

Religious Liberties

WHY NINETEENTH CENTURY BANS ON “SECTARIAN” AID ARE FACIALLY UNCONSTITUTIONAL: NEW EVIDENCE ON PLAIN MEANING

By Robert G. Natelson

Note from the Editor:

This article presents original research on the nineteenth century meaning of the word *sectarian*. The author argues that, based on this new evidence, bans on sectarian aid in state constitutions—often called Blaine Amendments—are likely unconstitutional on their face because they discriminate among religions.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. As always, we also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

- Richard G. Bacon, *Rum, Romanism and Romer: Equal Protection and the Blaine Amendment in State Constitutions*, 6 DEL. L. REV. 1 (2003).
- Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada’s “Little Blaine Amendment” and the Future of Religious Participation in Public Programs*, 2 NEV. L.J. 551 (2002), <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1231&context=nlj>.
- Erica Smith, *Blaine Amendments and the Unconstitutionality of Excluding Religious Options From School Choice Programs*, 18 FEDERALIST SOC’Y REV. 88 (2017), <https://fedsoc.org/commentary/publications/blaine-amendments-and-the-unconstitutionality-of-excluding-religious-options-from-school-choice-programs>.

About the Author:

Professor of Law, The University of Montana (ret.); Senior Fellow in Constitutional Jurisprudence, the Independence Institute, Denver. The author would like to thank the Education Policy Center at the Independence Institute and its director, Pam Benigno, for their support.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*¹ the Supreme Court struck down a Missouri state policy of restricting religious institutions from participating in grant programs. The policy arose from the state government’s efforts to comply with its state constitution’s prohibition on use of public funds to benefit “any church, sect or denomination of religion.”²

Many states have prohibitions even broader than the one in the Missouri constitution. Most state constitutions adopted during the nineteenth century, unlike that currently prevailing in Missouri, identified their proscribed recipients and purposes as *sectarian*. This was true of Missouri’s superseded 1875 charter,³ and it is also true of charters under which many states still operate.⁴ For example, the current Colorado constitution, ratified in 1876, provides:

No appropriation shall be made for charitable, industrial, educational or benevolent purposes . . . to any denominational or *sectarian* institution or association.⁵

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

¹ 137 S.Ct. 2012 (2017).

² MO. CONST. art. I, § 7:

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

³ MO. CONST. (1875), art. XI, § 11:

Neither the general assembly, nor any county, city, town, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, anything in aid of any religious creed, church, or sectarian purpose; or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning, controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.

⁴ *E.g.*, COLO. CONST. (1876), art. V, § 34 & art. IX, §§ 7 & 8 (discussed *infra* notes 29 and 34 and accompanying text); N.D. CONST. (1889), art. VIII, § 5 (“No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school”); NEV. CONST. (1864), art. XI, § 9 (“No sectarian instruction shall be imparted or tolerated in any school or University that may be established under this Constitution.”).

⁵ COLO. CONST., art. V, § 34 (italics added).

grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any *sectarian* purpose.⁶

No *sectarian* tenets or doctrines shall ever be taught in the public school . . .⁷

In some cases, prohibitions against aid to *sectarian* organizations or for *sectarian* purposes were not in the state's original constitution, but were added by amendment during the nineteenth century;⁸ many of these changes were minor alterations in wording, suggesting that no major substantive changes were contemplated.⁹ In other cases, twentieth century constitution writers copied such prohibitions from their states' earlier charters.¹⁰

Commentators have long argued that prohibitions against aid to *sectarian* groups are void under the First and Fourteenth Amendments to the U.S. Constitution. Their arguments traditionally have taken one of two forms:

- Assuming that *sectarian* means merely “religious,”¹¹ then a ban on aid to *sectarian* recipients unconstitutionally discriminates against religion in favor of non-religion.¹² Of course, this argument is not persuasive with “strict separationist” jurists, who believe it is fully consistent with—and may be required by—the First Amendment Religion Clauses for a state to put space between its

official functions and religion, so long as all religious are treated equally.¹³

- *Sectarian* is principally a nineteenth century code word for “Catholic,” so the intent behind such provisions was to discriminate *among* religions,¹⁴ which almost everyone agrees is prohibited by the Religion Clauses.

In support of the latter contention, opponents typically connect these provisions to James G. Blaine's 1875 effort to harness anti-Catholic sentiment to his presidential ambitions by sponsoring a federal amendment barring state aid to schools controlled by any “sect” or “denomination.”¹⁵ Although that proposal failed, the argument goes, Blaine remained so powerful that federal territories seeking statehood felt compelled to insert anti-sectarian language in their proposed state constitutions in order to win congressional approval. In commemoration of the putative link between state constitutions and Blaine's proposal, anti-sectarian clauses are frequently called “Blaine amendments” or “Blaine provisions.”¹⁶

However, there are some weaknesses in arguments blaming anti-Catholic sentiment or James G. Blaine for anti-sectarian provisions in state constitutions. First, the historical record does not support a link in every state between anti-Catholic animus and the state constitutional language.¹⁷ Second, several state

⁶ *Id.*, art. IX, §7 (italics added).

⁷ *Id.* art. IX, § 8 (italics added).

⁸ *E.g.*, NEV. CONST. art. XI, § 10 (added in 1880) (“No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.”).

⁹ *E.g.*, TEX. CONST. (1876), art. VII, §5 (“nor shall the same or any part thereof ever be appropriated to or used for the support of any sectarian school”), which now reads “The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school.” *Id.*, § 5(c); NEB. CONST. (1866-67), art. I, § 16, which is now *id.*, art. VII, § 11.

¹⁰ *E.g.*, MT. CONST. (1972), art. X, § 6:

The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any *sectarian* purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination. (Italics added.)

Very similar language appeared in the 1889 Montana constitution. MT. CONST. (1889), art. XI, § 8.

¹¹ *E.g.*, *Taxpayers for Public Education v. Douglas County School District*, 351 P.3d 461, 471 (2017), *cert. granted, vacated and remanded*, 137 S.Ct. 2327 (2017); U.S. COMMISSION ON CIVIL RIGHTS, SCHOOL CHOICE: THE BLAINE AMENDMENTS & ANTI-CATHOLICISM 24 (2007), <http://www.usccr.gov/pubs/BlaineReport.pdf> (hereinafter USCCR) (statement of Ellen Johnson) (claiming Blaine provisions “prohibit aid to *any and all* religious schools and other institutions”) (italics in original).

¹² *Cf. Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2001) (“The Establishment Clause of the First Amendment . . . prevents a State from enacting laws that have the “purpose” or “effect” of advancing or inhibiting religion.”).

¹³ *E.g.*, *Trinity Lutheran*, 137 S.Ct. at 2027 (Sotomayor, J., dissenting) (hailing “this country's longstanding commitment to a separation of church and state beneficial to both”).

¹⁴ *E.g.*, USCCR, *supra* note 11 at 11 (statement of Anthony R. Picarello, Jr.); *id.* at 36 (statement of Richard D. Komer); *id.* at 41 (“In summary, the Blaine Amendments were intended to preserve a Protestant monopoly on public education funds and to rebuff the efforts of Catholics to acquire equivalent funding for their schools. . . . ‘sectarian’ was understood to be a code word for Catholic.”). *See also* Richard G. Bacon, *Rum, Romanism and Romer: Equal Protection and the Blaine Amendment in State Constitutions*, 6 DEL. L. REV. 1, 2-5 (2003) (focusing on anti-Catholic factors as creating Blaine provisions); Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's “Little Blaine Amendment” and the Future of Religious Participation in Public Programs*, 2 NEV. L.J. 551, 554-56 (2002) (same); Erica Smith, *Blaine Amendments and the Unconstitutionality of Excluding Religious Options From School Choice Programs*, 18 FEDERALIST SOC'Y REV. 90 (2017) (same).

¹⁵ Blaine's proposal read:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Id. at 17 (statement of K. Hollyn Hollman).

¹⁶ Use of the word “sectarian” has been called “the watermark of a true Blaine Amendment.” *Id.* at 6 (statement of Anthony R. Picarello).

¹⁷ *Id.* at 17 (statement of K. Hollyn Hollman) (calling the history “not uniform” and claiming that these provisions “developed independently of any bias against a particular religion”). *See also id.* (“the history . . . cannot be reduced to a single phenomenon”); *id.* at 26 (statement of Ellen Johnson) (“The history and consequences of the Blaine Amendments have little or nothing to do with anti-Catholic animus”).

anti-sectarian clauses antedate Blaine’s proposed constitutional amendment.¹⁸ Third, Blaine himself was far from anti-Catholic:

. . . born to a Catholic mother and a father who later converted to Catholicism; as a child, he apparently was baptized in the Catholic Church. . . . He does not seem to have harbored anti-Catholic animosity, and he refused to be drawn into “any avowal of hostility or unfriendliness to Catholics.”¹⁹

Indeed, Blaine’s amendment, although it exploited anti-Catholic animus for political support, would not have placed Catholic church schools in a position any worse than schools sponsored by other religious denominations.²⁰

The same evenhandedness among religions cannot be ascribed to clauses that, unlike Blaine’s amendment, specifically forbid aid for *sectarian* institutions or purposes. Of course, provisions in state constitutions generally are interpreted to signify what their ratifiers understood them to mean,²¹ so the language means what it did when it was ratified.²² When understood in its nineteenth century context, the addition of the word *sectarian* creates effects more discriminatory and sinister than anything Blaine proposed.

Part I of this article examines language from nineteenth century state constitutions to determine whether, as some claim, *sectarian* meant merely “religious” or “denominational.” The texts tell us rather clearly that this was not the case—that *sectarian* held a meaning quite distinct from “religious” or “denominational.” Part II surveys contemporaneous dictionary definitions and newspaper usage. Those sources show that *sectarian* referred specifically to religions and religious people the speaker deemed bigoted or out of the mainstream. Part III summarizes the constitutional implications of these findings. However, this article does not discuss the standards of constitutional review or aspects of those standards such as levels of scrutiny or burdens of proof. The focus here is on the meaning of *sectarian*—a subject not heretofore reported accurately in the legal literature.

I. NINETEENTH CENTURY CONSTITUTIONAL PROVISIONS SHOW THAT “SECTARIAN” HAD A MEANING SEPARATE FROM “RELIGIOUS” OR “DENOMINATIONAL”

Although the texts of nineteenth century constitutions do not define the word *sectarian*, their language and structure show that it was not merely a synonym for religious. For example, the Nebraska constitution banned “sectarian” instruction and the use

of public funds for “sectarian” purposes.²³ Yet the same document made it clear that public schools were to promote religion in general: “Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature . . . to encourage schools and the means of instruction.”²⁴

In other state constitutions, “religion,” “church,” and “sectarian” appear under circumstances suggesting that the drafters were not merely stringing together synonyms. For example, the 1875 Missouri constitution provided:

Neither the general assembly, nor any county, city, town, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, anything in aid of any religious creed, church, or *sectarian* purpose; or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning, controlled by any religious creed, church, or *sectarian* denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any county, city, town, or other municipal corporation, for any religious creed, church, or *sectarian* purpose whatever.²⁵

The presumption against surplus counsels against reading the individual components of “religious creed, church, or sectarian denomination” or “religious creed, church, or sectarian purpose” as synonymous. So does the presumption that different words and phrases in the same document mean different things. Moreover, this section contains several other word lists:

- “general assembly . . . county, city, town, township, school district, or other municipal corporation;”
- “appropriation . . . public fund;”
- “school, academy, seminary, college, university, or other institution of learning;”
- “grant or donation;” and
- “personal property or real estate.”

Although the meanings of some components of these lists overlap, none is simply a synonym of another. They have different meanings, thereby implying that the lists in which *sectarian* appear are not to be read as repetitive.

In addition, some nineteenth century constitutions used the term *sectarian* to modify “religion,” a modification that would have been unnecessary if they meant the same thing. In 1864 a

18 *Id.* at 14 (statement of K. Hollyn Hollman).

19 Philip Hamburger, *Prejudice and the Blaine Amendments*, FIRST THINGS, Jun. 20, 2017, <https://www.firstthings.com/web-exclusives/2017/06/prejudice-and-the-blaine-amendments>.

20 See generally Brief for Legal and Religious Historians as Amici Curiae Supporting Respondent, *Trinity Lutheran*, 137 S.Ct. 2012 (No. 15-577), available at http://www.scotusblog.com/wp-content/uploads/2016/07/15-577_amicus_resp_legal_and_religious_historians_authcheckdam.pdf.

21 *E.g.*, *People v. Rodriguez*, 112 P.3d 693, 696 (Colo. 2005).

22 *Cf. Hawke v. Smith*, 252 U.S. 221, 227 (1920) (“What it meant when adopted it still means for the purpose of interpretation.”).

23 NEB. CONST. (1866-67) art. VIII, § 11:

No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes; nor shall the State accept any grant, conveyance, or bequest of money, lands, or other property, to be used for sectarian purposes.

24 *Id.*, art. I, § 16.

25 MO. CONST. 1875, art. XI, sec 11; MT. CONST. (1889), art. XI, § 8 (italics added).

convention proposed a constitution for Colorado. Article XIV, Section 3 provided:

The Legislative Assembly shall encourage the promotion of intellectual, moral, scientific and agricultural improvement, by establishing a uniform system of common schools, and schools of higher grade, embracing normal, preparatory, Collegiate and University Departments; *but no religious institution of a strictly sectarian character shall receive the aid of the state.*²⁶

The following year another convention proposed a constitution that repeated the italicized words verbatim.²⁷ If sectarian meant no more than “religious,” the provision would not have included the phrase “of a strictly sectarian character.”

Other nineteenth century state constitutional clauses compel the same conclusion. The final Colorado Constitution (tracked closely in the 1889 Montana charter)²⁸—contained this language:

No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatsoever. No *sectarian* tenets or doctrines shall ever be taught in the public school²⁹

Note how the language distinguished between “religious test[s]” and “religious service[s]” for teachers as opposed to “sectarian tenets” in the material taught. Again, the change in language raises a presumption that “religious” was not the same as *sectarian*. Indeed, in a 1927 case interpreting this section, the Colorado Supreme Court confirmed explicitly that they were not the same. In that case, the court held that the King James Version of the Bible, while religious, was “non-sectarian” and therefore appropriate for reading in Colorado schools.³⁰

Similar interpretive considerations tell us that *sectarian* was not a synonym for “denominational.” Constitutional provisions often used *sectarian* in addition to versions of “denomination” as a separate concept or as a qualifier. The 1873 Pennsylvania Constitution banned aid to any “denominational or sectarian

institution.”³¹ The 1870 Illinois,³² 1875 Missouri,³³ and 1876 Colorado³⁴ constitutions did not ban aid to denominations in general but only to “sectarian denominations.” Hence, the structure and language of these instruments inform us that *sectarian* had a special meaning of its own.

II. THE NINETEENTH CENTURY MEANING OF “SECTARIAN”

What was that special meaning? To answer the question, I consulted nineteenth century dictionaries to learn how drafters and ratifiers of these constitutional provisions used *sectarian* and certain related words. I then examined contemporaneous newspapers to verify whether the dictionaries were accurately reflecting common usage.

A. The Dictionaries

The ten dictionaries I consulted were published between 1828 and 1895. Four were American, five were British, and one issued from a publisher with offices in Britain, the United

²⁶ (Italics added).

²⁷ COLO. CONST. (proposed, 1865), Article XIII, § 3.

²⁸ MT. CONST. (1889), art. XI, § 9:

No religious or partisan test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student; nor shall attendance be required at any religious service whatever, nor shall any sectarian tenets be taught in any public educational institution of the state . . .

²⁹ COLO. CONST. art. IX, § 8 (italics added).

³⁰ People ex rel. Vollmar v. Stanley, 81 Colo. 276, 255 P. 610 (1927).

³¹ PA. CONST. (1873), art. III, § 18 (“No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational, or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation, or association.”).

³² ILL. CONST. (1870), Art. X, § 3:

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

³³ MO. CONST. 1875, art. XI, § 11, *quoted supra* notes 3 and 25 and accompanying text.

³⁴ COLO. CONST. Art. IX, §7:

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

See also COLO. CONST. art. V, § 34 (banning aid to “any denominational or *sectarian* institution or association”) (italics added).

States, and Australia. In chronological order of publication, the dictionaries are:

- NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. S Converse, New York 1828) (2 vols.) [hereinafter WEBSTER (1828)].
- NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. S. Converse, New York 1830) [hereinafter WEBSTER (1830)].
- JOHN LONGMUIR, WALKER AND WEBSTER COMBINED IN A DICTIONARY OF THE ENGLISH LANGUAGE (Aberdeen, 1864) [hereinafter LONGMUIR].
- THE GLOBE DICTIONARY OF THE ENGLISH LANGUAGE (William Collins, Sons, and Company, London and Glasgow, 1873) [hereinafter GLOBE DICTIONARY].
- THE CABINET DICTIONARY OF THE ENGLISH LANGUAGE (William Collins, Sons, and Company, London and Glasgow, 1874) [hereinafter CABINET DICTIONARY].
- WILLIAM CHAMBERS, CHAMBERS'S ETYMOLOGICAL DICTIONARY (W&R Chambers, London and Edinburgh, 1874) [hereinafter CHAMBERS' DICTIONARY].
- JOHN OGILVIE, THE IMPERIAL DICTIONARY OF THE ENGLISH LANGUAGE (Blackie & Son, London 1883) (4 vols.) [hereinafter OGILVIE'S DICTIONARY].
- THE ENCYCLOPAEDIC DICTIONARY (Cassell & Company, Limited, London, Paris, New York & Melbourne 1887) (7 vols.) [hereinafter ENCYCLOPAEDIC DICTIONARY].
- THE CENTURY DICTIONARY OF THE ENGLISH LANGUAGE (William Dwight Whitney ed., The Century Company, New York 1890-91) (10 vols.) [hereinafter CENTURY DICTIONARY].
- WEBSTER'S ACADEMIC DICTIONARY: DICTIONARY OF THE ENGLISH LANGUAGE (American Book Company, New York, Cincinnati, Chicago 1895) [hereinafter WEBSTER'S ACADEMIC].³⁵

Each of these works defines *sectarian* in ways that (1) state directly that a *sectarian* was a dissenter or otherwise out of the mainstream, (2) associate the word with a negative term, such as “prejudice,” “bigot,” or “heretic,” or (3) do both. For example, WEBSTER (1828) defines the word this way:

SECTA'RIAN, a. [Latin *sectarius*.] Pertaining to a sect or sects; as *sectarian* principles or prejudices.

SECTA'RIAN, n. One of a sect; one of a party in religion which has separated itself from the established church, or

which holds tenets different from those of the prevailing denomination in a kingdom or state.³⁶

The 1830 edition drops the word “prejudice,” but still indicates the marginalized nature of a *sectarian*:

SECTA'RIAN, a. [Latin *sectarius*.] Pertaining to a sect.

SECTA'RIAN, n. One of a sect; one of a party in religion which has separated itself from the established church, or which holds tenets different from those of the prevailing denomination in a kingdom or state.³⁷

Longmuir's Dictionary contains a list of synonyms for common words. The entry for *sectarian* is “see Heretic.”³⁸ The listed synonyms for “heretic” are “schismatic, sectarian.”³⁹ LONGMUIR defines “heretic” thus:

HER'E-TIC, n. One who departs from the fundamental doctrines of Christianity—SYN: Schismatic; sectarian. . . . A *Sectarian* is one who originates or promotes a *sect* or distinct organization which separates from the main body of believers. Hence the expression, “a *sectarian* spirit,” has a slightly bad sense, which does not attach to *denominational*.⁴⁰

Although LONGMUIR defines the adjective *sectarian* merely as “Pertaining or peculiar to a sect,” it defines the noun *sectarian* as “One of a sect, or one devoted to the interest of a sect; one of a party in religion which has separated itself from the established church. See HERETIC.”⁴¹ LONGMUIR's entry for “catholicity” is “The faith of the early fathers and councils; freedom from *sectarianism* or narrowness of views.”⁴²

The GLOBE DICTIONARY defines the adjective *sectarian* as “Pertaining to a sect;—devoted to a sect;—one-sided, bigoted,” and its entry for the noun is “One of a sect;— . . . one devoted to his party; a bigot; partisan.”⁴³ The CABINET DICTIONARY defines the adjective as “Pertaining or peculiar to a sect or to sects;—devoted to a sect;—hence, narrow-minded; one-sided; bigoted” and the noun as “One of a sect;— . . . one devoted to his party; a bigot; partisan.”⁴⁴

The definitions in Ogilvie's work were as follows:

Sectarian (sek-ta'ri-an), a. . . . Pertaining to a sect or sects; peculiar to a sect; strongly or bigotedly attached to the tenets and interests of a sect or religious denomination;

³⁵ All these dictionaries are retrievable (with some effort) from Google Books. To enable readers to examine them more conveniently, however, I have collected PDF versions of all relevant volumes online at <https://i2i.org/non-legal-materials-pertaining-meaning-sectarian-19th-century-state-constitutions/>.

³⁶ 2 WEBSTER (1828) (unpaginated).

³⁷ WEBSTER (1830) at 735.

³⁸ LONGMUIR at xxii.

³⁹ *Id.* at xix.

⁴⁰ *Id.* at 203 (italics in original).

⁴¹ *Id.* at 415.

⁴² *Id.* at 66 (italics added).

⁴³ GLOBE DICTIONARY at 520.

⁴⁴ CABINET DICTIONARY at 666.

as *sectarian* principles or prejudices. ‘Men of *sectarian* and factious spirits.’ . . .

Sectarian (sek-ta’ri-an), n. One of a sect; a member or adherent of a special school, denomination, or philosophical or religious party; especially, one of a party in religion which has separated itself from the established church, or which holds tenets different from those of the prevailing denomination in a kingdom or state.⁴⁵

The ENCYCLOPAEDIC DICTIONARY’s entries are similar. It defines *sectarian*, as an adjective, as:

Of or pertaining to a sect or sects; strongly or bigotedly devoted to the tenets and interests of a particular sect or religious denomination; characterized by bigoted devotion to a particular sect or religious denomination; peculiar to a sect.⁴⁶

It then defines *sectarianism* as “The quality or state of being a sectarian; the principles of sectarians; devoted adherence to a particular sect, school, or religious denomination; bigoted or partisan zeal for a particular sect.”⁴⁷ The multi-volume CENTURY DICTIONARY contains this extensive entry:

. . . I. a. 1. Of or pertaining to a sect or sects; peculiar to a sect: as, *sectarian* interests; *sectarian* principles.— 2. That inculcates the particular tenets of a sect: as, *sectarian* instruction; a *sectarian* book.—3. Of or pertaining to one who is bigotedly attached to a particular sect; characterized by or characteristic of bigoted attachment to a particular sect or its teachings, interests, etc.:

Zeal for some opinion, or some party, beareth out men of *sectarian* and factious spirits in such practices [as slander]. *Barrow*, Works, Sermon xviii.

The chief cause of *sectarian* animosity is the incapacity of most men to conceive systems in the light in which they appear to their adherents, and enter into the enthusiasm they inspire. *Lecky*, Europ. Morals, I. 141.

II. n. One of a sect; especially, a person who attaches excessive importance or is bigotedly attached to the tenets and interests of a sect.

But hardly less censurable, hardly less contemptible, is the tranquilly arrogant *sectarian*, who denies that wisdom or honesty can exist beyond the limits of his own ill-lighted

chamber. *Landor*, Imaginary Conversations, Lucian and Timotheus.

= Syn. See *heretic*.⁴⁸

WEBSTER’S ACADEMIC defines *sectarian* as “a. Pert[aining] to a sect, or to sects; bigotedly attached to the tenets of a denomination. — n[oun]. One of a sect. . . . Syn. — See HERETIC.”⁴⁹

Although CHAMBERS appears to define *sectarian* more neutrally—“*adj.*, pertaining to or peculiar to a sect.—*n.* one of a sect”⁵⁰—this definition depends on the following definition of “sect”: “those who dissent from an established church: those who hold the same views, esp. in religion or philosophy.”⁵¹

As shown by some of the foregoing extracts, dictionaries frequently connected *sectarianism* with bigotry. WEBSTER (1828) defines *bigot* as:

A person who is obstinately, and unreasonably wedded to a particular religious creed, opinion, practice, or ritual. The word is sometimes used in an enlarged sense, for a person who is illiberally, attached to any opinion, or system of belief; as a *bigot to the Mohammedan religion*; a bigot to a form of government.⁵²

B. Nineteenth Century Newspapers

Nineteen century newspapers show how these definitions worked in context. I examined two newspaper databases: (1) The *New York Times* collection at ProQuest Historical Newspapers and (2) the Gale Group’s *Nineteenth Century U.S. Newspapers*. Entering “sectarian” in the query lines generated thousands of usages amply confirming the word’s negative sense.⁵³ A representative sample illustrates six conclusions about the meaning of the word *sectarian* in the nineteenth century.

First, there is no evidence whatsoever that *sectarian* merely meant “religious.” The non-identity between sectarianism and religion is why an editor could criticize “sectarian” influence while also mocking a proposal for dismissing religion from public life.⁵⁴ Further evidence of this non-identity appears below.

Second, *sectarian* had very negative associations. Newspapers frequently paired *sectarian* with other disparaging words: “sectarian

⁴⁸ 5 CENTURY DICTIONARY at 5457.

⁴⁹ WEBSTER, ACADEMIC at 504.

⁵⁰ CHAMBERS’S DICTIONARY at 457 (italics in original).

⁵¹ *Id.*

⁵² 1 WEBSTER (1828) (unpaginated) (Emphasis added.). Other definitions did not include the reference to Islam. See, e.g., WEBSTER’S ACADEMIC at 62:

Bigot . . . One who regards his own faith as unquestionably right, and any other as unreasonable and wicked; one blindly devoted to his own church, party, belief, or opinion.—Bigoted, a.—Bigotry [sic], n. Syn.—Prejudiced; intolerant; narrow-minded.

⁵³ I have collected the representative examples discussed below in PDF format at <https://i2i.org/non-legal-materials-pertaining-meaning-sectarian-19th-century-state-constitutions/>.

⁵⁴ *Christianity in the Constitution*, DAILY ROCKY MTN. NEWS, Jan. 11, 1876, Gale Document No. GT3011719863.

⁴⁵ 4 OGILVIE’S DICTIONARY at 16.

⁴⁶ 6 ENCYCLOPAEDIC DICTIONARY at 315.

⁴⁷ *Id.* at 316.

bigotry”⁵⁵ “sectarian bigot,”⁵⁶ “sectarian dogma,”⁵⁷ “sectarian prejudice,”⁵⁸ “sectarian fanatics,”⁵⁹ and “sectarian hatred.”⁶⁰ An *Atlanta Daily Sun* story referred to “the narrow standpoint of the sectarian bigot, or that of the factious demagogue.”⁶¹ In announcing the new academic year, a professor at Colorado College assured readers that “The college had its origin, and is maintained in no narrow, exclusive or sectarian spirit.”⁶² A classified advertisement in a Boston newspaper coupled “Sectarian Revivals” with “Witchcraft” and other exotic phenomena.⁶³

Third, clinging to an unpopular religion in a way incomprehensible to the majority rendered a person *sectarian*. A Washington, D.C. paper assailed “men, otherwise respectable for understanding and deportment, [who] are so warped by sectarian or party spirit as not to acknowledge truths as plain as axioms.”⁶⁴

As a religious minority, Roman Catholics were frequent targets of “anti-sectarian” rhetoric. The *New York Times* ran stories about the “threat” from “sectarian” Catholic Schools.⁶⁵ A San Francisco paper reported a Protestant clergyman’s warnings

about “sectarian” Catholics and of the risks not reading the Bible in the public schools:

Rev. Dr. Clarke . . . made a severe argument against the Roman Catholics, and asserted that the cause of this sectarian movement was that the Papacy, which was growing weak in Europe, seeks to recover its vigor on our soil. He warned the people of the Divine displeasure in seeing God’s Word banished from the school.⁶⁶

In an article discussing the “sectarian question,” an editor complained that a Catholic clergyman, under cover of a state statute granting free exercise of religion, was encouraging prisoners not to attend the prison chaplain’s Protestant Sunday school. The editor urged prison authorities to prevent the priest from interfering.⁶⁷ A Protestant minister wrote that readers should “rejoice in the increase of an unsectarian spirit.” But he went on to warn that if Protestants started thinking that pointing out differences among Protestant sects was “the mark of a narrow and sectarian spirit,” then “some tolerance [would] soon be extended to the extremest doctrines of Ritualism and Popery.”⁶⁸

Yet Catholics were not the only “sectarians.” A contributor to a Boston paper attacked “sectarian bigots” of varying denominations.⁶⁹ Denver’s *Rocky Mountain News* referred to “Roman and other sectarian schools.”⁷⁰ Mormons were tarred as sectarians.⁷¹ Among those so tarring them was President Rutherford B. Hayes.⁷² Some thought Jews could be sectarians.⁷³ But Jewish speakers could turn the slur back against others. An Ohio paper reported that “A Jew proposes starting a National Young Men’s Hebrew Association, not, as he says, after the sectarian idea of the Young Men’s Christian Association, but on a national basis, progressive and social.”⁷⁴

Fourth, in contemporaneous discourse most Christians were not considered *sectarian*. Josiah Quincy, the president of Harvard

55 In addition to the examples in the text, see also *Telegraphic*, DAILY ROCKY MTN. NEWS, Aug. 10, 1876, Gale Document No. GT3011717001 (“sectarian bigotry”), and the results at <https://search-proquest-com.weblib.lib.umt.edu:2443/hnpnewyorktimes/results/DA689F95F7464754PQ/1?accountid=14593>.

56 In addition to the examples in the text, see also http://find.galegroup.com.weblib.lib.umt.edu:8080/ncnp/paginate.do?tabID=T003¤tPosition=1&searchId=R7&sort=DateDescend&src=bcrumb&inPS=true&useGroupName=mtlib_1_1195&prodId=NCNP&tabLimiterValue=&tabLimiterIndex=.

57 *E.g.*, *Canadian Department*, BOSTON INVESTIGATOR, Dec. 27, 1876, Gale Document No. GT3015847924 (“Mr. Cook strongly urged the contemplation of the above subject . . . as . . . striking at the root of sectarian dogma. . .”); see also <http://find.galegroup.com.weblib.lib.umt.edu:8080/ncnp/advancedSearch.do?sessionId=7807549EB6FBA644316540FC42E8A29E>.

58 *E.g.*, *The Easter Festival*, DAILY ROCKY MTN. NEWS, Mar. 28, 1875, Gale Document No. GT3011711427; *The Electoral Vote*, DAILY ROCKY MTN. NEWS, Nov. 10, 1875, Gale Document No. GT3011712738.

59 *E.g.* *Letter to the Editor*, BOSTON INVESTIGATOR, May 16, 1860, Gale Document No. GT3015813153.

60 *Mr. Moody in recent sermon is reported to have said . . .*, DAILY ROCKY MTN. NEWS, Jan. 7, 1876, Gale Document No. GT3011719757 (“bad passions . . . sectarian hatred”).

61 *The Riot in New York on Wednesday*, ATLANTA DAILY SUN, Jul. 14, 1871, Gale Document No. GT3017140662.

62 Winthrop D. Sheldon, *Colorado College Announcement*, DAILY ROCKY MTN. NEWS, Dec. 22, 1876, Gale Document No. GT3011718433.

63 *Multiple Classified Advertisements*, BOSTON INVESTIGATOR, Jan. 25, 1860, Gale Document No. GT3015812500.

64 Philo, *Plain Questions for Plain People*, DAILY NATIONAL INTELLIGENCER, Washington, D.C., Nov. 11, 1814, Gale Document No. GT3017469883.

65 *E.g.*, *Sectarian Education: Anti-Public School Crusade. Aggressive Attitude of the Roman Catholic Clergy—The Terrors of the Church Threatened*, N.Y. TIMES, Aug. 24, 1873, ProQuest Historical Newspapers.

66 *This Afternoon’s Despatches, The Bible in Common Schools . . . The Bible in the Public Schools—The Clergy Moving in the Matter*, DAILY EVENING BULLETIN (San Francisco), March 7, 1870, Gale Document No. GT3002354333.

67 *The “sectarian question” has invaded the Massachusetts State Prison at Charlestown*, THE CONGREGATIONALIST, Boston, Mass., Dec. 6, 1876, Gale Document No. GT3004399881.

68 Rev. J.M. Sturtevant, *Indifferentism*, THE CONGREGATIONALIST, Boston, Sept. 20, 1876, Gale Document No. GT3004402810.

69 Letter to the Editor, *Pugilistic Clergymen*, BOSTON INVESTIGATOR, Mar. 13, 1861, Gale Document No. GT3015815355.

70 *At the church congress . . .*,” DAILY ROCKY MTN. NEWS, Nov. 16, 1875, Gale Document No. GT3011712969 (italics added).

71 *E.g.*, *Quiet Revolutionary Movements in Mormonism*, FRANK LESLIE’S ILLUSTRATED NEWSPAPER, Apr. 1, 1871, Gale Document No. GT3012585419 (identifying the “Mormon system” as a “politico-sectarian concern”).

72 *The Nation*, MILWAUKEE SENTINEL, Dec. 7, 1880, Gale Document No. GT3015636616 (referring to “The Mormon sectarian organization”).

73 *Religious*, VERMONT CHRONICLE, Mar. 2, 1842, Gale Document No. GT3013286647 (referring to “Jewish sectarians”).

74 *Religious Intelligence*, THE DAILY CLEVELAND HERALD, Feb. 2, 1870, Gale Document No. GT3005261957.

College, explained that Unitarians, Quakers, Methodists, Baptists, Episcopalians, and the Orthodox Church were all non-sectarian. From Quincy's remarks, an Ohio editor deduced that he thought only "Roman Catholics and the Mohammedans" were sectarian.⁷⁵ Hence, a charity named for a Christian saint could be described in another article as "non-sectarian."⁷⁶

Fifth, as Quincy implicitly did, authors often contrasted *sectarianism* unfavorably with "good" Christianity. The *New Hampshire Statesman* praised a school for being "under a thoroughly Christian, not a sectarian, influence."⁷⁷ A Colorado editorial celebrated Thanksgiving by rejoicing that "What was once sectarian is now christian; that which was provincial is now national."⁷⁸ A Central City (Colorado) newspaper paper contrasted *sectarian* "rigidity" with Christian charity.⁷⁹ Newspapers even printed articles on how to be a good Christian and avoid sectarianism.⁸⁰

Sixth, as Josiah Quincy's list suggests, *sectarian* was not a mere synonym for denominational. Like Quincy, an editor observed that many colleges and universities were "organized, endowed, and fostered by leading denominations"—and were therefore "denominational" schools. But they were "not sectarian schools, like the Catholic."⁸¹ In an article celebrating "The Denominational Spirit," an Ohio paper quoted Reverend Dr. Skinner:

"There ought," says Dr. S., "to be no sectarianism among Christians, *notwithstanding* their differences . . . No matter, I repeat, what the differences may be, the fact that they [*sic*] are differences among Christians is decisive that they form no sufficient basis for sectarianism." Dr. Skinner . . . deprecated an evil sectarian spirit, as heretical and schismatic.

As an alternative to sectarian spirit, Skinner claimed, Christians should cultivate "The true denominational spirit" which "A

consistent Christian will always seek and strive to bring out, in himself and in his associates."⁸²

These articles illustrate the difference between *denominational* and *sectarian* as the terms were used in the nineteenth century. The former was, or could be, good; the latter was always bad. Accordingly, there were good denominations and there were sectarian (bad) denominations. The difference helps explain why the Illinois, Missouri, and Colorado constitutions did not ban aid to *all* denominations, but only to "*sectarian* denominations."⁸³

This survey of dictionary and newspaper evidence shows that, during the nineteenth century, *sectarian* was a word used to tar and marginalize unpopular religious groups. Bans on aid to "sectarian" institutions were designed to target religious groups of which the dominant culture disapproved.

IV. IMPLICATIONS FOR CONSTITUTIONALITY

State constitutional provisions adopted during the nineteenth century prohibiting aid to *sectarian* groups required the state to discriminate against religions that majority opinion deemed prejudiced, bigoted, or extreme. In some states, the most natural targets were Roman Catholics, but these provisions authorized discrimination against other unpopular religions as well. Because constitutional provisions are construed according to the understanding of their ratifiers,⁸⁴ those provisions mean what they meant in the nineteenth century.⁸⁵ Their meaning is not changed or "purged," as some have argued,⁸⁶ by easing of anti-Catholic animus or other intervening events.

Consider an analogy: Suppose a state constitution provided that "No law shall be passed impairing the freedom of speech, *except for the speech of extremists*." The exception purports to enable those controlling the state government to deny speech rights to what they see as fringe groups. Therefore it facially violates the First and Fourteenth Amendments, regardless of whether the exception was directed at any particular minority at the time of adoption, or whether there was a subsequent reduction of animus toward the original target.

Under the Fourteenth Amendment's Equal Protection Clause, state discrimination driven by animus generally is unconstitutional.⁸⁷ Moreover, equal treatment of religions is at

75 *What is Sectarianism?*, OHIO OBSERVER, Mar. 26, 1845, Gale Document No. GT3004755960.

76 *A Woman's Letter*, DAILY ROCKY MTN. NEWS, Mar. 6, 1875, Gale Document No. GT3011710762.

77 *Growth of the West*, NEW HAMPSHIRE STATESMAN, May 5, 1860, Gale Document No. GT3016204443.

78 *Thanksgiving Day and What It Suggests*, DAILY ROCKY MTN. NEWS, Nov. 27, 1873, Gale Document No. GT3010660793; *see also The Quakers*, *id.*, Dec. 5, 1875, Gale Document No. GT 3011706705 (contrasting "sectarian infatuation" with "true christianity").

79 *Religious Tendency of the Times*, DAILY CENTRAL CITY REGISTER, Jan. 17, 1872, Gale Document No. GT3016040476.

80 *What Constitutes a Christian: A Blow at Dogmatists and Sectarians*, N.Y. TIMES, Feb. 13, 1871 (reporting on a sermon by the famous minister Henry Ward Beecher).

81 *The University*, DAILY ROCKY MTN. NEWS, Dec. 24, 1873, Gale Document No. GT3011372277.

82 *The Denominational Spirit*, OHIO OBSERVER, Jan. 9, 1850, Gale Document No. GT3004766875.

83 *Supra* notes 32-34 and accompanying text.

84 *Supra* notes 21 and 22 and accompanying text.

85 *Cf.* *Hawke v. Smith*, 252 U.S. 221, 227 (1920) ("What it meant when adopted it still means for the purpose of interpretation.").

86 *E.g.*, USCCR, *supra* note 11 at 47-48 (statement of the Anti-Defamation League).

87 *E.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996) (provision of Colorado Constitution "inexplicable by anything but animus toward the class it affects" lacks a rational basis); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("mere negative attitudes, or fear" cannot justify legislation targeting a particular group); *cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *cf. U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

the core of the First Amendment's Religion Clauses, applied to the states through the Fourteenth Amendment's Due Process Clause.⁸⁸ A state's violation of this "core" equal treatment standard triggers the strict scrutiny requirement that the state demonstrate that its discrimination is narrowly tailored to advance a compelling governmental purpose.⁸⁹ As suggested by the Supreme Court in *Widmar v. Vincent*,⁹⁰ this is a very difficult standard for any state to meet.

88 *E.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that targeting unpopular religions violates the Free Exercise Clause); *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RIGHTS J. 73 (2005) (discussing the equal treatment principle underlying both clauses).

89 *E.g.*, *City of Hialeah*, 508 U.S. at 531, 546.

90 454 U.S. 263 (1981) (holding that wider separation of church and state did not meet this standard).

