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

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

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

The record of this briefing will be open
for 30 days. Public comments may be mailed to the
U.S. Commission on Civil Rights Office of the Civil
Rights Evaluation, room 740, 624 9th Street,

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

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

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

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

Hollyn Hollman is General Counsel of the Baptist Joint Committee for Religious Liberty. As General Counsel, Ms. Hollman has provided legal analysis of church-state issues that arise before Congress, the courts, and administrative agencies.
The Baptist Joint Committee is a nonprofit 501(c)(3) education and advocacy organization that serves 14 Baptist bodies, has worked for nearly 70 years promoting religious liberty for all and upholding the principle of church-state separation.

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

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

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

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

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

Ms. Johnson has co-hosted the cable television program the Atheist Viewpoint since 1994, now airs on 45 cable stations throughout the United States. She is also a frequent guest on national radio and TV shows, including Fox Network's Hannity & Colmes; Heartland with John Kasich; the O'Reilly Factor; MSNBC's Scarborough Country; the Larry King Show; the Barbara Walters specials; CNN Paula Zahn's Now; and C-Span's prestigious public affairs program, Washington Journal.
Johnson was chairperson of the Godless Americans March on Washington task force, which on November 2nd, 2002 brought together thousands of atheists, freethinkers, secular humanists, and other nonbelievers for an unprecedented display of unity in our nation's capital.

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

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

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

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

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

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

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

(Laughter.)

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


VICE CHAIR THERNSTROM: I already thought of that.

(Laughter.)

(Whereupon, all speakers were duly sworn.)

VICE CHAIR THERNSTROM: I'll call on you in the order that you have been given for the record. So, Mr. Picarello, will you speak for ten minutes? Thank you very much.

SPEAKERS' PRESENTATION

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

This issue has been a special concern of the Becket Fund for many years. And, as you have noted, the Becket Fund is a nonpartisan, interfaith
public interest law firm dedicated to protecting the free speech of all religious traditions.

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

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

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

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

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

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

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

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

In short, Blaine Amendments were not, not, designed to implement benign concerns for the separation of church and state traceable to the founding but, instead, to target for special disadvantaged the faiths of immigrants, especially
For years, the Becket Fund has worked to create the historical revisionism that would have erased this shameful chapter in our nation's history in order or protect state Blaine Amendments for use as the last constitutional weapon available to attack democratically enabled religion-neutral school voucher programs or social service programs that contract with faith-based providers.

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

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

I realize that I only have a short time for my prepared remarks. So I feel constrained to paint in relatively broad strokes in hopes of addressing the details in the course of our discussion later. So I will limit myself to three broader points.
First I want to identify the watermark of a true Blaine Amendment, which is the use of the term "sectarian" to identify those who should be excluded from government aid.

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

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

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

The term "sectarian" is not synonymous with "religious" but, instead, refers to a narrower subcategory connoting one or more sects or denominations of religion. For example, non-sectarian prayer is unmistakably religious, on the one hand, but
is not tied to any one sect or denomination, on the other.

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

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

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

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

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

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

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

The second point, the basic history of the meaning of sectarian is a legal term that has been
confirmed in the opinions of the U.S. Supreme Court written or joined by six current justices.

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

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

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

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

How much time do I have left?

VICE CHAIR THERNSTROM: You have 2 minutes and 33 seconds.
MR. PICARELLO: All right. Well, I'm going to power through the rest. The plurality --

VICE CHAIR THERNSTROM: We are sticking to time here.

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

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

And, again, I'm quoting from Justice Breyer's opinion. This is an opinion by Justice Breyer joined by Stevens and Souter, "Historians point out that during the early years of the republic, American schools, including the first public schools, were Protestant in character. Their students recited
Protestant prayers, read the King James Version of the Bible, and learned Protestant religious ideas. Those practices may have wrongly discriminated against members of minority religions, but given the small number of such individuals, the teaching of Protestant religions in schools did not threaten serious social conflict."

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

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

"In some states, Catholic students suffered beatings or expulsions for refusing to read from the Catholic Bible. And crowds rioted over whether Catholic children could be released from the
Finally, the justices detailed how Catholic efforts to correct this increasingly severe discrimination elicited a reaction from the form of the proposed federal Blaine Amendment and its successful state prodigy.

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

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

To be sure, justices in these two opinions differed on the legal consequences of these
historical facts, but they still agreed on those facts.

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

And I thank you.

VICE CHAIR THERNSTROM: And I thank you very much.

Ms. Hollman?

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

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

Painting such provisions, however, with a broad anti-Catholic brush is a very flawed tactic that
betrays our country's rich history of religious freedom. It emphasizes an anomalous period in our country's history and threatens to mislead us about the historic origins and the contemporaneous importance of concepts of church-state separation.

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

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

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

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

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

While some advocates in the voucher movement and many others very innocently might apply broadly to these state constitution provisions as Blaine Amendments, I would like to say at the outset that that is not actually correct. Many of the state constitutional provisions that provide a stronger
barrier to government funding of religion pre-existed the whole Blaine Amendment and I say are in no way diminished or should be tainted by the Blaine chapter.

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

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

State constitutional provisions like the First Amendment have been interpreted to prohibit the funding of religion broadly. And that cannot fairly be seen as discriminatory toward religion. Whatever the claims about the historical nature of some of these provisions, there is no evidence that in recent years, these state provisions or the word "sect" has been interpreted as only prohibiting aid or any kind of benefit, particular to Catholics or any other religious group. State constitutional amendments that
bar funding are part of our broad legal tradition for religious liberty.

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

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

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

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

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

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

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

Note they did not advocate this only for themselves but for all faiths. They did not ask for
taxes to be supported to all religions but to nine. And they held that deeply along with a held commitment that governments stay out of religious affairs. Often these things go together.

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

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

The introduction of the Blaine Amendment arose in an historical context that involved more than whether government would fund parochial schools. The debate involved questions of whether funding of religious schools violated principles of religious freedom and no establishment, the nature of public education, which was new at the time, and how universal it would be, how religious or secular it
would be, and whether the national government should mandate public education and how best to diffuse religious strife that was foreseen and growing at the time.

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

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

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

The court has never held that there was any right to a government-funded education, nor has
there been any idea that states were not able to
protect religious liberty interests in a way that is
different and more aggressive than the federal
Constitution did.

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

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

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

In conclusion, I would say the interest in
prohibiting public funding of religious institutions
has a variety of bases, many of which we could not go
into today but many unrelated to any judgment about
the nature of a specific religious tradition that
operates private schools and seeks to fund them through general taxation.

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

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

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

Laws against government aid to religious institutions have helped guard against government support for and interference in religion. They have helped create a system where citizens intended to have confidence in government neutrality toward religion.
and where our religious choices are many.

The absence of government funding for religious institutions has led to the great number and variety of religious options from which those in America can choose and the relative peace enjoyed between various religious communities in our country. Such a legacy should not be disregarded or unfairly tainted.

Thank you.

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

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

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

MS. JOHNSON: Thank you.

Recently supporters of tax dollars to religious schools and faith-based programs have targeted the Blaine Amendments. They have distorted the history of these amendments. They have misrepresented the life of James G. Blaine, claiming that he was an anti-Catholic bigot while ignoring the historical context of this man's time and the fact
that Mr. Blaine was a distinguished statesman. His own mother was a Catholic, and he was a member of the Congregationalist Church.

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

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

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

Catholic leaders desperately wanted public
funding for their school system. Protestants wanted the same but didn't want this government largess to benefit the Catholics.

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

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

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

In the mid Nineteenth Century, they also watched the growing rebellion against the papal states and how the popes exercised brutal temporal authority. No wonder they were concerned when an 1864 Pope Pius IX boldly declared that Catholicism should be, in effect, the state religion everywhere. This only
fueled the divisions and disputatious political crime
here in the United States.

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

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

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

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

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

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

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

Today we are concerned about tax-supported religious schools from taxpayer-funded vouchers. Some
courts, including the U.S. Supreme Court, have rendered decisions that appear to uphold the constitutionality of vouchers in specific cases.

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

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

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

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

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

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

We have the federal faith-based initiatives, where nearly $2 billion has been funded to religion-based social services. We have no idea how these funds are eventually spent. We have few adequate built-in safeguards that this money is not being used to promote religion, directly or indirectly.
The history and consequences of the Blaine Amendments have little or nothing to do with anti-Catholic animus. They and the First Amendment prohibition on the establishment of religion protect us from the disastrous and oppressive consequences of permitting clerical institutions to be given funding and special rights form our government.

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

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

The opponents of these amendments or, indeed, any prohibition on the use of tax money to benefit religious groups and projects don't want to call what their schemes really amount to: a religion tax. Instead, they distort history or they demonize someone like James G. Blaine.
It would be difficult for them to be so blatant when talking about Jefferson or Madison, although these men were denounced in their time by many clergy. So they dredge up some charge like anti-Catholic bias or they resort to legal artifice and claim that the Blaine Amendments somehow discriminate.

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

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

So religious leaders have to go to where the people are: the public schools, athletic events, the workplace, halls of governments, prisons, et cetera. This is about money and access to people, which is what the vouchers provide to organized religions.
I don't think that I should have to pay for the education of divinity students or programs which subsidize religion-based schools. Whether they are Protestant or Catholic or Islamic or operated by any other religion, I don't think I should have my tax money used to refurbish a church or a mosque or a temple.

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

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

Let me close with a quote. "I believe in America, where the separation of church and state is absolute, where no Catholic prolate would tell the President should he be Catholic how to act and no Protestant minister would tell his parishioners for
whom to vote, where no church or church school is
granted any public funds or political preference."

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

Thank you.

VICE CHAIR THERNSTROM: Thank you very
much.

Dick Komer?

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

(Laughter.)

VICE CHAIR THERNSTROM: Sorry about that.

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

(Laughter.)

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

And I am going to also sort of attach
myself to Anthony Picarello’s comments because
everything that Anthony said, he has said better that I could.

Instead, what I would like to do is elaborate on this through my own personal experience. And first I would like to say how flabbergasted and pleased I am that the U.S. Commission on Civil Rights is actually addressing this topic because, as you can see from my background, my first career was in civil rights.

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

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

The first thing that I would like you to just sort of think about or even to do is to understand the importance of this issue, you need to
go to typical inner city urban schools, say in New
Jersey, like in Newark, Trenton, Jersey City, Camden. These school districts are now almost exclusively minority.

And the public schools there are wretched. It is not a funding problem. Because of school equity decisions in New Jersey, almost as old as those in California, that have been going on since 1972, they are funding the inner city school districts of New Jersey at a rate far in excess of anywhere else in the country.

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

Now, in all of these cities, there are, as in most American urban areas, Catholic schools. Those Catholic schools have a far superior track record of providing the same kinds of kids a far superior education. And while most, nearly a majority of, public school students drop out before graduation in New Jersey, the Catholic schools of New Jersey are graduating almost all of their students. And an enormous proportion are going on to post-secondary education.
Now, that system arose out of the events that Mr. Picarello discussed and that we discuss in our written testimony, the parallel Catholic school system.

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

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

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

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

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

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

VICE CHAIR THERNSTROM: I was going to
MR. KOMER: And I'm sorry, Vice Chairman.

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

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

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

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

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

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

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

That is exactly what we do in the higher education system. We provide Pell grants, et cetera,
to everyone, regardless of the institution that they select.

I see my time is up.

VICE CHAIR THERNSTROM: Your time is up.

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

(Laughter.)

QUESTIONS BY COMMISSIONERS AND STAFF DIRECTOR

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

Were you the one who mentioned the Massachusetts vote?

MS. JOHNSON: Yes.

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

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

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

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

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

MS. JOHNSON: Yes.

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

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

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

What stops you from saying to yourselves -- I mean, this is literally a question I have never
understood from saying to yourselves, "Look, these kids have got to get educated." And that is number one. They've got to learn to read and write. They're going to sink in this society if they don't.

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

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

MS. JOHNSON: Who do you want to go first?

Go ahead, Hollyn.

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

I am very surprised, I think, if I heard Mr. Komer correctly, that somehow the state of the public schools in Newark related to the history that Mr. Picarello -- I think we are getting a little bit far as far as cause and effect about this big educational problem I think you are getting to.
What I would question is why we would sacrifice important principles of religious liberty and how we treat the relationship between government and religion in our country to address another important problem. I don't think that's necessary.

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

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

VICE CHAIR THERNSTROM: You give families, public school choice in Newark, New Jersey and there is no choice. I mean, it is a sham. It's a fiction. You know, which school that is not educating its kids would you like to go to? And, as Mr. Komer said, I mean, I think it, frankly, is the most important point.

We're not giving this money directly to schools. You're giving it to the parents if it's a voucher program. But I will let somebody else ask
MS. JOHNSON: Vice Chair, may I please address that?

VICE CHAIR THERNSTROM: Yes.

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

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

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

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

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

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

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

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

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

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

VICE CHAIR THERNSTROM: Well, you don't know that you would be violating --
COMMISSIONER KIRSANOW: Thank you, Madam Chair.

VICE CHAIR THERNSTROM: Commissioner Kirsanow?

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

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

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

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

In the current incarnation of voucher programs, that is what Mr. Komer is talking about. The aid is indirect, which you still oppose. I just want to flesh that out. And maybe I'm not drawing appropriate analogies, but if you oppose council or an individual making a decision to use funds, which may
be tax dollars initially when conveyed to the parents to select which schools they go to, would you then also, for example, oppose a Social Security recipient who has his tax money and he decides to refurbish a mosque, he makes a donation to his mosque or to his temple or to his church or what if someone who --

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

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

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

And I think that if parents want their
children to have a religious education, if you want your children to have an education that teaches you a particular religion, we have always, always thought it was important that all children receive an education in comparative religion. But if you want a particular religious education, you should pay for it.

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

MR. PICARELLO: Sure.

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

MR. PICARELLO: The answer is no. And Zelman actually specifically addressed that question because there was a relatively high percentage of Catholic schools among particularly the private schools that were available as choices for parents. That was one of the bases for the challenge, and it was rejected.
And the theory of it is precisely that so long as there is a genuine and independent private choice on the part of non-state actors, the parents themselves and the children, then they have a role but, in any event, not the government. Then that is the relevant decision that should be evaluated. And that is precisely -- to dismiss it as laundering is to trivialize the importance of the decision of parents in that regard.

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

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

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

It's true -- and I agree with Hollyn --
that states can effectuate a greater separation of church and state than the federal government does, but states are still subject to federal constitutional limitations on how broadly they expand that.

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

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

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

MR. PICARELLO: Oh, my gosh. Religious education is right at the heart of religious exercise. Religious worship is one of the things that goes on in religious instruction.

But the ability of parents to guide the religious upbringing and education of their children is a fundamental right that's even been extracted, as it were, from the due process clause of the Fourteenth Amendment, not to mention the free exercise clause. So it's right in the wheel house. There's no question about the ability of parents to be --
MS. JOHNSON: But no one is stopping you from giving your children a religious education.

MR. PICARELLO: Education. Yes, I know.

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

COMMISSIONER KIRSANOW: But what about the Fourteenth Amendment?

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

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

MR. PICARELLO: Of course not.

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

MR. PICARELLO: No, but --

COMMISSIONER YAKI: -- I am not able and that money does not come back to me to light a candle at my Catholic parish, that somehow I have been
deprived of my ability to exercise my Catholic religion?

MR. PICARELLO: What I would say is --

COMMISSIONER YAKI: I don't see that connection.

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

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

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

COMMISSIONER YAKI: Well, see --

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

COMMISSIONER YAKI: Well, see, this is --

MR. PICARELLO: Of their children direct
those funds at the --

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

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

MR. PICARELLO: Well, sometimes it is.

COMMISSIONER YAKI: It shouldn't be, but you want it to be the source. But it usually has always been referred to as a shield against which the government cannot tell you how to worship or how to behave in terms of your worship, but you would want to make it a sword to say, well, let's simply cut everything out and basically if my religion -- I mean,
we can start down the road. And that road leads
inevitably to those things that Justice O'Connor
talked about, which is why would we start now
tampering with a system that has served us so well
when we look elsewhere in the world and realize it has
served people within?

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

    COMMISSIONER YAKI: Right.

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

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

    MR. PICARELLO: -- is not permitted --

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

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

    COMMISSIONER YAKI: -- as Ms. Johnson
said, churches are tax-exempt. The places in which
you wish to worship is tax-exempt. We know that
through the enactment of -- that a lot of communities
can't selectively zone to prevent houses of worship from appearing in neighbors because people don't want that kind of church or this kind of church or whatever to appear.

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

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

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

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

MR. PICARELLO: I finished my high school in Virginia, by the way.
MR. KOMER: All right.

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

COMMISSIONER KIRSANOW: They talk really fast.

MR. PICARELLO: These northern Virginia schools.

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

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

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

COMMISSIONER YAKI: So you find no distinction between the post-secondary system and the
elementary school system?

MR. KOMER: Absolutely none.

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

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

COMMISSIONER YAKI: You have mandatory school --

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

COMMISSIONER YAKI: Correct.

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

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

MR. KOMER: No. Compulsory education is fine. The problem is when you make public education publicly funded and free, you create a monopoly situation, which is it's not religious discrimination that created the problems in Newark. It is the fact
that it is a public monopoly, which provides poor service at high cost.

COMMISSIONER YAKI: But what you --

MR. KOMER: And the answer is --

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

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

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

COMMISSIONER YAKI: No, there is no way.

MR. KOMER: Not immediately, but --

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

MR. KOMER: Let's talk about Milwaukee.
All right? It's got 100,000 school kids.

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

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

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

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

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

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

COMMISSIONER KIRSANOW: -- who has
combined both of them.

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

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

MS. JOHNSON: Yes.

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

COMMISSIONER KIRSANOW: Go ahead.

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

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

Milwaukee was very similar. It had this
parallel Catholic school system, which arose as a
function of religious discrimination by the Protestant
majority against the Catholic minority. That is why
they are there, but it doesn't have to stay that way.

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

Those schools have been created. Forty
percent of them are non-religious. The ones that are
religious are a wide array of different denominations.
All of them satisfy the legitimate interests of the
state in providing an adequate education K through 12.
That is the legitimate interest of the state. It is
not in compelling them to receive a non-religious
education.

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

And those public schools were generically
Protestant. It would have killed off all of the
Catholic schools in Oregon. It was deliberately aimed
against Catholics, among others. It was promoted in
large part by the Oregon Ku Klux Klan. Why? Because
they wanted the kids in the public schools because the
Klan opposed blacks, Catholics, and Jews.

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

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

There is no level playing field. You
cannot compare the one with the other unless they are
both required to meet the same academic standards and
accept all the children, the public schools of our
nation accept all the children, of this nation. And
that's one reason why I have a problem.
VICE CHAIR THERNSTROM: Mr. Picarello?

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

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

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

It seems to me that separate --

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

MR. PICARELLO: Yes.

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

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

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

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

But that is a different principle than the one that was established, as it were, 125 years later,
as the common schools were emerging, as immigrants
were pouring into the country, as that wave of
immigration brought with it a wave of hostility to
Catholicism, but not just Catholics.

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

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

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

COMMISSIONER KIRSANOW: Madam Chair?

VICE CHAIR THERNSTROM: Yes?

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

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

COMMISSIONER KIRSANOW: A long time ago.

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

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

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

MS. HOLLMAN: Thank you. You asked a good question. Let's see if I can keep up with it to
follow because I do have an answer to it.

COMMISSIONER KIRSANOW: I'm sure you do.

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

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

So that is the first part. Secondly --

COMMISSIONER YAKI: So just to clarify, so
what Blaine may have said may not have control or legislative intent behind all of the other --

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

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

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

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

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

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

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

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

There is recognition of that very value
throughout the law and, actually, the design of the
First Amendment that makes your hypothetical a little
It seems to me, though, even if we could say that things were largely motivated, the Blaine Amendment, a state constitutional Blaine Amendment, was largely motivated by anti-Catholic bigotry because it does not serve that purpose today. And I would say that it serves the opposite purpose, that maybe religious freedom is flourishing because we have not funded religious schools and we have avoided some strife in that area.

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

I don't think we would use that history to now say that we don't defend and protect and uphold Title VII's protection of gender discrimination.
MS. JOHNSON: And, Commissioner, I can't accept that the premise of this was based on that anti-Catholic bigotry.

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

MS. JOHNSON: The evidence is not --

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

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

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

MS. JOHNSON: And the Catholics were --

COMMISSIONER KIRSANOW: -- that refused the motivation.

MS. JOHNSON: And the Catholics were anti-Protestant just as vehemently. And all of the legislation is neutral. None of the legislation that came out said anything about singling out any
particular religion. There is no anti-Catholicism.

COMMISSIONER KIRSANOW: But then how do you --

MS. JOHNSON: It's all the --

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

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

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

When I look at the legislation and the legislative history, they use the term "sectarian" and then also use the term -- they talked about the King James Bible, for example, and not necessarily excluding doing certain things with respect to reading King James, which is not a Catholic Bible, which would seem to suggest that they meant sectarian to mean something discrete; that is, it was either Catholic or someone else, because they are permitting the Protestant inculcation but they have used sectarian as kind of a -- just as when you could talk to Bull Conner in 1963 about a poll tax, it was a poll tax, which applies to everybody, but, you know, it has a
certain connotation that dealt with the fact that
certain ancestors of certain people hadn't voted
earlier. And so that was the operative effect. So
sectarian, that legislative history --

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

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

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

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

MR. KOMER: I'm sorry.

VICE CHAIR THERNSTROM: Let Mr. Komer --

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

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

COMMISSIONER KIRSANOW: In 1960 --

MS. JOHNSON: No, no. It has nothing to
do with the Blaine --
VICE CHAIR THERNSTROM: Commissioner Kirsanow, let me Komer --

MR. KOMER: Ms. Johnson?

MS. JOHNSON: Yes?

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

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

MS. JOHNSON: We have never --

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

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

MR. KOMER: But we still --

(Laughter.)

MS. JOHNSON: That is so absolutely just the opposite. The public schools say there are 10,000 Bible clubs in the public schools. There are organized prayers going on in the public schools.
Every student anywhere in the public school --

VICE CHAIR THERNSTROM: Wait a minute.

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

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

COMMISSIONER TAYLOR: Ms. Johnson?

MS. JOHNSON: Yes, Commissioner?

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

MS. JOHNSON: I agree, Commissioner.

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

MS. JOHNSON: No. They violate the rules when they get in the schools, Commissioner.
COMMISSIONER TAYLOR: I guess --

MS. JOHNSON: There are problems with them.

COMMISSIONER TAYLOR: Just as a broader question --

MS. JOHNSON: Okay.

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

MS. JOHNSON: Okay.

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

MR. KOMER: Our position is we favor neutrality.

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

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

MS. JOHNSON: No. It depends.

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

But I do affirm -- and you are trying to get through this little path we took there about
religion. And yes, we helped. Our organization helped worked to get Protestantism out of the schools.

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

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

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

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

Now, there are some historical precedents
obviously. And the Lock v. Davey case entails that specifically. It involves a situation where the Government of Washington wanted to exclude what was essentially clergy training from what it was funding. And because that is, on the one hand, traceable back to the founding, it didn't bring with it the historical animus that Commissioner Kirsanow has referred to.

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

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

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

COMMISSIONER TAYLOR: Right.
MR. PICARELLO: Right? So there's some sense in which neutrality cannot be an absolute rule. And then, correspondingly, the devil, you know, comes in the details about debating what exactly neutrality consists of.

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

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

In other words, for someone to make out a claim under Hunter against Underwood, they don't need to show that the only thing that went into that law was "We hate Catholics" or "We hate those religious outsiders, which are mostly Catholic these days."
"We hate those sectarians" who back in the earliest Nineteenth Century were Baptists if you were Presbyterians or Presbyterian if you were Baptist. The idea is sectarian is less than all religious people. And it's the ones you don't like.

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

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

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

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

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

VICE CHAIR THERNSTROM: And so it's not fair, but, you know, I don't see why you can't address
your question to every one of these panels for them to answer in written form supplementing their statements.

I really don't want to be unfair.

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

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

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