colorado, experts on each side of the voucher issue agreed that bigotry was at least part of the motivation. Attorney Martin Nussbaum (pro-voucher) testified that the motive nationally was anti-Irish, while being anti-Mexican in Colorado.¹⁶ Ph.D. candidate Sarah LaCour (anti-voucher) testified that the No Sectarian Aid Clauses appealed to anti-Irish and anti-Italian sentiment nationally, and in Colorado, to anti-Latino sentiment.¹⁷

Attorney Andrew Seidel, of the Freedom From Religion Foundation (anti-voucher), traced the no aid principle to the freedom of conscience principles of the American Founding. He pointed to James Madison’s 1785 *Memorial and Remonstrance against Religious Assessments*, which argued that the principle of no government aid to churches was essential to religious freedom.¹⁸ While acknowledging that “nativist groups hijacked the no-funding principle for their bigoted aims,” he argued that this does not discredit the principle, nor does it mean that all non-funding advocates

¹³ Cindy Barnard, *Taxpayers for Public Education*, Testimony before the Colorado State Advisory Committee to the U.S. Commission on Civil Rights, Denver, CO, July 18, 2017, p. 92.

¹⁴ See Joseph P Sánchez, *Early Hispanic Colorado 1678-1900* (Rio Grande Books, 2015), p. 3 (7,000 Hispanics in the New Mexico Territory counties that were incorporated into the Colorado Territory); Frank Hall, 4 *History of the State of Colorado* (Blakely Printing Co., 1895), p. 192; Eugene H. Berwanger, *The Rise of the Centennial State: Colorado Territory, 1861–76* (U. of Ill. Pr., 2007), pp. 42–43 (political antagonism in 1864 between Hispanic south and Anglo north in Colorado), pp. 112–13 (Hispanics did not move to northern Colorado until the 20th century; 19th century English press in Colorado was hostile to Colorado Hispanics), p. 149 (southern Colorado was the region most opposed to ratification of the 1876 Constitution).

¹⁵ *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality op. of Justices Thomas, Rehnquist, Scalia, and Kennedy; Blaine Amendments have “a shameful pedigree” and were “born of bigotry”); *Zelman v. Simmons-Harris*, 536 U.S. 639, 720–21 (2002) (dissenting opinion of Justices Breyer, Stevens, and Souter) (Blaine amendment promoted “discrimination against religious minorities in schools”); *Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004) (Justices Rehnquist, Stevens, O’Connor, Kennedy, Souter, Ginsburg, Breyer; Blaine Amendment “linked with anti-Catholicism”). See also *Kotterman v. Killian*, 193 Ariz. 273, 291 (1999) (“The Blaine Amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing ‘Catholic menace’ . . .”).

¹⁶ Nussbaum, Testimony, *Hearing Transcript*, pp. 22–23, 85; Nussbaum, *Unconstitutional Blaine Amendment*, p. 7 (citing Colorado newspaper articles) (“There was at least one difference between the Colorado Blaine Amendment movement and the national movement. The despised Catholic minority nationally was Irish. In Colorado it was the Mexicans.”).

¹⁷ Sarah LaCour, Testimony before the Colorado State Advisory Committee to the U.S. Commission on Civil Rights, Denver, CO, July 18, 2017, pp. 25–26.

¹⁸ Writing anonymously, Madison was opposing a proposal to tax Virginians to support Christian ministers; the tax revenue would be given to a Christian denomination of the taxpayer’s choice. National Archives, “Memorial and Remonstrance against Religious Assessments, [ca. 20 June] 1785,” <https://founders.archives.gov/documents/Madison/01-08-02-0163>.

were or are bigots.¹⁹ His written report explained that opposition in some states to funding of “sectarian” institutions preceded the mass Irish Catholic immigration that began in 1841, and that anti-Catholicism was not an important factor in the no-funding movement before the Civil War.²⁰

According to American Civil Liberties Union attorney Mark Silverstein (anti-voucher):

But, yes, there was anti-Catholic bigotry. That was one of the factors going on when these no-aid provisions were enacted in the 1870s when the Colorado Constitution was adopted. That was one strand of the support for this No Aid provision. But there were others, too. There were people who understood that the public schools, the common schools, needed to serve as the place where all of these strands of the American experience could come together.

He pointed to the ideals of Thomas Jefferson and James Madison, who opposed government funding of churches, and who believed that churches and government should live in separate spheres.²¹

C. The Colorado Constitutional Convention and Ratification

In March 1875 Congress passed an Enabling Act for Colorado statehood.²² The Act mandated that the Colorado Constitution contain certain provisions (such as a guarantee of religious freedom) but said nothing for or against a No Sectarian Aid Clause. In later years, the congressional enabling acts for some new states did mandate that the state constitutions include No Sectarian Aid Clauses.

The people of Colorado elected 39 delegates to a constitutional convention, which was held in Denver from December 1875 to March 1876. After debates on various provisions, the delegates unanimously adopted the proposed constitution and recommended its ratification by the people. On July 1, 1876, the voters of Colorado adopted the Constitution by a 3:1 margin.²³ There was no organized opposition.²⁴ On August 1, 1876, President Grant issued the proclamation making Colorado the 38th State in the Union.²⁵

¹⁹ Andrew L. Seidel, written testimony before the Colorado State Advisory Committee to the U.S. Commission on Civil Rights, hearing, Denver, CO, July 18, 2017, *No Aid Clauses Should Be Preserved and Enforced*, p. 4 (quoting Steven Green, “‘Blaming Blaine’: Understanding the First Amendment and the ‘No-Funding’ Principle,” 2 *First Amendment L. Rev.* 107, 113 (2004)).

²⁰ Seidel, *No Aid Clauses*, pp. 4–5. For example, in New York in the early nineteenth century, the legislature prohibited New York City funding of the Bethel Baptist Church (a school controlled by a Protestant denomination) because tax money should not “be subject to the control of any religious organization.” Green, “Blaming Blaine,” at 121.

No one would contend that anti-Catholicism was unimportant in general in American politics in the two decades before the Civil War. For example, the Native American Party was a major political force in the 1850s and was vehemently anti-immigrant and anti-Catholic. The party members were commonly known as the “Know Nothings,” because the party had originally been a secret society. Members were instructed to say “I know nothing” if an outsider asked them about the party.

²¹ Mark Silverstein, testimony before the Colorado State Advisory Committee to the U.S. Commission on Civil Rights, hearing, Denver, CO, July 18, 2017, pp. 41–42.

²² 18 Stat. 474 (March 3, 1875), http://www.netstate.com/states/government/co_statehood.htm.

²³ The vote was 15,443 in favor and 4,052 opposed.

²⁴ Frank Hall, 2 *History of Colorado* (Blakely Printing Co., 1890), p. 328. Hall had served as Territorial Secretary. His four-volume history is the most detailed account of early Colorado politics.

²⁵ The American Presidency Project, “Ulysses S. Grant, Proclamation 230 – Admission of Colorado Into the Union,” <http://www.presidency.ucsb.edu/ws/?pid=70540>.

The 39 delegates to the Colorado Convention were 24 Republicans and 15 Democrats. But partisan considerations had little if any effect on the deliberations of the Convention.²⁶

Convention delegates included at least three Catholics: Agapito Vigil, Jesus Maria Garcia, and Casimiro Barela. All were from southern Colorado. All were native speakers of Spanish, and the first two required translation services, which the Convention provided.²⁷

The official records of the Convention do not have extensive detail about the Convention debates. However, more information was reported by newspapers that covered the Convention.

Public school teachers, who had first organized in 1875, strongly opposed aid to non-government schools.²⁸ The teachers had resolved that Colorado should copy the No Sectarian Aid Clause from the Illinois Constitution, and the Convention later did so.²⁹

Petitions filed to the convention came from Protestant and Catholic groups, with Protestants for No Sectarian Aid, and Catholics against.³⁰ Colorado's leading newspaper, the *Rocky Mountain News*, predicted that Protestants would vote for the Constitution because of the clause, and Catholics against.³¹ The prediction was overstated; even though southern Colorado was less supportive of the proposed Constitution, a substantial minority of southerners voted for it. Likewise, the Protestant north included a substantial minority who voted against the Constitution.

In considering the No Sectarian Aid Clause, the 1875–76 Convention delegates may have been aware of a problem that had recently arisen in Trinidad, the largest town in southern Colorado. In 1874, the public schools in Trinidad had accepted the aid of the Sisters of Charity, a Catholic order of religious women dedicated to teaching. These teachers used textbooks from Catholic Christian Brothers, also an educational religious order. The public schools were closed on Catholic religious holidays.

²⁶ Wilbur Fiske Stone—a Democrat, delegate, and future Supreme Court Justice—recalled “there was no politics in it at all.” Hensel, *History of the Colorado Constitution*, p. 101 (citing Denver Post, Oct. 22, 1911 (interview with Stone)); E.T. Wells, a Republican delegate and a territorial judge, and then a Colorado Supreme Court Justice wrote that on “no occasion whatever” did “personal acrimony or partisan feelings” impede the Convention. E.T. Wells, “State Constitutional Convention” in *Legislative, Historical and Biographical Compendium of Colorado* (Forgotten Books, 2015) (C.F. Coleman’s Pub. House, 1887), p. 166; see also 2 Hall, *History of Colorado*, p. 295 (after the Convention officers were elected, “no spectator could have supposed, from anything heard or seen in the assembly or in any outer room, that party politics had ever been so much as dreamed of in the loft of the mansard room occupied by the convention.”); *Id.*, p. 296 (the Convention heeded its President’s admonition against the “slightest semblance of partisanship or sectional spirit.” It has neither “time, opportunity, or inclination to rethresh the oft cudged sheaves of party politics”).

²⁷ Barela had been a member of the territorial legislature and also Sheriff of Las Animas County. In 1876 he was elected to the Colorado Senate, where he served until 1916. He was a Democrat until the early twentieth century, switching to Republican after the Democratic Party moved leftward under the influence of William Jennings Bryan. José E. Fernández, *The Biography of Casimiro Barela* (trans. A Gabriel Meléndez, 2003) (1911), pp. 16–17, 35–36, 42–46, 57, 80–81, 93, 99, 106, 135, 138, 150–56, 164–72, 179, 186, 196, 230–33; “Casimiro Barela,” History Colorado. http://legacy.historycolorado.org/sites/default/files/files/Kids_Students/Bios/Casimiro_Barela.pdf For Barela’s activities while being raised as practicing Catholic, see Fernández, *Biography of Barela*, pp. 7–12. We know Barela’s religion for certain because he is the subject of a biographical book. We infer that Agapito Vigil and Jesus Maria Garcia, for whom records are sparser than for Barela, were Catholic, based on their names, ethnicity, and district of election. Jesus Maria Garcia was a Democratic rancher, born in Mexico in 1842. Because he spoke Spanish and not English, he had to speak through an interpreter at the Convention, where he represented part of Las Animas County. Hensel, *History of the Colorado Constitution*, p. 413. Democrat Agapito Vigil was born in Mexico in 1833, served in the New Mexico territorial legislature and was elected Assessor of Las Animas County in 1872. He represented Las Animas and Huerfano Counties at the Convention, where he needed to speak through an interpreter. *Id.*, p. 422.

²⁸ Donald W. Hensel, “Religion and the Writing of the Colorado Constitution,” 30 *Church History* (1961), p. 354 (available via JSTOR).

²⁹ *Id.*

³⁰ “Protestant and Catholic camps submitted 45 petitions of which thirty eight called for prohibition of public funding for Catholic schools.” Nussbaum *Unconstitutional Blaine Amendment*, p. 5; Nussbaum, Testimony, *Hearing Transcript*, p. 21.

³¹ *Id.*, p. 22.

This provoked furious denunciation from the editor of the *Trinidad Enterprise* newspaper, who was an outspoken anti-Catholic bigot. With the connivance of local law enforcement, the editor was assaulted by a local bully, and saved himself only by drawing his handgun.³²

Likewise controversial was the territorial legislature's \$3,800 grant to Episcopalian Bishop George M. Randall to establish an institution for instruction in mining ("Jarvis Hall") at the College of St. John the Evangelist, in Golden. In 1874, the entire institution was transferred to the territory, and renamed the Colorado School of Mines.³³

Doubtless, the events in Trinidad helped convince the Convention to adopt Section 8 of article IX, which provided:

No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatsoever. No sectarian tenets or doctrines shall ever be taught in the public school, nor shall any distinction or classification of pupils be made on account of race or color.

Notwithstanding the text of the 1876 Colorado Constitution, as of 1887 the Sisters of Charity were still running the Trinidad public school.³⁴

It is well-known that during the months the Colorado Convention met, Colorado's Catholic leader Joseph Machebeuf organized strong opposition to the No Aid Clause, which would become section 7.³⁵ (Separate from the just-quoted section 8). As will be discussed below, the predominant model in public education in Colorado was what might be called "Protestant-lite," including short daily readings from the King James Bible—a translation that is acceptable to all Protestants, but not to Catholics.

It is doubtful that Machebeuf could have been satisfied by balance—such as alternating between Protestant and Catholic Bible translations. Nor was he arguing that public schools would be appropriate for Catholics if the schools omitted religion entirely and just taught reading, writing, and arithmetic. In other states, Catholics had urged that Bible reading be removed from the public schools, and these requests had sometimes provoked anti-Catholic riots.³⁶ So trying to eliminate Bible reading was not only an exercise in futility, it was very dangerous.

The purpose of Catholic education (like most religious education) is for the whole child, including moral formation.³⁷ Indeed, in 1884, a plenary council of American Catholic leaders adopted a rule

³² Morris F. Taylor, *Trinidad, Colorado Territory* (Trinidad State Junior Coll., 1966), pp. 141–43.

³³ Eugene H. Berwanger, *The Rise of the Centennial State: Colorado Territory, 1861–76* (U. of Ill. Pr., 2007), p. 126.

³⁴ Thomas J. Noel, *Colorado Catholicism and the Archdiocese of Denver, 1857–1989* (Univ. Pr. of Colo., 1990), p. 33.

³⁵ As of 1876, Machebeuf was the Vicar Apostolic of Colorado and Utah and thus the leader of Colorado Catholics. He was promoted to Archbishop in 1887, after Colorado became a diocese.

³⁶ E.g., Michael Feldberg, *The Philadelphia Riots of 1844: A Study of Ethnic Conflict* (Praeger, 1975); Sean McCarroll, *The Plenary Councils of Baltimore (1852-1884): The Formation of America's Catholic School System Amidst Anti-Catholicism in the United States* (2011), <https://michiganjournalhistory.files.wordpress.com/2014/02/mccarroll.pdf> (listing anti-Catholic riots and mob attacks).

³⁷ Philip V. Robey, "Catholic Schools and Educating the Whole Child," *Education Week* (Oct. 4, 2011), <https://www.edweek.org/ew/articles/2011/10/05/06robey.h31.html>.

that Catholic students *must not* attend a non-Catholic school.³⁸ According to the American Bishops at the time, Catholic children must *only* attend schools that were run by the Catholic Church.

So what Machebeuf and American Catholics were asking for was essentially a Colorado version of the Quebec system. There, French Catholic children attended schools run by the Catholic Church, with French often as the language of instruction. English Protestant children attended Protestant schools where English was the language of instruction.³⁹ These parallel school systems were both supported by the government. For the Quebecois, the parallel system seemed to work pretty well. At the Convention, Machebeuf and his allies unsuccessfully lobbied for public funds for Catholic schools.⁴⁰

By writing the No Aid Sectarian Clause, the Colorado Convention overwhelmingly rejected the Quebec model. The delegates voted 24–3 to retain the No Sectarian Aid Clause.⁴¹ The rejection was consistent with the Colorado Constitution’s general principle against giving government aid to *any* non-government organization. Article V, section 34, of the Constitution forbade legislative appropriations for the benefit of *any* non-government entity. Having already outlawed aid for everyone, section 34 for good measure specifically stated that the no aid rule included “any denominational or sectarian institution or association.”⁴² Meanwhile, article XI of the Constitution outlawed *all* government aid to business.⁴³

³⁸ “[W]e not only exhort Catholic parents...but we *command* them with all the authority in our power, to procure a truly Christian education for their dear offspring...[and] send them to Catholic...schools.” Patricia Wittberg, *From Piety to Professionalism--and Back?: Transformations of Organized Religious Virtuosity* (Lexington Books, 2006), p. 40; parental failure to do was declared to be mortal sin (imperiling the soul) and would result in the parents being deprived of the sacraments. The rule was rigorously enforced by Colorado’s Bishop Nicholas Chrysostom Matz, who served from 1889 to 1917. Noel, *Colorado Catholicism*, p. 64.

³⁹ Under the Quebec taxation system adopted in 1869, Catholic families paid property taxes that were given to the Catholic school system, and Protestants paid property taxes into a Protestant school system. The property taxes of “neutral” taxpayers, such as corporations, were divided proportionately among the Catholic and Protestant systems, based on student enrollment. G. Emmett Carter, *The Catholic Public Schools of Quebec* (W.J. Gage, 1957), pp. 41–43.

⁴⁰ Noel, *Colorado Catholicism*, p. 35.

⁴¹ Hensel, *Religion*, p. 355; of the three delegates of Mexican ancestry, only Vigil was present, and he voted to keep the clause. *Id.* Regarding aid to parochial schools, and sectarian teaching in the public schools, Hensel observes, “On these two issues alone the convention refused to compromise contending factions. The Protestant majority saw to that. To strengthen the separation of church and state, Coloradans had to pay an initial price of animosity to avoid later and more corrosive bitterness.” *Id.*, p. 356.

⁴² “No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.” Colo. Const., Art. V, § 34.

Later, the Colorado Supreme Court judicially nullified Art. V, § 34. Under current precedents, as long as the legislature can rationally claim that the grant to a private institution serves some public purpose, private appropriations are allowed. *See Bedford v. White*, 106 P.2d 469 (1940) (appropriations to private parties are lawful whenever the legislature claims there is some public purpose). This is plainly contrary to the text of section 34.

⁴³ “Neither the state, nor any county, city, town, township or school district shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company or corporation, public or private, for any amount, or for any purpose whatever; or become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state.” Colo. Const., Art. XI, § 1.

“Neither the state, nor any county, city, town, township, or school district shall make any donation or grant to, or in aid of, or become a subscriber to, or shareholder in any corporation or company or a joint owner with any person, company, or corporation, public or private, in or out of the state, except as to such ownership as may accrue to the state by escheat, or by forfeiture, by operation or provision of law; and except as to such ownership as may accrue to the state, or to any county, city, town, township, or school district, or to either or any of them, jointly with any person, company, or corporation, by forfeiture or sale of real estate for nonpayment of taxes, or by donation or devise for public use, or by purchase by or on behalf of any or either of them, jointly with any or either of them, under execution in cases of fines, penalties, or forfeiture of recognizance, breach of condition of official bond, or of bond to secure public moneys, or the performance of any contract in which they or any of them may be jointly or severally interested.” Colo. Const., Art. XI, § 2.

In 1974, an exception was added by constitutional amendment, allowing Colorado governments to participate in the energy business.

Like the no aid provision in article V, section 34, the no aid for business provisions of article XI were later nullified by judicial interpretation. *See, e.g., McNichols v. City and County of Denver*, 131 Colo. 246, 280 P.2d 1096 (1955) (“public purpose” exception); *Allardice v. Adams*

The Convention was particularly determined to outlaw government aid to railroads, which had swindled the taxpayers during the Territorial Period. The Convention had not only learned a lesson about aid to railroads, it applied a broader lesson about government aid to private organizations, and it comprehensively outlawed such aid.⁴⁴ Presciently, the Convention expected both the legislature and local governments to be corrupt,⁴⁵ and the Convention did everything it could think of to tie their fiscal hands.⁴⁶ So in one sense, article IX's No Sectarian Aid Clause could be seen as a specific restatement of the Constitution's pervasive No Aid to anyone principle.

While suspicious of government aid to anyone or anything, the Colorado Convention was certainly *not* hostile to immigrants in general. To the contrary, the young and growing would-be state welcomed immigrants, and adopted several provisions for their benefit.

- A then-novel provision guaranteeing the property rights of aliens.⁴⁷
- Copying Missouri's very strong right to arms clause but altering the Missouri language about the right to the "citizen" to instead protect the right of every "person."⁴⁸
- Prohibiting all racial discrimination in the public schools.⁴⁹
- Adopting the proposal of Casimiro Barela that state statutes be printed in Spanish and German as well as English, until at least 1900.⁵⁰
- Printing the proposed Constitution in English, Spanish, and German.

Unfortunately, when we examine the text of article IX, § 7, we do not find a comprehensive no aid rule, which would have been consistent with the Convention's broad suspicion of government aid to anyone.

Instead, the text singles out some religions for disfavored treatment. The text of the Constitution supports the unanimous conclusions of the testifying experts from both sides who found section 7 to be at least partly rooted in bigotry.

In 2015, three Justices of the Colorado Supreme Court cited a 2014 dictionary and asserted that the word "sectarian" in the Colorado Constitution is a synonym for "religious."⁵¹ This is

County, 476 P.2d 982, 990 (1970) (making "[e]very presumption" in favor of there being a valid public purpose, for bonds to subsidize an agricultural feed plant);

⁴⁴ Donald Wayne Hensel, *A History of the Colorado Constitution in the Nineteenth Century* (Ph.D. thesis in History, U. of Colo., 1957), p. 156.

⁴⁵ The post-Statehood period of the nineteenth century was characterized by "executive and legislative disrespect for constitutional mandate. There was little effort to keep state expenses within constitutional limits of state revenue. County and state debt ceilings proved meaningless. As if negligence toward tax and debt restrictions were not enough, the legislature compounded this apathy by robbing the inviolate school fund to finance its own illegally excessive appropriations." *Id.*, p. iii.

⁴⁶ The Convention believed "that permitting too much freedom to govern was a far greater threat than possibly clogging the government's effectiveness in order to shield the people from their own rules. If the turnstiles blocked efficiency they also checked exploitation and rascality." *Id.*, p. 120.

⁴⁷ Colo. Const., art. II, § 27.

⁴⁸ The right to arms provision was later successfully invoked by a legal resident alien from Japan. *People v. Nakamura*, 62 P.2d 246, 99 Colo. 262 (1936) (striking 1921 ban on firearms possession by legal resident aliens, which had been enacted for the ostensible purpose of preserving game for the citizens). The history of the Colorado arms right provision is detailed in David B. Kopel, "The Right to Arms in Nineteenth Century Colorado," 95 *Denv. U. L. Rev.* 329 (2018).

⁴⁹ Colo. Const., art IX, § 8.

⁵⁰ Colo. Const. 1876, art. XVIII § 8.

⁵¹ *Taxpayers for Public Education v. Douglas County School District*, 2015 CO 50, ¶ 27, 351 P.3d 461, 470 (Colo. 2015) (plurality op.) (quoting 10th edition of Black's Law Dictionary), *vacated sub nom. Colo State Board of Education v. Taxpayers for Public Education*, 137 S.Ct. 2327 (2017).

inconsistent with the original public meaning from 1876. The 2015 opinion did not address the precisely opposite determination of the Colorado Supreme Court in 1927, for the same clause: “Religious and sectarian are not synonymous.”⁵²

The people of Colorado knew how to use the words “religion” or “religious.” The Free Exercise of Religion Clause of the 1876 Bill of Rights uses the word, encompassing all forms of faith.⁵³

It would have been straightforward for the Convention to use the same word in article IX, to prohibit government aid to any “religious society”, to any “religious denomination whatsoever,” “or for any religious purpose.” Such language would have been comprehensive, and it would have been neutral between religions.

But the Convention did not use the word “religious” in article IX. Instead, copying Illinois, it chose a word that disfavors *some* religions. That word is “sectarian.” Government may not give money to a “sectarian society”, to any “sectarian denomination whatsoever,” “or for any sectarian purpose.” As noted above, the Colorado Constitution elsewhere uses the term “sectarian” with a negative connotation; section 8 of article IX forbade the teaching of “sectarian tenets or doctrines” in public schools but was interpreted to allow Protestant Bible readings.⁵⁴

Earlier in the nineteenth century, when different Protestant denominations had fought each other over government funding for their schools, the term “sectarian” had been used to urge the Protestants to stop squabbling over denominational disputes.⁵⁵

A 2014 dictionary is useful evidence about the current meaning of words, but it is less helpful as evidence for how a word was understood in 1876.

⁵² *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 290, 255 P. 610, 616 (1927). The Court then explained why the King James Bible is not “sectarian” within the meaning of section 7:

The ultimate answer to the question ‘sectarian or not?’ whether with reference to the Bible or any other book or doctrine, must be by the courts. *Hackett v. School Dist.*, [120 Ky. 608 (1905)]. We are now answering it with reference to the Bible. The Bible is a compilation of many books. Even an atheist could find nothing sectarian in the book of Esther. [The only book of the Bible in which the word “God” or its synonyms do not appear.] Is it not as practicable to say that that book is not sectarian as to say that the whole Bible is? Can we not separate the sectarian teachings of the Bible as practically as those of any other book? What right have we to say that the whole is when we know that part is not?

It is argued that, because some sects regard the whole Bible as sacred and inspired and others not, it is therefore sectarian. Non sequitur. Sectarian or not cannot be determined of a book by how sects regard it. The decisive question is whether it teaches some doctrine peculiar to a sect. That part which does not is not sectarian. The eloquence of Amos and Isaiah and the wisdom of the parables is sectarian or not, whether read from King James version, the English Revised, the American Revised, the Douai, or any of the many other translations, or from any other book.

It is said that King James Bible is proscribed by Roman Catholic authority; but proscription cannot make that sectarian which is not actually so. *Hackett v. Brooksville, etc.*, 120 Ky. 608, 617, 618, 87 S. W. 792, 69 L. R. A. 592, 117 Am. St. Rep. 599, 9 Ann. Cas. 36. If it could, the atheists could proscribe the Star Spangled Banner, the Calvinists Whittier [John Greenleaf Whittier, Quaker poet], and the fundamentalists half of modern science. Neither can the fact that it is authorized by a sect make it sectarian.

True, the address of the Constitutional Convention to the people stated that the Constitution provided ‘that no religious or sectarian dogmas’ shall ever be taught in any of the schools under the patronage of the state, but ‘dogma’ here has its ordinary meaning when used in connection with religion, which is ‘arbitrary dictum.’ Webster. It has no reference to the Bible or its teaching, but to arbitrary propositions of religion or theology.

Id., pp. Colo. 291–92.

⁵³ “The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.” Colo. Const., art. II, § 4.

⁵⁴ The use of the same word in article V, § 34, is, at least arguably, without a negative connotation.

⁵⁵ Izard, *Testimony, Hearing Transcript*, pp. 36–38.

In the nineteenth century, the word “sectarian” had a negative connotation, which intensified as the century wore on. Nineteenth century dictionaries agree that “sectarian” is *not* a reference to religion in general. Instead, it refers only to religions that are in some way bad: religions that are “fanatical” or “heretical.”⁵⁶

By the standards of 1876, what religions would be “sectarian,” in the eyes of the general public? At the top of the list would be the Church of Jesus Christ of Latter-Day Saints (Mormons); Colorado’s neighbor was the Utah Territory, which Brigham Young was running as a theocracy.

Catholicism would also be on the list. Catholics had been present in the future United States ever since the founding of the Maryland Colony in 1636. But their numbers were few until mass Irish Catholic immigration began in the 1840s. As an overwhelmingly Protestant nation, America in 1876 was dominated by citizens whose own religions had been founded on explicit rejection of Catholicism as a superstitious heresy that was contrary to Biblical Christianity.

The American Catholic hierarchy had always been strongly patriotic and supportive of the constitutional rights of all Americans. The same cannot be said of the Vatican. As of 1876 (and for decades thereafter), the official position of the Vatican rejected the human rights principle of freedom of religion.⁵⁷

Other religions that might have been considered “sectarian” in 1876 were some of the new Christian denominations. Christian Scientists got their national start in 1875 with the publication of Mary Baker Eddy’s *Science and Health*.⁵⁸ Christian Scientists reject conventional medical care for some illnesses, and instead rely on faith healing.⁵⁹ Seventh-Day Adventists grew out of an upstate New York movement that expected the end of the world on October 22, 1844.⁶⁰ They believe that the Christian sabbath is properly Saturday, **not** Sunday.⁶¹

⁵⁶ Robert G. Natelson, “Why Nineteenth Century Bans on ‘Sectarian’ Aid Are Facially Unconstitutional: New Evidence on Plain Meaning,” 19 *Federalist Society Rev.* 98, 104 (2018) <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/3hGnTbVvEyDQTHhfi9LjF2o9MN02HqKnSGSLkV7F.pdf> (examining numerous dictionaries and hundreds of newspaper articles from the period, including many Colorado newspapers); *see also* Rob Natelson, “Some of the Colorado Supreme Court’s Mistakes in the Douglas County School Choice Case” Independence Institute, Oct. 22, 2015, <https://i2i.org/some-of-the-colorado-supreme-courts-mistakes-in-the-douglas-county-school-choice-case/> (blog post quoting several dictionaries).

For example: Webster (1828) (the first *American* dictionary of the English language) (“one of a party in religion which has separated itself from the established church, or which holds tenets different from those of the prevailing denomination in a kingdom or state”); Webster & Walker (1864) (“one of a party in religion which has separated itself from the established church. See Heretic”); Webster’s Academic Dictionary (1895) (“Pertaining to a sect or to sects; bigotted attachedly to the tenets of a denomination. n. One of a sect.”).

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⁵⁷ Pope Pius IX (reigned 1846–78) condemned religious freedom in his 1864 *Syllabus of Errors* (*Syllabus Errorum*), item 15 <http://www.papalencyclicals.net/Pius09/p9syll.htm>. (describing as erroneous the idea that “Every man is free to embrace and profess that religion which, guided by the light of reason, he shall consider true.”)

In 1965, the Second Vatican Council strongly endorsed religious liberty. Pope Paul VI, *Dignitatis humanae* (Of the Dignity of the Human Person), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

⁵⁸ Yvonne Fettweis & Robert Warneck, *Mary Baker Eddy: Christian Healer* (Christian Science Pr., 2009).

⁵⁹ Mary Baker Eddy, *Science and Health with Key to the Scriptures* (First Church of Christ, Scientist, in Boston, 1875), pp. 142–200; Aaron Martin Crane, *Christian Science: A Brief Answer to the Question, “What Is It?”* (Forgotten Books, reprint, 2018), pp. 13–15, <https://archive.org/details/christianscience00cran>.

⁶⁰ George K. Knight, *Millennial Fever and the End of the World: A Study of Millerite Adventism* (Idaho Pacific Pr., 1993)

⁶¹ Richard W. Schwarz, *Light Bearers: A History of the Seventh-Day Adventist Church* (Review & Herald Publishing Assoc., 2013).

People varied in what particular religions they might denounce as “sectarian.” There is no doubt that the word “sectarian” intentionally divided religious people into two classes; the disfavored class were the “sectarians,” the followers of religions that were reviled by the mainstream. They were specially singled out for unfavorable treatment by article IX, § 7.

III. Historical Application of the No Aid Clause

The next issue for the Advisory Committee is whether the past or present application of the No Sectarian Aid Clause has violated civil rights.

Under the text of the No Sectarian Aid Clause, it would have been permissible for government to provide direct support to non-sectarian religious—that is, to schools whose religions were not considered fanatical or heretical. In the understanding of the time, the “sectarian” language prohibited aid to Catholic or other “sectarian” schools, while permitting aid to mainstream religious schools, such as Methodist, Baptist, Episcopalian, or Lutheran the latter of which had an extensive school system.⁶²

As will be detailed in Part IV, starting the 1970s the Colorado legislature created student aid programs that discriminated against disfavored religions. Before that, during Colorado’s first century of statehood, public education discrimination against sectarians took a different form, as we will now describe.

In proper compliance with the Colorado Constitution, and with broader principles against government establishment of religion, Trinidad eventually stopped using church employees as public school teachers or church textbooks as public school textbooks.⁶³

Fortunately, many of the Colorado Supreme Court cases interpreting section 7 seem to have ignored the implications of the anti-sectarian language. For example, a school district informally allowed its custodian to spend some of his work hours in helping to construct a church. In exchange, some boys from the church would perform the custodian’s tasks at school. The Colorado Supreme Court held that the relationship did not violate section 7, because it was a fair, arms-length exchange of services, and not a payment to the church. The nature of the particular religion at issue appears to have been irrelevant to the Justices.⁶⁴

⁶² In the United States, before the institution of public education, some four hundred Lutheran elementary schools were established and maintained; and as the major Lutheran system came to be developed contemporaneously with the public schools, from 1840 to the present [1939], nearly three thousand elementary schools came to be established in the numerous Lutheran congregations which into being with the influx of large numbers of Lutherans from the German and Scandinavian countries abroad.” Walter H. Beck, *Lutheran Elementary Schools in the United States* (Concordia Pub. House, 1939), p. v. “[E]arly Lutheran school systems constituted the most extensive and permanent denominational system instituted and maintained by any Protestant church-body or private organization.” *Id.*, pp. 83–84.

Thirty-four cities or towns in Colorado presently have at least one Lutheran school. “Lutheran Schools, Colorado,” K12 Academics, <https://www.k12academics.com/national-directories/lutheran-school/Colorado>.

⁶³ We were not able to determine the precise date when Trinidad policies were changed. We searched the archives of the *Trinidad Enterprise*, the only Las Animas County newspaper in the Colorado Historic Newspapers Collection. The searchable archives are 1873 to 1880, and only half of the 84 months in this period contain even a single issue of the *Trinidad Enterprise*.

⁶⁴ *School Dist. No. 97 in Weld County v. Schmidt*, 128 Colo. 495, 263 P.2d 581 (1953).

But Colorado public schools did generally practice religious discrimination, at least as that term is understood in modern civil rights law. Until U.S. Supreme Court rulings in the 1960s, it was not uncommon for Colorado public schools to begin each day with reading of a Bible verse.⁶⁵ Schools participated in the Christian tradition in other ways, such as by singing Christmas carols or by having Christmas pageants.⁶⁶

Presumably, the public schools considered themselves to be in compliance with the Colorado Constitution. Following the No Sectarian Aid Clause (section 7) of article IX is another clause against sectarianism: “No sectarian tenets or doctrines shall ever be taught in the public school...” Art. IX, § 8. Bible readings, Christmas celebrations, and the like, with broad appeal to most Christians, were not considered “sectarian.”⁶⁷

However, this approach treated students of minority religions like outsiders, which (at least according to modern Supreme Court doctrine) constituted discrimination on the basis of religion in violation of the First and Fourteenth Amendments to the U.S. Constitution. To begin with, as of 1876, some Denver Public School students were the children of Denver’s small but growing Chinese population. Presumably many of them adhered to Buddhism, Taoism, Confucianism, or other non-Christian religious traditions.⁶⁸

⁶⁵ The 1927 *Vollmer* case, discussed later in this section, describes such practices in the Denver Public Schools.

⁶⁶ For example, the following articles describing a “Christmas Pageant” at a Colorado public school can be found in the “Colorado Historic Newspapers Collection” database. The citations below are a representative list, and not comprehensive. The database itself does not purport to be comprehensive. Moreover, OCR scanned issues are added to the database only after being read and corrected for spelling by volunteer editors. For many years, only a few days in any given month have scanned issues in the database. So the following cites should be considered samples: *Aspen Daily Times*, Dec. 22, 1961 p. 11 (photo); “Elementary Pupils to Stage Original Operetta on Dec. 22,” *Aspen Daily Times*, Dec. 4, 1959, p. 13; “School’s Biggest Christmas Pageant in Many Years,” *Aspen Daily Times*, Dec. 11, 1958, p. 13; “School Classes Collaborate on Xmas Pageant,” *Aspen Daily Times*, Dec. 12, 1957, p. 12; “Did You Know,” *Aspen Daily Times*, Dec. 13, 1956, p. 16; *Aspen Daily Times*, Dec. 27, 1956, p. 9 (photo of pageant at Aspen School); “P.T.A. Notes,” *Aurora Advocate*, Dec. 4, 1952; “Christmas Pageant to be Presented by High School Dec. 15,” *Colorado Transcript*, Dec. 14, 1944, p. 1; “Parent Teacher Help with Christmas Pageant,” *Colorado Transcript*, Dec. 4, 1941, p. 6; “Maroon and White,” *Colorado Transcript*, November 23, 1944, p. 6; “Christmas Pageant Dealing With Nativity Given By Glee Club,” *Colorado Transcript*, Jan. 1, 1911, p. 4; “We Doff Our Hats,” *Craig Empire Courier*, Dec. 23, 1936, p. 1; “Lily,” *Craig Empire Courier*, Dec. 28, 1932, p. 2; “Neighborhood Gossip,” *Craig Empire*, Dec. 20, 1922, p. 2; “Santa Claus for President,” *Douglas County News*, Dec. 21, 1979, p. 30; “Christmas Programs at Churches-Schools,” *Douglas County News*, Dec. 19, 1957, p. 1; “Sedalia Sidelights,” *Douglas County News*, Dec. 27, 1951, p. 2; “Minturn,” *Eagle Valley Enterprise*, Jan. 1, 1959, p. 4; “Special Events Will Mark Christmas Week,” *Eagle Valley Enterprise*, Dec. 13, 1956, p. 1; “Minturn School,” *Eagle Valley Enterprise*, Dec. 30, 1954, p. 6; “Basalt cont.,” *Eagle Valley Enterprise*, Dec. 9, 1954, p. 7; “George to Enter Colorado U. to Complete Master’s Degree,” *Granada Pioneer*, July 15, 1944, p. 5 (noting that George had directed the Christmas pageant and the senior class play); “Indian School Students Plan Christmas Pageant,” *Ignacio Chieftain*, Dec. 11, 1942, p.1; “Christmas Vacation to Start Dec. 19,” *Louisville Times*, Dec. 4, 1947, p. 1 (Christmas programs on Dec. 18 and 19); “Another Program Clicks,” *Louisville Times*, Dec. 26, 1946, p. 4; “Christmas Pageant at Maple Grove,” *Montrose Daily Press*, Dec. 20, 1919, p. 1 (Central school); “Christmas Spirit Held High During School Program,” *Montrose Daily Press*, Dec. 20, 1919, p. 1; “High School Notes,” *Oak Creek Times*, Dec. 5, 1924, p. 1; “Bulldog G-R-O-W-L-S,” *Palisade Tribune*, Dec. 22, 1939, p. 5; “Grade School Notes,” *Record Journal of Douglas*, Dec. 15, 1939, p. 5; *Steamboat Pilot*, Dec. 23, 1971, p. 5 (photos); “Soroco Rams,” *Steamboat Pilot*, Dec. 24, 1970, p. 9; “Children to Give Program Tuesday,” *Steamboat Pilot*, Dec. 12, 1957, p. 1; “Christmas Pageant at School Will Have Much Colorful Music This Year,” *Steamboat Pilot*, Dec. 14, 1950, p. 1; “Mt. Harris,” *Steamboat Pilot*, Dec. 23, 1943; “Savery,” *Steamboat Pilot*, Dec. 3, 1942; “Yampa,” *Steamboat Pilot*, Dec. 29, 1933, p. 4; “Hayden Briefs,” *Steamboat Pilot*, Dec. 16, 1932, p. 7; “Music Class in Christmas Pageant,” *Steamboat Pilot*, Dec. 25, 1931, p. 2; “Yampa,” *Steamboat Pilot*, Dec. 14, 1928, p. 9; “Oak Creek School Notes,” *Steamboat Pilot*, Dec. 9, 1927, p. 5; “Oak Creek,” *Steamboat Pilot*, Dec. 3, 1924, p. 7.

⁶⁷ Alternatively, one could argue that Bible readings unadorned by commentary from the teacher, singing Christmas carols, and so on would not be considered the “teaching” of doctrines or tenets. The argument is implausible. “Teaching” comprises more than direct instruction by the teacher. “Teaching” also includes instructing students to read and recite particular texts. The Bible and Christmas carols obviously present religious doctrines, and students were required to say or sing the words of those doctrines. “Veiled in flesh, the Godhead see. Hail the incarnate deity,” says the very popular “Hark the Herald Angels Sing.” Less theoretical songs, such as “Away in the Manger,” still present as fact the birth story of an individual who is considered the messiah by Christians, but not by other religions. Every sentence of the Bible is religious doctrine. As any Torah student could explain, even Bible verses that do not expressly present a doctrine are laden with doctrinal implications.

⁶⁸ According the 1880 census, Colorado’s Chinese population was 612, of whom 238 lived in Denver. Liping Zhu, *The Road to Chinese Exclusion: The Denver Riot, the 1880 Election, and the Rise of the West* (Univ. Pr. of Kansas, 2013), p. 70. By 1890, the number had risen to 1,398 in Colorado, of whom 980 were in Denver. *Id.*, p. 73. The counts may be low, since Chinese in late nineteenth century America sometimes avoided census takers, for fear that they were tax collectors or immigration officials who would deport them. *Id.*, p. 65.

Second, there was Colorado's Jewish population. Many lived in the Denver area, but by the late nineteenth century, Trinidad had become an important Jewish population center.⁶⁹

Based on word count, about three-quarters of the King James Bible is comprised of the Old Testament. What Christians call the "Old Testament" is the Jewish Bible. So many of the public school Bible verse readings would have been consistent with the Jewish faith, while some would not have been.⁷⁰ Obviously, Christmas and Easter celebrations at the public schools were contrary to the faith of the Jewish students.

Finally, there were the Roman Catholic students. Some of them had always attended public schools, and their numbers later increased after the American Bishops changed their minds in the twentieth century and authorized Catholic attendance at public schools. Christmas and Easter celebrations *per se* would not be problematic for them. However, the King James Bible was a very serious problem.

Translated by a committee of scholars at the behest of England's King James I in the early seventeenth century, the King James Version (KJV) of the Bible was acceptable to all Protestant denominations, even though some preferred subsequent translations that were more accurate and that were written in modern English, instead of the KJV's Shakespearean style.

The U.S. census does not ask questions about individuals' religion, which would be a highly improper subject of government inquiry. It does seem clear that much of Colorado's Chinese population was non-Christian. Denver's Central Presbyterian Church opened a religious and English education program for Chinese and attracted about fifteen to seventeen regular students. *Id.*, pp. 90, 95. In 1877, the *Denver Times* ran an opinion article opposing restrictions on Chinese immigration; the author argued that converting the Chinese to Christianity would be easy. *Id.*, p. 95. This indicates that most Chinese in Colorado were not then Christian. Colorado Governor Pitkin's 1881 inaugural address argued against Chinese immigration; among his reasons was that Chinese had no desire to adopt American religion. *Id.* p. 227 (citing Second Inaugural Address of His Excellency Frederick W. Pitkin, p. 12). In the aftermath of an anti-Chinese riot in Denver just before the 1880 general election, "Most of" the Denver Chinese "earnestly studied English while also embracing Christianity." *Id.*, p. 258.

However, whatever Christian conversion took place after 1876 was far from universal. The Chinese in Denver established non-Christian temples known as "Joss houses." Chinese religions practices were often mocked, and in 1889, a Joss house in Denver was attacked by Salvation Army soldiers. In the 1890s, rival Chinese factions contended for control of Joss houses. William Wei, *Asians in Colorado: A History of Persecution and Perseverance in the Centennial State* (U. Wash. Pr. 2016). pp. 87–88.

Describing the mid-1880s in Denver, Wei says that "Chinese were forbidden to attend public schools." *Id.* at 90. Unfortunately, Wei provides no citation for this statement. A search of the Session Laws Library of HeinOnline found no such statewide statute. (Search terms were "Chinese", "Mongol", "Asiatic", and "Asia"—the relevant key words of the late nineteenth century for legal descriptions of Chinese immigrants.) It is possible that the Denver Public Schools in this period had some sort of policy against the children of Chinese immigrants, although such a policy would seem contrary to Article IX, § 8 of the Colorado Constitution, which provides: "nor shall any distinction or classification of pupils be made on account of race or color." It is possible that Chinese children were excluded on the grounds that they were not citizens; the citizenship of American-born children of Chinese immigrants (the adult Chinese immigrants at the time not being eligible for naturalization) was not confirmed by the U.S. Supreme Court until 1898. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

⁶⁹ See Ida Libert Uchil, *Pioneers Peddlers and Tsadikim: The Story of Jews in Colorado* (Univ. Pr. of Colo., 2000).

⁷⁰ This does not mean that all Jewish students found to the KJV translation of the Old Testament (the Hebrew Bible) to be unproblematic. To start with, the KJV puts the various books in a different order. The Hebrew Bible (Tanakh) and the Christian Old Testament begin with the same five books (comprising the Torah or Pentateuch). Thereafter, the Hebrew Bible presents the various books of the "Prophets." The final major part of the Hebrew Bible is "Writings," consisting of Psalms (hymns), stories about persons who were not prophets (e.g., Ruth, Esther, Job, and other material). The order of the KJV Old Testament is entirely different; it completely mixes the "Prophets" and "Writings." For example, in the Hebrew Bible, Malachi is the last book of the Prophets section, and thus precedes the 13 books of the Writings. In the KJV, Malachi is the very last book of the Old Testament. In the Hebrew Bible, Nehemiah is the 37th book, while it is 16th in the KJV.

More fundamentally, the KJV is laden with annotations that cross-reference other books of the Bible. The cross-references to the New Testament books aim to show the New Testament as fulfillment of the Old Testament, and that the Old Testament anticipates Jesus. This is clear from the marginal notes themselves. For more on the KJV and its ideological orientation, see David Daiches, *The King James Version of the English Bible* (Univ. of Chi. Pr., 1941).

Catholics, however, had several objections: First, their Church forbade them to read the KJV, and told them to instead rely on authorized Catholic translations, such as the Douay-Rheims version.⁷¹

Second, and perhaps even more importantly, there was the fundamental Catholic/Protestant split on how and when to read the Bible. Protestants extolled personal, solitary study of the Bible, guided by individual discernment. Catholics believed that the Bible should be read in conjunction with knowledgeable guidance, such as by a Priest or other approved religious authority.⁷² Catholic objections to Bible reading in public schools had led to a major anti-Catholic in Philadelphia in 1844.⁷³

The issue came to a head in a 1927 Colorado Supreme Court case, when a Catholic student in the Denver Public Schools challenged the daily King James Bible readings on precisely the above grounds. The Court rendered a mixed decision.⁷⁴

First, the Court upheld the use of the KJV in public schools. The Court said that at least some of the KJV was “religious” but not “sectarian.”⁷⁵ This was in the spirit of the 1876 Constitution’s view that mainstream generic Protestantism is not “sectarian.”

Second, the Court ruled that the Catholic student had an absolute right to be excused from the daily readings.⁷⁶ Safeguarding the right to opt out was protective of civil rights. The right to opt out was later nationalized by the U.S. Supreme Court in the 1943 *Barnette* case, holding that Jehovah’s Witnesses (who do not believe in taking oaths) could opt out from public schools’ daily recitations of the Pledge of Allegiance.⁷⁷

Bible readings in U.S. public schools began to come to an end following a 1963 U.S. Supreme Court decision.⁷⁸ In the following decades, most other instances of recognition of Christianity, such as Christmas pageants, have been removed from Colorado public schools.

IV. Modern Application

Whatever the text or history of the No Sectarian Aid Clause, does it contribute to civil rights violations today?

⁷¹ Catholic Bibles include and KJV Bibles published after 1885 omit various books from the intertestamental period (written between the last book of the Old Testament and the first book of the New Testament). Collectively, these books are called “The Apocrypha.” The books include Judith, and First and Second Maccabees, which are heroic tales of Jewish resistance to foreign conquest. See “Apocrypha,” King James Bible Online, <https://www.kingjamesbibleonline.org/Apocrypha-Books/>.

⁷² The differences of the time in attitudes towards Bible reading were explained, from a Catholic viewpoint, in Brotherhood of St. Vincent of Paul, 1 *The Clifton Tracts* (Edward Dunigan & Bro., 1854), ch. IV, <https://archive.org/details/CliftonTractsVI>. As the front matter of the book indicates, the book was published with the approval of the regional Cardinal and Archbishop.

⁷³ McCarroll, *Plenary Councils of Baltimore* (listing riots and also noting that armed Catholic self-defense led by priests deterred some incipient rioters).

⁷⁴ *People ex rel. Vollmer v. Stanley* 81 Colo. 276, 255 P. 610 (1927), overruled *Conrad v. City and County of Denver, Colo.*, 656 P.2d 662 (Colo. 1982). The *Vollmer* analysis implicitly left open the possibility for challenges to particular passages that could be considered “sectarian,” but the *Vollmer* case itself was about the KJV as a whole, and not about particular parts of the Bible.

⁷⁵ *Vollmer*, at 288–94.

⁷⁶ *Vollmer*, at 286, 294.

⁷⁷ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁷⁸ *Abington School District v. Schempp*, 374 U.S. 203 (1963). Accordingly, *Vollmer* was later partially overruled by the Colorado Supreme Court, to the extent that it conflicted with *Abington*. *Conrad v. City and County of Denver, Colo.*, 656 P.2d 662, 670 n.6 (Colo. 1983).

As discussed in Part III, in terms of taxpayer funding of non-government entities, the application of the No Sectarian Aid Clause in Colorado in the first century of statehood was equal, without discrimination. In the 19th century, there was no favoritism of Lutherans and Episcopalians over Mormons and Confucians. As will be discussed in Part IV.C., below, starting in the last quarter of the twentieth century, Colorado government funding did begin to discriminate against “sectarians,” until a federal court halted the discrimination.

The core issues from the 1876 Convention remain well-settled. Public school teachers are not the employees of religious organizations, do not dress in religious garb, and do not use textbooks created by religious organizations. There is not, and never has been, direct general government grants to religious organizations to pay for the operation of a religious school system.

However, unlike in 1876, a substantial amount of taxpayer funding *does* now flow to religious educational institutions, by various means. This is the subject of our final inquiry.

A. Civil Rights and Education

Before addressing the issue, we note another subject on which the testifying experts agreed across ideological lines: many Colorado children suffer in inadequate public school systems.

Whether education is *per se* a civil right is a subject on which there is disagreement. According to U.S. Supreme Court precedent, there is no federal constitutional right to an education.⁷⁹ According to Colorado Supreme Court precedent, based on the text of the Colorado Constitution (including article IX, which is all about education), public education *is* a constitutional right in Colorado.⁸⁰ However, Colorado judicial precedents are highly deferential to legislative and school board decisions about the effectuation of this right.⁸¹

While many families are content with the quality of public education in Colorado, Advisory Committee member Helen Raleigh stated, and experts on both sides agreed, that some Colorado children are assigned to low-quality public schools that provide a poor education.⁸² These young victims are disproportionately children of color and of low socioeconomic background. Substandard and unequal education is a civil rights problem.

Identifying the problem is easy, but solving it is not. Increased funding is no panacea.

⁷⁹ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1972).

⁸⁰ “The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously.” Colo. Const., art. IX, § 2. For cases, see the next footnote.

⁸¹ *E.g.*, *Lobato v. State*, 304 P.3d 1132 (Colo. 2013); *Lujan v. Colorado State Board of Education*, 649 P.2d 1005 (Colo. 1982) (both holding that the statewide school finance system is constitutional as long as it has a “rational basis”).

⁸² Helen Raleigh (committee member), Nussbaum, Silverstein (“trapped in underperforming schools”), Izard, LaCour (“yes, absolutely it is a civil rights issue”), Testimony, *Hearing Transcript*, pp. 64–67.

Justice Bender’s dissent in the *Lobato* case listed some of the problems:

Colorado ranks 46th in the nation in the rate of high school completion. For those students who do graduate high school, 29% are not college-ready, meaning they must take remedial classes before taking college-level courses. In some districts, over 50% of students are not college-ready by graduation. According to Lieutenant Governor Joe Garcia, who testified as an expert in Colorado education policy, these percentages significantly increase for African-American and Hispanic students and for low-income students.

Lobato, 304 F.3d at 1146 (Bender, J., dissenting).

Since the 1970s, per-pupil spending on education in the United States approximately tripled.⁸³ Yet educational progress has been much more limited; although Colorado public students often perform better than the national average, in neither Colorado nor the nation do the majority of fourth grade or eighth grade students achieve grade-level proficiency in Mathematics or Reading.⁸⁴ One expert holds out hope for the “long, slow road to improving public education.”⁸⁵ Another argues that even if these reforms succeed, their timeline is 20 years or more, leaving yet another generation deprived of the Colorado Constitution’s promise of a “thorough” and “efficient” public education.⁸⁶

Whether vouchers can be part a solution is disputed. Opponents argue that historically, some voucher programs have wasted taxpayer dollars and student time on underregulated, underperforming schools.⁸⁷ Opponents also argue that voucher programs mainly benefit students

⁸³ Adjusting for inflation, the total cost of K–12 education for an average U.S. student graduating in a given year rose from \$56,903 in the early 1970s to \$164,426 in 2010. Andrew J. Coulson, *State Education Trends*, Cato Institute, Policy Analysis no. 746 (Mar. 18, 2014), p. 2, <https://www.cato.org/publications/policy-analysis/state-education-trends> Inflation-adjusted per-pupil spending in Colorado rose 120% from 1972 to 2012, which is a very large increase, but less than the national average. *Id.*, p. 10.

⁸⁴ Annual student test scores on various metrics from the 1970s to the present are available from the National Assessment of Educational Progress, “Explore Assessment Data,” <https://nces.ed.gov/nationsreportcard/data/>.

The following are some of the Colorado data, found via queries to the above URL. The NAEP’s scale is 0 to 500. “Basic” means “partial mastery of prerequisite knowledge and skills that are fundamental for proficient work at each grade assessed.” “Proficient” means “solid academic performance for each grade assessed...competency over challenging subject matter, including subject-matter knowledge, application of such knowledge to real-world situations, and analytical skills appropriate to the subject matter.” “Advanced” means “superior performance.” National Assessment of Educational Progress, “Glossary,” <https://www.nationsreportcard.gov/glossary.aspx>. Stated another way, an eighth grader who is “proficient” at reading reads with solid competence at an eighth-grade level.

For the very earliest Colorado scores, accommodations were not permitted. Later, accommodations have been permitted. So we compare the most recent Colorado scores with the earliest Colorado scores for tests in which accommodations were permitted

Grade 4 Mathematics. 2017: average 241, 80% at or above Basic, 42% at or above Proficient, 9% Advanced. 2003: average 235, 77% Basic, 34% Proficient, 4% Advanced. In both years, the Colorado average was not significantly different from the national average.

Grade 4 Reading. 2017: average 225, 71% Basic, 40% Proficient, 10% Advanced. 1998: 220 average, 67% Basic, 37% Proficient, 6% Advanced. In both years, the Colorado average was significantly above the national average.

Grade 8 Mathematics. 2017: average 286, 74% Basic, 38% Proficient, 12% Advanced. 2003: average 283, 74% Basic, 34% Proficient, 8% Advanced. In both years, the Colorado average was significantly above the national average.

Grade 8 Reading. 2017: average 270, 79% Basic, 41% Proficient, 6% Advanced. 1998: average 264, 77% Basic, 30% Proficient, 2% Advanced. In both years, the Colorado average was significantly above the national average.

For the national figures for public school students, the data are as follows. The national results do not indicate what percentage of students were “Advanced.”

Grade 4 Mathematics. 2017: average 239, 79% Basic, 40% Proficient. 2000: average 224, 64% Basic, 22% Proficient.

Grade 4 Reading. 2017: average 221, 67% Basic, 35% Proficient. 1998: average 213, 58% Basic, 28% Proficient.

Grade 8 Mathematics. 2017: average 282, Basic 69%, Proficient 33%. 2000: average 272, Basic 62%, Proficient 25%.

Grade 8 Reading. 2017: average 265, Basic 75%, Proficient 35%. 1998: average 261, 71% Basic, 30% Proficient.

Not all states participated in the national assessment program in any given year. The figures are for public school students (including charter schools), and do not include independent or religious schools.

⁸⁵ LaCour, Testimony, *Hearing Transcript*, p. 68. As the scores in the previous footnote indicate, there has been progress in Colorado and nationally and that progress has been long and slow.

⁸⁶ Izard, Testimony, *Hearing Transcript*, pp. 66–67; Colo. Const., art. IX, § 2 (“The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state....”).

Indeed, if the improvement from 1998 or 2000 through 2018 were to continue at the same rate, then 20 years hence at least 40% of Colorado fourth and eighth grades would still be failing to achieve grade-level proficiency in Mathematics and Reading.

⁸⁷ LaCour, Testimony, *Hearing Transcript*, p. 51; Seidel, Testimony, *Hearing Transcript*, pp. 59–60. Andrew Seidel, one of the experts who testified at the hearing, filed a supplemental written report that described extensive fraud and mismanagement in Wisconsin’s voucher program.

who are already in non-government schools.⁸⁸ Further, opponents raise concerns that allowing students to exit the public school system may weaken that system, to the detriment of students left behind.⁸⁹

Another issue is the possibility that in a particular area, the only independent schools that would take vouchers might be religious schools.⁹⁰

Finally, government funding rarely comes without government control. This has been the case in higher education, where federal research grants and student loans for private colleges and universities have led to extensive federal control. The same could occur with independent schools that accept voucher students.⁹¹ The government control could undermine that freedom and diversity that make some independent schools successful in the first place.

Other public comments at the July hearing pointed out current problems with the public schools and discussed personal stories about the benefits of non-government schools.⁹² So did some of the written comments in the month following the public hearing.

The Colorado Advisory Committee has neither the jurisdiction nor the expertise to make a conclusive policy determination on the alleged benefits or harms of education vouchers. Decisions about the merits of vouchers, and the pro/con social science studies, are within the jurisdiction of Colorado General Assembly, Colorado's 179 elected School Boards, and the voters who elect them, not the Advisory Committee.

B. Students with Disabilities

The right of persons with disabilities are a core subject for the U.S. Civil Rights Commission and hence for the state advisory committees. The federal Rehabilitation Act of 1973 forbade discrimination against persons with disabilities by any entity that receives federal funding.⁹³ In effect, this includes all public K–12 schools, all public institutions of higher education, and almost

The report highlighted hundreds of millions of dollars in public funds that went to schools that were later barred from the voucher program for failing to meet basic requirements.

Definitively evaluating the Wisconsin program is obviously beyond the scope of the Colorado Advisory Committee's capabilities, but the Seidel supplemental report does highlight the importance of ensuring that voucher programs (or any other programs transferring public tax dollars to non-government organizations) should have appropriate monitoring and anti-fraud provisions.

Of course the fact that a particular voucher program may have been victimized by fraud is not directly relevant to the question being addressed by the Colorado Advisory Committee: namely the exclusion of "sectarian" schools, only, from voucher programs. We are not aware of evidence indicating that sectarian schools are different from other independent schools regarding potential fraud.

⁸⁸ Seidel, Testimony, *Hearing Transcript*, p. 109 (three-quarters of participants in Wisconsin choice program were already enrolled in independent schools).

⁸⁹ LaCour, Testimony, *Hearing Transcript*, pp. 31, 52–53.

⁹⁰ This is currently true, in a limited sense, for Colorado's College Opportunity Scholarship program, discussed below. For college students who want to major in Classical Music, the only currently available option in Colorado is at Regis University, a Jesuit institution. It seems hard to argue that the expanded choice available to music majors via Regis is harmful.

⁹¹ Renee Reif, Colorado Chapter, Americans United for Separation of Church and State, Testimony, *Hearing Transcript*, p. 79.

⁹² *E.g.*, Testimony, *Hearing Transcript*, pp. 93 (Rita Young; vouchers help low-income families in poor neighborhoods); 96 (Kelly Sloan; efforts since the 1980s to improve public schools have failed); 100 (Kelsey Alexander; non-Catholic sent her son to a Catholic school because the public school was not challenging, and was causing behavioral problems); 105–106 (Evelyn Zur, former Cleveland resident; inner-city schools are failing); 107–108 (Kim Monson, former executive board member of Lutheran family services; describing wildly inaccurate and anti-American version of World War II being taught in some Denver metro public schools).

⁹³ 29 U.S.C. § 794. This is reinforced by Title II of the Americans with Disabilities Act (ADA), which was enacted in 1990. 42 U.S.C. § 12131 et seq.

all private institutions of higher education. The principles of the 1973 Act were given more detailed application by the 1975 Individuals with Disabilities Education Act (IDEA).⁹⁴

Federal statutes and regulations require public school districts to provide disabled students with a “free appropriate public education.”⁹⁵

The federal statutes and regulations have never been interpreted to require that every public school provide services for every type of disability. To the contrary, the requirement is that the *district* provide the services, and those services need not be in every single building.⁹⁶

Indeed, sometimes school districts are *required* by federal law to pay the private school tuition for disabled students when the district lacks the capability to provide an “appropriate” education for those students. The Douglas County School District was ordered to do so in a recent U.S. Supreme Court decision.⁹⁷

Accordingly, it is implausible to argue that under current law, a public school district providing tuition payments to private schools is necessarily a violation of the rights of students with disabilities.

When a public school district places a special education student in an independent school, the independent school must comply with IDEA. However, if the student’s family chooses to leave a public school and enroll the student in an independent school, then IDEA does not apply, since no government funding is following the student into the independent school. Under current law, the rules for religious independent schools are the same as for all other independent schools.⁹⁸

⁹⁴ 20 U.S. Code § 1400 et seq. The original name was the Education for All Handicapped Children Act (EHA). The new name was adopted in 1990.

⁹⁵ 34 C.F.R. Part 104.

⁹⁶ See *Barnett v. Fairfax County School Board*, 927 F.2d 146, 153 (4th Cir. 1991) (federal statute does not “impos[e] upon a school board the obligation to place a child in his base school. Rather, this section requires only that a school board take into account, as one factor, the geographical proximity of the placement in making these decisions.”); *Schuldt v. Mankato School District No. 77*, 937 F.2d 1357, 1361 (8th Cir.1991) (statutory phrase “as close as possible” does not mandate the home school); *Murray v. Montrose County School District RE-1J*, 51 F.3d 921, 929 (10th Cir.1995) (“A natural and logical reading of these two regulations is that a disabled child should be educated in the school he or she would attend if not disabled (i.e., the neighborhood school), unless the child’s IEP requires placement elsewhere. If the IEP requires placement elsewhere, then, in deciding where the appropriate placement is, geographical proximity to home is relevant, and the child should be placed as close to home as possible.”); *Hudson v. Bloomfield Hills School District*, 910 F. Supp. 1291, 1304 (E.D. Mich. 1995) (“nothing in the statute or regulations requires a school district to in every instance place a child in the neighborhood school that he/she would attend if not handicapped”); *Fischer v. Rochester Community Schools*, [780 F. Supp. 1142](#), 1150 (E.D. Mich. 1991) (“no such entitlement”).

A special education law textbook summarizes:

[T]he placement should be as close to home as possible. Unless otherwise indicated in the IEP [Individual Education Plan for a special needs student], the students should be placed in schools they would be attending if they did not have a disability. This is not an absolute right so much as it is a preference. If placement in home schools will not provide a FAPE, schools may place students in more distant schools.

Mitchell L. Yell, *The Law and Special Education* (Pearson, 4th ed. 2016), p. 179 (citing *Hudson*).

⁹⁷ The federal Individuals with Disabilities in Education Act (IDEA) requires that schools receiving federal aid for special needs students provide students with disabilities a “free appropriate public education” (FAPE). 20 U.S.C. §§ 1401(9), 1411. A FAPE includes an “individualized education plan” (IEP). 20 U.S.C. §§ 1401(20), 1414(d)(1)(A)(i). In the Douglas County public schools, Andrew F., a child with autism, made progress in early years, but stalled in fourth grade. His parents believed the school district’s IEP inadequate, and enrolled him in a private school, which resulted in significant progress. Pursuant to the IDEA, the parents sought reimbursement from the Douglas County School District for the private school tuition; such reimbursement is allowed when a public school district does not or cannot provide an adequate IEP. Based on case precedents, the District argued that an IEP was legally sufficient if it allowed the student to make “more than *de minimis*” progress. The unanimous Supreme Court held that IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988, 998 (2017).

⁹⁸ Nussbaum, Testimony, *Hearing Transcript*, p. 71.

In the *Lobato* case, discussed above, Colorado Justice Bender wrote that “Many [Colorado public] schools do not comply with the Americans with Disabilities Act and are largely inaccessible to students with special needs.”⁹⁹ Moreover, “Parents in the Boulder and Denver school districts testified that their special-needs children were shunted from school to school and had to leave programs that were working because the programs were deemed too expensive.”¹⁰⁰

Like the current federal laws, the 1876 Colorado Constitution required that the state government provide education for students with disabilities. And like the federal laws, the Constitution did not expect that every public school or every public school district would be able to provide that education itself. Instead, the Constitution ordered the creation of “institutions...for the benefit of ...[the] blind, deaf and mute.”¹⁰¹ Accordingly, the general assembly funded the Institute for the Education of Mutes, located in Colorado Springs. Today, it is known as the Colorado School for the Deaf and Blind.¹⁰²

The Committee heard testimony from the parent of a student with profound disabilities whose neighborhood public school did not provide the services the student needed.¹⁰³ The Committee also heard testimony that some of the private schools that participated in the now-defunct Douglas County voucher program did not offer a full range of services to students with disabilities.¹⁰⁴ In that regard, those private schools were like many public schools, which also do not provide all disability services in every building.

In the never-implemented Douglas County voucher program, parental acceptance of the vouchers was considered a parental placement, not a school placement, so IDEA would not apply.¹⁰⁵ Among the Douglas County schools that were willing to participate in the voucher program was a specialized school for students with disabilities.¹⁰⁶ Many states have voucher programs for students with disabilities.¹⁰⁷

At the public hearing, some witnesses worried that a broad voucher program would reduce resources for the public schools, and lead to deterioration of public school services for students with disabilities.¹⁰⁸ The five expert witnesses did not address the issue of whether this has or has not happened in other jurisdictions with voucher programs. Accordingly, the Advisory Committee makes no finding on this issue.¹⁰⁹

⁹⁹ *Lobato*, *supra*, 342 P.3d at 1147 (Bender, J., dissenting).

¹⁰⁰ *Id.*, at 1148.

¹⁰¹ Colo. Const., art. VII, § 1.

¹⁰² Colo. Rev. Stat. §§ 22-80-101.5 et seq.

¹⁰³ Danae Davidson, Testimony, *Hearing Transcript*, pp. 103–105 (public school across the street won’t take her daughter).

¹⁰⁴ Jennifer Levin, attorney for Disability Law Colorado, Testimony, *Hearing Transcript*, p. 69–70; Allison Daniels, director of legal services, Disability Law Colorado, Testimony, *Hearing Transcript*, pp. 73–76; Letter from Matt Cloven, The Arc of Larimer County, to Colorado State Advisory Committee, July 20, 2017 (concern that vouchers will take money from public schools, and so the schools will have fewer resources for students with disabilities).

¹⁰⁵ Renee Reif, Testimony, *Hearing Transcript*, p. 80.

¹⁰⁶ Nussbaum, Testimony, *Hearing Transcript*, pp. 71–72.

¹⁰⁷ Ed Choice, “Can school choice help students with special needs?” https://www.edchoice.org/school_choice_faqs/can-school-choice-help-students-with-special-needs/ (listing 20 state programs; Colorado not among them). However, Colorado does have the Exceptional Children’s Education Act, discussed in Part IV.D., below, that provides vouchers for some students with disabilities.

¹⁰⁸ Testimony, *Hearing Transcript*, pp. 69–70 (Jennifer Levin, Disability Law Colorado), 73–76 (Allison Daniels, Disability Law Colorado).

¹⁰⁹ In Florida, the McKay Scholarship Program for Students with Disabilities allows some students with disabilities to receive vouchers to attend alternative schools. A study of the students with disabilities who remained in public schools found McKay had “a positive but very modest impact on math and reading performance of the students in the public schools.” Marcus A. Winters & Jay P. Greene, “Public School Response to Special Education Vouchers: The Impact of Florida’s McKay Scholarship Program on Disability Diagnosis and Student Achievement in Public

We do emphasize that the concerns of all witnesses should be taken seriously. Any voucher program, whether or not it includes religious schools, should be carefully designed with the needs of special education students in mind. The program should result in no decline, either short term or long term, in public school services for students with disabilities. Ideally, a voucher program should *expand* the options for students with disabilities.

Every school district, of whatever size, should constantly be searching for ways to improve services for students with disabilities, preferably in an environment which attempts to maximize interaction with other students, and that provides special education services relatively near to where the student lives. As the testimony indicated, there appears to be room for improvement in Colorado in this regard.

C. Civil Rights Violations in Higher Education Scholarships

Today, a great deal of taxpayer funding is provided to non-government religious schools, at all levels. For example, professors at Regis University (a private Catholic Jesuit school) can apply for scientific research grants on a level playing field with professors from the University of Colorado (a government school) or the University of Denver (originally the Colorado Seminary, a private Methodist school, but now non-religious) or Colorado College (not at all religious today but founded in 1874 by Congregationalists).¹¹⁰

As will be described below, Colorado has many scholarship programs for higher education. The broadest of these, which was created in 2004, is the College Opportunity Fund (COF).¹¹¹ It provides Colorado residents with tuition aid that can be used at any Colorado institution of higher education. As originally enacted, the program included schools that were considered moderately religious (like Regis Jesuit, or the Buddhist-oriented Naropa University¹¹² in Boulder) but excluded schools that were “pervasively sectarian” (namely, Colorado Christian University, a non-denominational religious school with several campuses).

The exclusion of “pervasively sectarian” institutions from student aid in the 2004 law was consistent with similar exclusions that had applied to other Colorado higher education scholarships since at least the 1970s.¹¹³

Schools” 33 *Educational Evaluation and Policy Analysis* 138, 156 (June 2011). The same study also found a significant *reduction* in the number of students who were diagnosed by the public schools as having a “specific learning disability” (SLD). Students with SLD comprise by far the largest number of special needs students in Florida public schools, and a significant percentage of enrollment. As the authors note, prior research has indicated that the SLD diagnosis has been over-used by public schools as an excuse for low student achievement. The authors suggested that the public schools may have reduced SLD diagnoses for fear that students so diagnosed could then use a McKay voucher. Pre-McKay, over-use of the SLD diagnosis was financially beneficial to public schools, since the schools received additional funding for special needs students. But with McKay in the picture, the financial benefit of the diagnosis was balanced by the risk of the student using a voucher to attend a different school. *Id.*, pp. 139–41.

We present the above study in the interests of completeness, but we reiterate that the Colorado Special Advisory Committee’s project was to investigate religious discrimination pursuant to the No Sectarian Aid Clause, and not to conduct a literature review or social science study of vouchers in general, or of vouchers for students with special needs.

¹¹⁰ The original Colorado Seminary opened in 1864 but closed in 1867 because of financial problems. In 1880 it re-opened as the University of Denver Colorado Seminary. Carl Ubbelohde, Maxine Benson & Duane A. Smith, *A Colorado History* (WestWinds Pr., 10th ed. 2015), p. 162.

¹¹¹ 2004 Colo. Legis. Serv. Ch. 215 (S.B. 04–189).

¹¹² Named for an Indian Buddhist sage of the 11th century. The first Buddhist temple in Colorado was founded in 1916, a result of Japanese immigration in the very late nineteenth and the early twentieth centuries. Bill Hosokawa, *Colorado’s Japanese Americans: From 1886 to the Present* (Univ. Pr. of Colo., 2005), p. 65.

¹¹³ *E.g.*, S.B.398, 51st General Assembly, 1st Regular Sess. (Colo. 1977) (Colorado Student Incentive Grant Program) (vol. 1, ch. 279, p. 1104).

Applying the No Sectarian Aid Clause, the Colorado Supreme Court upheld the taxpayer funding of scholarships to Regis and Naropa and also upheld the “pervasively sectarian” limit to exclude Colorado Christian University.¹¹⁴

As discussed above, the No Sectarian Aid Clause was not aimed at all religions, but only at religions that were considered, by the government of any given time, to be religious in an extreme and negative way. Coloradans of 1876 might have been surprised to find that Jesuit and Buddhist schools were no longer considered to be too “sectarian,” whereas a non-denominational school that treats Protestants equally with the school’s many Catholic students was “pervasively sectarian.”

The change from 1876 to 2004 in who was targeted for special disapproval was consistent with the text of the No Sectarian Aid Clause. The clause did not prohibit aid to “Catholic” institutions; instead it prohibited aid to “sectarian” institutions. The decision about what kinds of institutions would be considered “sectarian” would be up to future legislatures and courts to consider, based on the circumstances of their own times.

So by the late 20th and early 21st centuries, Catholicism *per se* was not “sectarian”—at least as Catholicism was practiced at a liberal institution like Regis University. Coloradans of 1876 might have been astonished at the result, considering that Regis is run by the Society of Jesus, known as the Jesuits. In earlier times, the Jesuits were the most feared of all the Catholic orders, because of their reputation for intelligence and cunning. While the word “Jesuit” has a primary meaning of referring to the Society, the secondary meaning is “one given to intrigue or equivocation.” The variants “Jesuitical” or “Jesuitism” are “usually disparaging.”¹¹⁵

Meanwhile, a non-denominational religious school for Protestants and Catholics *was* now considered to be too sectarian. Part of the problem, according to the Colorado government regulators, was that CCU’s curriculum in Bible studies presumed that the Bible was authoritative scripture.

This too would have astonished the generation of 1876. The Protestants and Catholics of 1876 entirely agreed that the Bible was authoritative scripture. Their only disagreement was which version to use, and whether Bible readings in schools needed to be accompanied by explication of the text by an appropriate teacher.¹¹⁶

Between 1876 and 2004, the government’s attitude had inverted regarding the Bible in education. Again, the inversion was consistent with the 1876 Constitution’s anti-“sectarian” language. As of 1876, being a “sectarian” could include having the wrong attitude about the Bible; the same was true in 2004. In 1876, the politically correct view was the Bible is an authoritative source of rules for proper behavior; by 2004, this view was had become politically incorrect. Again, the change in *which* Bible attitudes were governmentally disfavored was consistent with the 1876 text—which allowed for changing public understanding of what is “sectarian.”

¹¹⁴ *Americans United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982)

¹¹⁵ Merriam-Webster Dictionary, Definition of Jesuit, <https://www.merriam-webster.com/dictionary/Jesuit>. Jesuits were the tip of the spear of the Catholic Counter-Reformation (which began in the mid-sixteenth century) and were often active behind the scenes in Protestant-ruled nations.

¹¹⁶ The differing views are detailed in Part III, *supra*.

Partly as a result of changes in U.S. Supreme Court precedent, the federal Tenth Circuit Court of Appeals held in 2008 that the “pervasively sectarian” exclusion in Colorado higher education scholarships violated the First Amendment.¹¹⁷ In other words, the anti-“sectarian” discrimination violated the civil rights of pervasively religious people.

The Tenth Circuit found that Colorado officials had engaged in inappropriate, anti-religious curriculum investigations. Government micro-inquiries into the nature of people’s religious lives is forbidden by the First Amendment.¹¹⁸ The Tenth Circuit’s decision reinforces the Advisory Committee’s conclusion that the “sectarian” language of the No Aid clause is an invitation for discrimination against governmentally-disfavored religion and has been used to violate civil rights.

In response to the *Colorado Christian University* decision, the Colorado General Assembly in 2009 amended all higher education scholarship laws to eliminate the “pervasively sectarian” prohibition.¹¹⁹ The amended statutes simply bar scholarships for students who are pursuing a professional degree in theology.¹²⁰ This is consistent with current U.S. Supreme precedent on the First Amendment, as the legislature declared: “This new standard reflects the decision of the United States Supreme Court in *Locke v. Davey*, 540 U.S. 712 (U.S. 2004), and the provisions of section 7 of article IX of the state constitution.”¹²¹ (emphasis added).

Although legislative declarations are not necessarily binding on the courts, the legislature did seem to declare that a scholarship program by which students may choose to attend very sectarian schools is compliant with the No Sectarian Aid Clause—as long as the student is not pursuing a professional theology degree.¹²²

¹¹⁷ *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). The decision was based in part on the U.S. Supreme Court decision *Mitchell v. Helms*, 530 U.S. 793 (2000). There, six Justices upheld a Louisiana program to distribute non-religious library, computer, and media materials to public and private schools, including religious ones. The six Justices who agreed on the judgement differed in part on the rationale. Justice Thomas, joined by three others, noted that when the term “pervasively sectarian” had been invented by the Supreme Court in 1973, the term “applied almost exclusively to Catholic parochial schools.” *Id.* at 829 (discussing *Hunt v. McNair*, 413 U.S. 734 (1973)).

Thus Colorado legislators who discriminated against “pervasively sectarian” schools from the 1970s onward were following relevant U.S. Supreme Court precedent. But the Court later changed its mind on the permissibility of such discrimination, leading to the 2008 Tenth Circuit decision, which applied more recent precedent.

¹¹⁸ *Cf. Mitchell v. Helms*, at 828 (plurality op.) (“[T]he inquiry into the recipient’s religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person’s or institution’s religious beliefs.”).

¹¹⁹ The bill to revise the Colorado program in response to the Tenth Circuit decision began:

SECTION 1. Legislative declaration. (1) The general assembly hereby observes that in the recent case of *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), the United States tenth circuit court of appeals held that Colorado’s use of the “pervasively sectarian” standard to discriminate among religious educational institutions in determining those institutions’ respective eligibility for state moneys is unconstitutional because:

- (a) The standard expressly discriminates among religions without constitutional justification; and
- (b) The criteria used by the standard involve unconstitutionally intrusive scrutiny of religious belief and practice.

(2) Therefore, the general assembly hereby declares that:

- (a) The “pervasively sectarian” standard of the Colorado Revised Statutes shall be replaced with a new standard that prohibits state assistance only to students who are pursuing professional degrees in theology;

H.B. 1267, 67th General Assembly, 1st Regular Sess. (Colo. 2009) (ch. 348).

¹²⁰ C.R.S. § 23-18-102(5)(a)(II)(C.5). This means a program that is both “(I) Devotional in nature or designed to induce religious faith” and is “preparation for a career in the clergy.” *Id.* at § 102(9.5).

¹²¹ “A similar limit in a Washington State program was upheld by the U.S. Supreme Court in *Locke v. Davey*, 540 U.S. 712 (2004) and the provisions of section 7 of article IX of the state constitution.” 2009 Colo. Legis. Serv. Ch. 348 (H.B. 09–1267) (legislative declaration, § 1, subsection (2)(c)).

¹²² H.B. 1267, 67th General Assembly, 1st Regular Sess. (Colo. 2009) (ch. 348).

The Colorado college scholarship programs from the late 20th century until 2009 are modern examples of how the No Sectarian Aid Clause has been used for religious discrimination.

D. Current Colorado voucher programs

According to the written report of expert witness Martin Nussbaum, there are a number of different educational programs in Colorado that in some fashion provide taxpayer funding to religious schools.¹²³ Based on the Advisory Committee’s independent review of the list and of Colorado statutes, we have identified thirteen voucher-like programs in Colorado in which participants may choose a religious school:

- Colorado Preschool Program. For the benefit of at-risk children, public school districts may contract for pre-school services with independent schools, including religious ones.¹²⁴
- Denver Preschool Program. Taxpayer funds may be used for tuition at independent preschools, including religious ones.¹²⁵
- Exceptional Children’s Education Act. School districts may place students with disabilities in independent schools, including religious ones.¹²⁶
- Concurrent Enrollment Programs Act. When a high school does not provide a course that a student is ready for (e.g., advanced calculus, science, or foreign language classes), the student may use a portion of her per-pupil funding to pay course tuition at a public or independent institution of higher education. Religious colleges and universities are not excluded.¹²⁷ A former version of the statute had excluded any “pervasively sectarian or theological institution.”¹²⁸
- College Opportunity Fund. As discussed above, students may use a state grant to pay tuition at public or private colleges and universities, including religious ones.¹²⁹

¹²³ These programs are detailed in the Appendix, Nussbaum, *Unconstitutional Blaine Amendment*, pp. 13–15. The Appendix also contains the written reports of the other experts.

The programs were also cited in the Aug. 4, 2014, Answer Brief of the Douglas County School District and the Colorado State Board of Education in the *Douglas County* case.

¹²⁴ C.R.S. §§ 22-28-109 (school district may contract with a child care agency for preschool services); 22-28-103(2) (“child care agency” defined by reference to the next-cited statute); 26-6-102(5) (“child care center”...“includes those facilities for children under the age of six years with stated educational purposes operated in conjunction with a public, private, or parochial college or a private or parochial school; except that the term shall not apply to any kindergarten maintained in connection with a public, private, or parochial elementary school system of at least six grades or operated as a component of a school district’s preschool program operated pursuant to article 28 of title 22, C.R.S.”). In other words, the preschool statute is for three-to-five-year-old children in the year or two *before* kindergarten. The state preschool funding may not be used for kindergarten programs at any type of school, whether public, religious, or other.

¹²⁵ Denver Mun. Code, § 11-22(5)(i) (Denver Preschool Program provides tuition credits on a sliding scale; eligible providers include any “preschool” that is “licensed under the Colorado Child Care Licensing Act, C.R.S. § 26-6-101 et seq.” and that is willing to participate in the programs for measuring and improving the quality of education).

¹²⁶ C.R.S. §§ 22-20-109 (public schools may pay tuition for a special needs student at an “approved facility school”); 22-20-103(2.7) (“Approved facility school” means an educational program that is operated by a facility to provide educational services to students placed in the facility”); 22-30-103(12.3) (“Facility” means a day treatment center, residential child care facility, or other facility licensed by the department of human services...”).

Another feature of the Exceptional Children’s Education Act is provision for gifted and talented students. Currently, the program requires public schools to provide special programming and planning to meet the needs of gifted and talented K–12 students. C.R.S. § 22-20-201 et seq. An earlier version of the program, enacted in 1985, allowed gifted and talented secondary students to be placed in short-term private programs, as long as the private programs were “not operated by nor connected with any pervasively sectarian” entity, and the curriculum was “pervasively nonsectarian.” Former C.R.S. § 22-26-102(1)(d) & (e); Laws 1985, S.B.187, § 1.

¹²⁷ C.R.S. §§ 22-35-105 (providing for tuition payments); 22-35-103(12) (Eligible “Institution of higher education” includes private schools that award a bachelor’s degree and are eligible for federal student loans for college students).

¹²⁸ Former § 22-35-103(2)(f) (effective until May 20, 2009).

¹²⁹ C.R.S. § 23-18-102(9) (“Private institution of higher education” means a non-profit college in Colorado that offers a bachelor’s degree, and is accredited by one of six national accrediting organizations, or another accrediting agency approved by the Colorado Commission on Higher

- Eight other programs provide for tuition assistance for Colorado college or graduate students. These are:
 - Tuition assistance for dependents of prisoners of war, military personnel missing in action, or dependents of deceased or permanently disabled National Guardsmen, law enforcement officers, or firefighters.¹³⁰
 - State matches for federal student loans.¹³¹
 - Work-Study Program.¹³²
 - Scholarship and grant program. Financial assistance based on need, merit, and talent.¹³³
 - Nursing Scholarship Program.¹³⁴
 - Teach Colorado grant initiative. Grants to higher education institutions to support teacher training for students who will teach in Colorado school districts where needs are greatest.¹³⁵
 - Colorado Student Incentive Grant Program. Allows grants for attending private higher education, but the student’s need will be considered only to the extent that the private tuition does not exceed “the highest in-state tuition rate charged by a comparable state institution of higher education.”¹³⁶
 - Tuition Assistance Grant Program. Designed “to assist in-state students in meeting the increased costs of education at Colorado’s nonpublic institutions of higher education.” Such assistance is declared to foster “Colorado’s traditional diversity in higher education and access to a variety of educational opportunities for Coloradans of all backgrounds and resources.”¹³⁷

None of them prohibit the funds from being used at religious schools.¹³⁸

It could be argued that every one of these programs violate the No Sectarian Aid Clause, to the extent that participating students are allowed to choose religious schools. Note that the text of the No Sectarian Aid Clause does not distinguish “mildly sectarian” schools from “pervasively sectarian” schools. By the text, any “sectarian” institution may not receive a penny of taxpayer funding.

Yet as far as the Advisory Committee is aware, no-one has asserted that any of these programs violate the No Sectarian Aid Clause. In fact, as discussed above, the Colorado General Assembly declared in 2009 that the above programs *comply* with the No Sectarian Aid Clause.¹³⁹

Education); C.R.S. § 23-18-201 (describing performance contracts for private colleges). As noted, students may not use the Fund to pursue a professional degree in theology. C.R.S. §23-18-102(5)(a)(II)(C.5).

¹³⁰ C.R.S. § 23-3.3.201 et seq.

¹³¹ *Id.*

¹³² C.R.S. § 23-3.3-401.

¹³³ C.R.S. § 23-3.3-501.

¹³⁴ C.R.S. § 23-3.3-701. This would include the Loretto Heights School of Nursing at Regis University.

¹³⁵ C.R.S. § 23-3.3-901.

¹³⁶ C.R.S. § 23-3.5-103(5). Along with other Colorado programs, this was updated in 2009 to remove the “pervasively sectarian” ban and replace it a professional theology ban. *Id.*

¹³⁷ C.R.S. § 23-3.7-101; this program too replaced the “pervasively sectarian” ban with a professional theology ban. §§ 23-3.7-103(2)(a) (theology); 23-3.7-104 (pervasively sectarian, repealed 2009).

¹³⁸ As with the College Opportunity Fund, the money from all these programs is not available for the pursuit of a professional degree in theology. C.R.S. § 23-3.3-104.

¹³⁹ See H.B. 1267, 67th General Assembly, 1st Regular Sess. (Colo. 2009) (ch. 348). The declaration did not apply to the Denver Preschool Program, which was not yet in existence, and which is a Denver program, not a state program.

In a decision that was later vacated by the U.S. Supreme Court on First Amendment grounds, a plurality of three of the seven Justices of the Colorado Supreme Court stated that the Douglas County School District’s K–12 voucher program (which included religious schools) violated article IX, § 7.¹⁴⁰ How can the Douglas County program be distinguished from all the other, similar programs?

Three dissenting Justices of the Colorado Supreme Court asked this question. The three Justices who said that Douglas County had violated the No Sectarian Aid Clause addressed this concern by responding that they did not have to consider the effect of their interpretation on the other programs, because the other programs were not currently before the Court.

Justices have the discretion not to write about what they do not want to write about.

The Advisory Committee has the discretion to inquire even about topics that judges may not want to write about.

We asked Mr. Silverstein, the plaintiffs’ lawyer in the Douglas County case. He answered that in the Court of Appeals, “the judge did not want to consider what were the potential ramifications of the strict interpretation of Article 9, Section 7. I think that what would happen eventually is some exploration of this public money is going to fund activities that are like religious uses of the money, something that was, I think, left open in the footnote in *Trinity Lutheran* proselytizing worship, or is more an incidental aid to a religious institution.”¹⁴¹

Although that exploration has not yet taken place, we do know that, Colorado Christian University participates in some of these state programs, and we know that it is “pervasively sectarian.” The same may well be true of other religious schools, including the some of the preschools that participate in some of the above programs.

Accordingly, if the other voucher-like programs that include religious schools are not a violation of the No Sectarian Aid Clause, what is the basis for claiming that a voucher program for K-12 students violates No Sectarian Aid?

There is no persuasive distinction, from a civil rights perspective.

Of course there can be policy differences, which are the appropriate domain of legislatures and school boards. For example, higher education, secondary education, primary education, and preschool are different, and there can be policy differences about the appropriateness (or not) of a religious atmosphere for students of different ages and intellectual independence. Likewise, there can be different policy choices related to the varying qualities of neighborhood schools from one district to another, or differing choices for whether choice programs should be open to all students, or only to certain categories, such as at-risk or special needs.

Many of the same arguments for and against vouchers, which we have previously noted, can be applied to the other voucher programs currently active in Colorado. As also previously noted, the

¹⁴⁰ *Taxpayers for Public Education v. Douglas County School District*, 2015 CO 50, ¶ 27, 351 P.3d 461, 470 (Colo. 2015) (plurality op.), *vacated sub nom. Colo State Board of Education v. Taxpayers for Public Education*, 137 S.Ct. 2327 (2017).

¹⁴¹ Testimony, *Hearing Transcript*, pp. 57–58.

structural design of voucher programs can vary in quality, and some are better than others. Again, the Advisory Committee expresses no opinion on the merits of vouchers in general, or about any of the Colorado voucher programs. That matter is the domain of elected officials and voters.¹⁴²

The No Sectarian Aid Clause, as currently interpreted and applied in Colorado, does not prevent taxpayer dollars from flowing to religious schools in numerous programs. A strict and literal application of the No Sectarian Aid Clause would probably extinguish religious organization participation in all of them. (Whether that extinction would violate the U.S. First Amendment is a question the Advisory Committee does not attempt to answer.)

The three other No Aid Clauses in the Colorado Constitution have been loosely construed by the Colorado Supreme Court in recent decades: one clause that bans aid to anyone, and two clauses that ban aid to businesses.¹⁴³

The No Sectarian Aid Clause does not prohibit voucher programs for non-religious independent schools. As applied today, it does not seem to prohibit voucher-like programs that can or do include religious schools.

Instead, we are faced with the unique situation in which a voucher program in one school district was held to violate the No Sectarian Aid Clause.¹⁴⁴ From a legal or civil rights perspective, there is no plausible reason to repress that particular program while leaving undisturbed so many similar programs.

One aspect of civil rights is that all persons are entitled to the Equal Protection of the Law.¹⁴⁵ U.S. Supreme Court precedent holds that Equal Protection includes the principle that all government actions, including actions that make distinctions between categories of persons, must have a “rational basis.”¹⁴⁶ No rational basis has been propounded to distinguish the former beneficiaries of the Douglas County program from the beneficiaries of the other Colorado programs that in some manner provide taxpayer support to religious schools.

The disparate treatment of the Douglas County families would not be found by a court to violate the Equal Protection Clause. It is not an equal protection violation for plaintiffs to sue whomever they want, nor is it a violation for courts refuse to consider particular facts or legal arguments.

Nevertheless, the Douglas County families were singled out for especially unfavorable treatment on the basis of the No Sectarian Aid Clause, and no rational basis has been shown for that disparate

¹⁴² Of course any voucher program must comply with other Colorado laws. A state statute that created a voucher program for Denver and some other low-performing districts was held to violate the Local Control Clause of the Colorado Constitution. Colo. Const., art. IX, § 15; *Owens v. Colorado Congress of Parents, Teachers and Students*, 92 P.3d 933 (Colo. 2004).

In the Douglas County case, the decisive fourth vote against the Douglas County voucher program came from Justice Marquez, who did not need to address constitutional issues, because she determined that the Douglas program violated the School Finance Act. *Taxpayers for Public Education v. Douglas County School District*, 351 P.3d 461, 475 (Colo. 2015) (Marquez, J., concurring). As previously noted, the entire decision was later vacated by the U.S. Supreme Court. *Colorado State Board of Education v. Taxpayers for Public Education*, 137 S.Ct. 2325 (2017).

¹⁴³ See notes 44–45.

¹⁴⁴ The Douglas County School District has 60,000 students, and the voucher program was limited to 500. Nussbaum, *Unconstitutional Blaine Amendment*, p. 1.

¹⁴⁵ U.S. Const., amend. XIV, § 1 (“No State shall ... deny to any person within its jurisdiction the equal protection of the laws.”)

¹⁴⁶ E.g., *Romer v. Evans*, 517 U.S. 620, 635 (1996) (Colorado constitutional amendment that prohibited governments from enacting anti-discrimination laws for the benefit of homosexuals held to have no rational basis).

treatment. At the least, the disparate treatment was contrary to the spirit of equal protection of the law.

V. Findings

1. The historical background and the text of the No Sectarian Aid Clause, with its hostility to “sectarian” bodies, embraced discrimination against religions that were not considered to be part of the mainstream.
2. There were other, non-bigoted, laudable reasons why some persons supported the No Sectarian Aid Clause. These include maintaining religious liberty, preventing governmental involvement with (and possible resulting coercion) of religious schools, and ensuring that public funding for education is not distributed in ways that might cause public division along religious lines.
3. The text and original public meaning of Colorado’s No Sectarian Aid Clause violated civil rights, because it treated non-mainstream religions differently.
4. During most of the first century of Colorado statehood, public schools engaged in some discrimination against non-Protestant children. The “sectarian” language of the Colorado Constitution contributed to public school favoritism of Protestantism against all other religions.
5. The Advisory Committee makes no finding about whether education voucher programs can help advance the civil rights of disadvantaged students.
6. The Advisory Committee makes no finding about whether education voucher programs can help advance the civil rights of minority students.
7. The Advisory Committee makes no finding about whether education voucher programs can help advance the civil rights of students with disabilities.
8. The Advisory Committee cautions that voucher programs should be designed so that they do not degrade, even indirectly, the quality of education provided to students with disabilities, minority students, or disadvantaged students.
9. Today, the No Sectarian Aid Clause has been interpreted and applied so that it creates little impediment to government aid to religious schools, as long as the aid is not in the form of direct government support for the operation of a religious school system.
10. There does not appear to be any equitable reason why Douglas County families have been treated differently pursuant to the No Sectarian Aid Clause, compared to other families that receive voucher-like aid in various other Colorado educational programs.

VI. Appendix



**Colorado Advisory Committee to the
U.S. Commission on Civil Rights**

**University of Denver, Sturm Hall (Building 26)
Lindsay Auditorium (Room 281), 2000 E. Asbury Ave, Denver, CO 80208**

Tuesday, July 18, 2017

Blaine Amendment: Colorado Constitution's No Aid Clause and Its Impact In Colorado

Agenda

6:00 - 6:05 p.m.	Welcome and Introductions
6:05 – 6:15	Introduction – The Blaine Amendment
6:15	Panelist Presentations
6:15 – 6:25	Andrew L. Seidel, Staff Attorney, Freedom From Religion Foundation
6:25 – 6:35	L. Martin Nussbaum, Co-Chair, Religious Institutions Group, Lewis Roca Rothgerber Christie LLP
6:35 – 6:45	Sarah E. LaCour, PhD Candidate, School of Education, CU Boulder
6:45 – 6:55	Ross Izard, Senior Education Policy Analyst, Independence Institute
6:55 – 7:05	Mark Silverstein, Legal Director, ACLU Colorado
7:05 – 7:30	Questions of Panelists by the Colorado Advisory Committee
7:30 – 7:45	BREAK
7:45 – 8:45	Open Forum
8:45 – 9:00	Closing Remarks and Adjournment

**COLORADO ADVISORY COMMITTEE TO
THE U.S. COMMISSION ON CIVIL RIGHTS
MEETING MINUTES**

July 18, 2017 (Tuesday)

The Colorado Advisory Committee to the U.S. Commission on Civil Rights (Committee) convened a briefing at the University of Denver, Sturm Hall, Lindsay Auditorium 2000 E. Asbury Avenue, Denver, CO 80208 to discuss the Blaine Amendment: Colorado Constitution’s No Aid Clause and Its Impact in Colorado.

The meeting was open to the public and took place from 6:00 p.m. – 9:15 p.m.

Absent:

Present:

Ms. Alvina L. Earnhart, chair
Ms. Ming H. Chen
Ms. Kyle R. Conrad
Mr. David B. Kopel
Ms. Nancy N. Morehead
Mr. William P. Pendley
Ms. Helen Z. Raleigh
Mr. Bill E. Trachman –recused himself

Ms. Christine M. Alonzo
Mr. Shawn L. Coleman
Mr. Robert P. Detrick
Mr. Vernard T. Gant
Rev. Cleveland A. Thompson
Ms. Eva Muniz Valdez

Excused

Commission Staff Present: Malee V. Craft, DFO, and Evelyn S. Bohor, staff.

Members of the public present: agenda attached

Presenters:

Andrew L. Seidel, Staff Attorney, Freedom From Religion Foundation
L. Martin Nussbaum, Co-Chair, Religious Institutions Group, Lewis Roca Rothgerber Christie LLP
Sarah E. LaCour, PhD Candidate, School of Education, CU Boulder
Ross Izard, Senior Education Policy Analyst, Independence Institute
Mark Silverstein, Legal Director, ACLU Colorado

Public:

Alison Daniels, Disability Law Colorado
Will Holtzmann
Jennifer Levin
Krista Holtzmann
Delanc Mayns
Jake Holtzmann
Renee Reif, Americans United for Separation of Church and State-CO
Arash Jahamian, ACLU of CO
Tamara Rowe
Joe Peters
Jenny Kraska
Connie Davison

Cindy Barnard, Taxpayers for Public Education
John Rea
Susan Bang
Carol Ayars
Pam Benigno, Independence Institute
Mike Smith, ACLU of CO
Jeremy Shaver, Anti-Defamation League
Felicia and Scott Davis
Danae Davison
Melissa Garland
Michael Raleigh
John Wilson, ACSI Children's Education Fund
Julie Schneider, CU Law Student
Rebecca Greben, Freedom From Religion Foundation
Vince Borengasser, Freedom From Religion Foundation
Chris O'Brien
Matt Garcia, CU Boulder
Pam Orr
Kevin Leung
Carly Barnard
Kelly Sloan
Ben Earnhart
Evelyn Zur
Rita Young
Kim Monson
Dianna Cooper-Ribnez

Open Session:

Jennifer Levin
Alison Daniels
Renee L. Reif
John Rea
Cindy Barnard
Rita Young
Michael Raleigh

Kelly Sloan
Rebecca Greben
Kelsey Alexander
Danae Davison
Evelyn Zur
Kim Monson

Meeting Notes/ Decisions Made:

Ms. Alvina Earnhart, chair, welcomed everyone, called for introductions of SAC members, and read statement of purpose and rules for briefing meeting. An introduction on the Blaine Amendment was shared with those in attendance.

Five persons (see attached agenda) made presentations before the Colorado State Advisory Committee to the US Commission on Civil Rights. The presenters shared their expertise on the Blaine Amendment: Colorado Constitution's No Aid Clause. They brought experience from several disciplines that included education and education policy analysis, religious perspectives and civil liberties.

Additionally, approximately 40 persons from the public were in attendance. Of that number, thirteen persons made statements or addressed the SAC/presenters during the Open Forum portion of the briefing meeting. One written statement was also submitted.

The briefing meeting was recorded by a court reporter and the record of the meeting will be available in approximately 30 days.

The record for submission of written testimony is open until August 21, 2017.

Next meeting: To be determined.

Meeting Adjourned: The meeting adjourned at 9:15 p.m.

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