

## U.S. COMMISSION ON CIVIL RIGHTS

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## COMMISSION BRIEFING

SCHOOL CHOICE, THE BLAINE AMENDMENTS AND  
ANTI-CATHOLICISM

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FRIDAY, JUNE 1, 2007

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

## PRESENT:

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

KENNETH L. MARCUS, Staff Director

## STAFF PRESENT:

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

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## STAFF PRESENT (Continued):

KIMBERLY TOLHURST  
AUDREY WRIGHT  
MICHELLE YORKMAN

## COMMISSIONER ASSISTANTS PRESENT:

DOMINIQUE LUDVIGSON  
LISA NEUDER  
RICHARD SCHMELCHEL

## PANELISTS:

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

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

(11:30 a.m.)

**INTRODUCTORY REMARKS BY CHAIRMAN**

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

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

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

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

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

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

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

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

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1 Justice.

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

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

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

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

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

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

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

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

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1 concern to the nation's atheists."

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

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

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

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

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

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

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

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

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

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

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

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

3 (Laughter.)

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

6 COMMISSIONER YAKI: Version 2.

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

9 (Laughter.)

10 (Whereupon, all speakers were duly sworn.)

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

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

14 Thank you very much.

15 **SPEAKERS' PRESENTATION**

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

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

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

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

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

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

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

25 The first of these amendments at the state

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

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

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

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

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

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1 Catholicism.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 than taught in the "common" schools.

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

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

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

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

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

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

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

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

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

23 How much time do I have left?

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

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

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

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

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

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

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

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

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

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

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1 classroom during Bible reading."

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

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

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

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

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

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

8 And I thank you.

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

11 Ms. Hollman?

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

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

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

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

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

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

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

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1 done that well.

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

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

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

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

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

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

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

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

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

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

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

25 Of course, the Memorial and Monstrance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 and where our religious choices are many.

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

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

9 Thank you.

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

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

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

18 MS. JOHNSON: Thank you.

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

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

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

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

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

25 Catholic leaders desperately wanted public

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

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

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

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

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

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

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

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

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

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

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

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1 assessments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 Thank you.

6 VICE CHAIR THERNSTROM: Thank you very  
7 much.

8 Dick Komer?

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

12 (Laughter.)

13 VICE CHAIR THERNSTROM: Sorry about that.

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

18 (Laughter.)

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

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

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

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

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

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

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

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

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

3 These school districts are now almost exclusively  
4 minority.

5 And the public schools there are wretched.

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

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

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

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

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

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

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

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1 unheared of elsewhere.

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

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

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

25 VICE CHAIR THERNSTROM: I was going to

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1 say.

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

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

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

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

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

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1 for members of all sects.

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

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

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

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

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

3 I see my time is up.

4 VICE CHAIR THERNSTROM: Your time is up.

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

7 (Laughter.)

8 **QUESTIONS BY COMMISSIONERS AND STAFF DIRECTOR**

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

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

16 MS. JOHNSON: Yes.

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

23 The legislature is 88 percent Democratic.  
24 That, in great part, reflects the enormous power of  
25 the teachers' union in the state, who basically own

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1 those Democratic legislators.

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

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

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

12 MS. JOHNSON: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 questions.

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

4 VICE CHAIR THERNSTROM: Yes.

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

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

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

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

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

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

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1 science textbooks.

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

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

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

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

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

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1 COMMISSIONER KIRSANOW: Thank you, Madam  
2 Chair.

3 VICE CHAIR THERNSTROM: Commissioner  
4 Kirsanow?

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

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

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

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

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

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

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

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

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

25 And I think that if parents want their

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

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

9 MR. PICARELLO: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MR. PICARELLO: Of course not.

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

22 MR. PICARELLO: No, but --

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

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

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

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

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

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

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

21 COMMISSIONER YAKI: Well, see --

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

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

25 MR. PICARELLO: Of their children direct

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1 those funds at the --

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

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

18 MR. PICARELLO: Well, sometimes it is.

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

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

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

10 COMMISSIONER YAKI: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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1 MR. KOMER: All right.

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

4 COMMISSIONER KIRSANOW: They talk really  
5 fast.

6 MR. PICARELLO: These northern Virginia  
7 schools.

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

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

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

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

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1 elementary school system?

2 MR. KOMER: Absolutely none.

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

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

7 COMMISSIONER YAKI: You have mandatory  
8 school --

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

12 COMMISSIONER YAKI: Correct.

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

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

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

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

3 COMMISSIONER YAKI: But what you --

4 MR. KOMER: And the answer is --

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

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

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

21 COMMISSIONER YAKI: No, there is no way.

22 MR. KOMER: Not immediately, but --

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

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

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

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

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

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

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

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

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

25 COMMISSIONER KIRSANOW: -- who has

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1 combined both of them.

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

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

7 MS. JOHNSON: Yes.

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

11 COMMISSIONER KIRSANOW: Go ahead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 VICE CHAIR THERNSTROM: Mr. Picarello?

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

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

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

21 It seems to me that separate --

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

24 MR. PICARELLO: Yes.

25 MS. JOHNSON: Meaning?

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

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

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

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

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

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

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

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

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

18 COMMISSIONER KIRSANOW: Madam Chair?

19 VICE CHAIR THERNSTROM: Yes?

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

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

24 COMMISSIONER KIRSANOW: A long time ago.

25 MR. PICARELLO: Sorry.

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

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

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

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

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1 follow because I do have an answer to it.

2 COMMISSIONER KIRSANOW: I'm sure you do.

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

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

24 So that is the first part. Secondly --

25 COMMISSIONER YAKI: So just to clarify, so

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

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

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

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

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

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

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1 want to make.

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

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

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

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

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1 bit hard to apply.

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

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

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

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

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

8 MS. JOHNSON: The evidence is not --

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

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

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

19 MS. JOHNSON: And the Catholics were --

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

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

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1 particular religion. There is no anti-Catholicism.

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

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

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

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

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

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

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

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

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

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

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

17 MR. KOMER: I'm sorry.

18 VICE CHAIR THERNSTROM: Let Mr. Komer --

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

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

23 COMMISSIONER KIRSANOW: In 1960 --

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

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

3 MR. KOMER: Ms. Johnson?

4 MS. JOHNSON: Yes?

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

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

16 MS. JOHNSON: We have never --

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

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

20 MR. KOMER: But we still --

21 (Laughter.)

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

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1 Every student anywhere in the public school --

2 VICE CHAIR THERNSTROM: Wait a minute.

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

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

12 COMMISSIONER TAYLOR: Ms. Johnson?

13 MS. JOHNSON: Yes, Commissioner?

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

20 MS. JOHNSON: I agree, Commissioner.

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

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

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1 COMMISSIONER TAYLOR: I guess --

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

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

6 MS. JOHNSON: Okay.

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

9 MS. JOHNSON: Okay.

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

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

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

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

19 MS. JOHNSON: No. It depends.

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

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

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

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

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

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

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

25 Now, there are some historical precedents

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

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

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

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

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

25 COMMISSIONER TAYLOR: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

3 I really don't want to be unfair.

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

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

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

15

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