

No. 18-1195

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In The  
**Supreme Court of the United States**

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KENDRA ESPINOZA, JERI ELLEN ANDERSON,  
and JAIME SCHAEFER,

*Petitioners,*

v.

MONTANA DEPARTMENT OF REVENUE and  
GENE WALBORN, in his official capacity as  
director of the Montana Department of Revenue,

*Respondents.*

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**On Writ Of Certiorari To  
The Montana Supreme Court**

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**BRIEF OF *AMICUS CURIAE*  
INDEPENDENCE INSTITUTE  
IN SUPPORT OF PETITIONERS**

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## INTEREST OF *AMICUS CURIAE*

The Independence Institute is a non-profit Colorado corporation founded in 1985 on the eternal truths of the Declaration of Independence.<sup>1</sup> The Institute has participated in many constitutional cases, and its *amicus* briefs in *District of Columbia v. Heller* and *McDonald v. Chicago* were cited in the opinions of Justices Alito, Breyer, and Stevens (under the name of lead *amicus* ILEETA, International Law Enforcement Educators and Trainers Association).

The Institute's Senior Fellow in Constitutional Jurisprudence, Robert G. Natelson, contributed substantially to this brief. He is Professor of Law (ret.) at the University of Montana and a prominent constitutional historian whose writings on constitutional issues have been relied on by justices of the U.S. Supreme Court in six cases, and by Justice (then Judge) Gorsuch in *Kerr v. Hickenlooper*, 754 F.3d 1156, 1195 (10th Cir. 2014) (Gorsuch, J., dissenting).

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## SUMMARY OF ARGUMENT

Prior arguments involving state constitutional bans on “sectarian” aid have centered on (1) whether

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<sup>1</sup> No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus*, its members, or its counsel made such a monetary contribution. Both parties consented to the filing of this brief.

they were motivated primarily or only tangentially by anti-Catholic bigotry and (2) whether excluding all religious schools from choice programs violates the First and Fourteenth Amendments to the U.S. Constitution. However, it is unnecessary to answer either of those questions to resolve this case. In other words, no detailed inquiry is required to determine whether Montana Constitution, Article X, Section 6, was motivated by bigotry against Roman Catholics, and it is unnecessary to determine whether the state may, under *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017), exclude religious schools from a general state program.

This is because the plain meaning of Article X, Section 6 as understood by the Montana Constitution's drafters and ratifiers, authorized the state to discriminate against disfavored religious beliefs.

The evidence firmly contradicts the Montana Supreme Court's tacit assumption (arrived at without analysis) that the constitutional word "sectarian" means "religious." Actually, the term designates religious groups or people believed to be outside the religious mainstream. Thus, while Protestants historically have defamed Roman Catholics as "sectarian," the state constitutional term "sectarian" designates any religious group the government deems heretical, bigoted, or eccentric.

The word "sectarian" became part of Montana constitutional law in 1889 with the drafting and ratification of the first state constitution that year. The

Montana constitution was one of several adopted around the same time, and their texts are explicable only if “sectarian” carried a meaning different from “religious” or “denominational.” Dictionaries from the time define “sectarian” as designating religiously marginalized groups. Contemporaneous newspaper articles—including Montana newspaper articles—reflect that meaning.

The 1972 state constitution also used “sectarian” in a pejorative way. Definitions of “sectarian” in twentieth century dictionaries, including the authoritative *Oxford English Dictionary*, show that when the 1972 constitution was drafted and ratified, “sectarian” retained much of its pejorative sense. Newspaper articles published in Montana in the years leading up to 1972 further demonstrate that term “sectarian” continued to be used to distinguish among religions and religious groups.

Moreover, during the drafting and ratification of the 1972 constitution, its sponsors revealed a specific intent to carry over into the new document the precise meaning of “sectarian” from the former one.

Thus, Article X, Section 6 facially discriminates among religions and religious groups. Under the U.S. Constitution’s First and Fourteenth Amendments, therefore, it can be justified only by the Department of Revenue persuading this Court that the provision is

narrowly tailored to serve a compelling governmental interest.

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## ARGUMENT

### I. **As used by nineteenth century constitutions, the adjective “sectarian” designated only disfavored religions.**

Although James G. Blaine often receives the credit, or blame, for state bans on “sectarian” aid, his proposed 1875 constitutional amendment avoided the then-explosive word “sectarian.”<sup>2</sup> However, many state constitution-writers, both before and after Blaine’s proposal, did employ that word. Their state constitutional texts show that the term “sectarian” was not a synonym for “religious.” Rather, the term designated *disfavored* types of religion.

For example, the 1867 Nebraska Constitution stated that public schools should promote religion:

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<sup>2</sup> Blaine’s proposal was as follows:

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.

*Quoted in Robert G. Natelson, Why Nineteenth Century Bans on “Sectarian” Aid Are Facially Unconstitutional: New Evidence on Plain Meaning*, 19 FED. SOC. REV. 98, 99 n. 15 (2018).

“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.”<sup>3</sup> Yet the same document banned “sectarian” instruction and the use of public funds for “sectarian” purposes.<sup>4</sup> Clearly the Nebraska drafters viewed religion as a proper care for the public schools, but not the particular subset of religion deemed “sectarian.”

Similarly, the proposed 1864 Colorado Constitution declared:

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. (emphasis added).<sup>5</sup>

Obviously, if sectarian meant no more than “religious,” the provision would not have included the phrase “of a strictly sectarian character.” The following year another Colorado convention proposed a constitution

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<sup>3</sup> NEB. CONST. art. I, § 16.

<sup>4</sup> NEB. CONST. 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.”

<sup>5</sup> COLO. CONST. (proposed, 1864) art. XIV, § 3.

that repeated the italicized words verbatim,<sup>6</sup> and the final (1876) Colorado Constitution pointed toward the same conclusion:

No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatsoever. No *sectarian tenets or doctrines* shall ever be taught in the public school. . . .<sup>7</sup>

Note how this language distinguished “religious tests” and “religious service[s]” (as hiring or enrollment conditions) from “sectarian tenets” in the material taught.

The same kind of language shift surfaced in the 1875 Missouri Constitution:

Neither the general assembly, nor any county [etc.] 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 . . . school . . . 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 . . . for

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<sup>6</sup> COLO. CONST. (proposed, 1865) art. XIII, § 3.

<sup>7</sup> COLO. CONST. art. IX, § 8 (emphasis added).

any religious creed, church, or *sectarian* purpose whatever.<sup>8</sup>

This language demonstrates that “sectarian denomination” and “sectarian purpose” were not the same as “religious creed” or “church.” The phrase “sectarian denomination” further suggests that a “sectarian” denomination was but one kind of religious denomination.

Other state constitutions also used “sectarian” as a separate concept from “denomination” or as a qualifier. Thus, like the contemporaneous Missouri and Colorado Constitutions, the 1873 Pennsylvania Constitution banned aid to any “denominational or sectarian” institution.<sup>9</sup> The 1870 Illinois Constitution did not ban aid to denominations in general but only to “sectarian denominations.”<sup>10</sup> The 1889 Montana Constitution

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<sup>8</sup> MO. CONST. art. XI, § 11 (emphasis and brackets added).

<sup>9</sup> PA. CONST. 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.”).

<sup>10</sup> ILL. CONST. 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

similarly employed “sectarian” in distinction to “church,” “sect,” “denomination,” and “religious”:

§ 8. Neither the legislative assembly [etc.] shall ever make directly or indirectly, any appropriation . . . in aid of any church, or for any *sectarian* purpose, or to aid in the support of any school . . . controlled in whole or in part by any church, sect or denomination whatever.

§ 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. . . .<sup>11</sup>

Thus, as in Colorado, Montana public schools were banned from imposing “religious” tests on prospective

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corporation, to any church, or for any *sectarian* purpose.

<sup>11</sup> Italics added. This language derived largely from MONT. CONST. (proposed, 1884) art. IX, § 9:

Neither the Legislative Assembly, nor any county, city, town, or school district, or other public corporation, shall ever make, directly, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property, in aid of any church, or for any sectarian purpose, or to aid in the support of any school, academy, seminary, college, or university, or other literary or scientific institution, controlled in whole or in part by any church, sect or denomination whatever.

employees or students or requiring employees or students attend a “religious service.” But they were not thereby prohibited from teaching religious content. The only proscribed subject matter was “sectarian.”

What distinguished “sectarian” religion from other religion? As explained in Part II (dictionaries) and Part III (newspapers), a religion was “sectarian” if those in authority thought it was fanatical, intolerant, or extreme.

**II. As shown by nineteenth century dictionaries, “sectarian” was a pejorative term for religions viewed negatively.**

As detailed in Part I, in nineteenth century state constitutions, “religious” and “sectarian” meant different things. Dictionaries of the time confirm that “sectarian” never meant religion in general. “Sectarian” referred only to disfavored religious groups, as is shown by a survey of dictionaries published from 1828 to 1895; the dictionaries are four American, five British, and one issued from a publisher with offices in Britain, the United States, and Australia. In chronological order of publication, they are:

- NOAH WEBSTER, *AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (1st ed. S. Converse, N.Y. 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, & Co., London & Glasgow, 1873) [hereinafter GLOBE DICTIONARY]
- THE CABINET DICTIONARY OF THE ENGLISH LANGUAGE (William Collins, Sons, & Co., London & Glasgow, 1874) [hereinafter CABINET DICTIONARY]
- WILLIAM CHAMBERS, CHAMBERS'S ETYMOLOGICAL DICTIONARY (W&R Chambers, London & 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 & Co., Ltd., London, Paris, New York & Melbourne 1887) (7 vols.) [hereinafter ENCYCLOPAEDIC DICTIONARY]
- THE CENTURY DICTIONARY OF THE ENGLISH LANGUAGE (William Dwight Whitney ed., The Century Co., N.Y. 1890–91) (10 vols.) [hereinafter CENTURY DICTIONARY]
- WEBSTER'S ACADEMIC DICTIONARY: DICTIONARY OF THE ENGLISH LANGUAGE (American Book

Co., N.Y., Cincinnati, Chicago 1895) [hereinafter WEBSTER'S ACADEMIC].<sup>12</sup>

Each of these works defined “sectarian” in ways that (1) stated directly that a sectarian was a dissenter or otherwise out of the mainstream, (2) associated the word with a negative qualifier, such as “prejudice,” “bigot,” or “heretic,” or (3) both. For example, *Webster* (1828) defined 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.<sup>13</sup>

In the 1830 edition *Webster* dropped the word “prejudice,” but still indicated the marginalizing nature of *sectarian*:

Sectarian a[jective]. “Pertaining to a sect.”

Sectarian n[oun]. “One of a sect; one of a party in religion which has separated itself from the established church, or which holds

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<sup>12</sup> All these dictionaries are retrievable from Google Books, but *amicus* also has collected Portable Document Format (PDF) versions of all relevant volumes at <https://i2i.org/non-legal-materials-pertaining-meaning-sectarian-19th-century-state-constitutions/>.

<sup>13</sup> 2 WEBSTER (1828) (unpaginated).

tenets different from those of the prevailing denomination in a kingdom or state.<sup>14</sup>

*Longmuir* contained a list of synonyms for common words. The entry for “Sectarian” was “see Heretic.”<sup>15</sup> The listed synonyms for “heretic” were “schismatic, sectarian.”<sup>16</sup> *Longmuir* defined “heretic” thus:

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*.<sup>17</sup>

Although *Longmuir* described the adjective “sectarian” merely as “Pertaining or peculiar to a sect,” it defined 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.”<sup>18</sup> *Longmuir’s* entry for “catholicity” was “The faith of the early fathers and councils; freedom from sectarianism or narrowness of views.”<sup>19</sup>

The *Globe Dictionary* described the adjective *sectarian* as “Pertaining to a sect;—devoted to a sect;—one-sided,

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<sup>14</sup> WEBSTER (1830), at 735 (brackets added).

<sup>15</sup> LONGMUIR, at xxii.

<sup>16</sup> *Id.* at xix.

<sup>17</sup> *Id.* at 203 (italics in original).

<sup>18</sup> *Id.* at 415.

<sup>19</sup> *Id.* at 66 (italics added).

bigoted.” Its entry for the noun was “One of a sect;— . . . one devoted to his party; a bigot; partisan.”<sup>20</sup>

The *Cabinet Dictionary* defined 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.”<sup>21</sup>

The definitions in *Ogilvie’s Dictionary* were as follows:

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

Sectarian 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.<sup>22</sup>

The *Encyclopaedic Dictionary’s* entries were similar:

*As Adj.:* Of or pertaining to a sect or sects; strongly or bigotedly devoted to the

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<sup>20</sup> GLOBE DICTIONARY, at 520.

<sup>21</sup> CABINET DICTIONARY, at 666.

<sup>22</sup> 4 OGILVIE’S DICTIONARY, at 16.

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.

Sectarianism: 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.<sup>23</sup>

The multi-volume *Century Dictionary*, contained this extensive entry:

Sectarian a. and n. I. n. 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

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<sup>23</sup> 6 ENCYCLOPAEDIC DICTIONARY, at 316.

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*.<sup>24</sup>

In the *Academic Dictionary*, synonyms for “heretic” were “Schismatic, Sectarian.”<sup>25</sup> The dictionary defined “sectarian” as “a[djective]. 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.”<sup>26</sup>

Although *Chambers* seems to have defined “sectarian” more neutrally (“Sectarian a. “*pertaining to or peculiar to a sect.*—n. one of a sect.”),<sup>27</sup> this definition is parasitic on the definition of “sect:” “those

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<sup>24</sup> 5 CENTURY DICTIONARY, at 5457.

<sup>25</sup> ACADEMIC DICTIONARY, at 268.

<sup>26</sup> WEBSTER'S ACADEMIC, at 504 (brackets added).

<sup>27</sup> CHAMBERS'S DICTIONARY, at 458.

who dissent from an established church: those who hold the same views, esp. in religion or philosophy.”<sup>28</sup>

As shown by some of the foregoing extracts, dictionaries frequently connected sectarianism with bigotry. In this regard, some related definitions can be revealing. *Webster* (1828) defined “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 Moham-  
medan religion; a bigot to a form of govern-  
ment.<sup>29</sup>

Like constitution writers, therefore, dictionaries distinguished “sectarian” from “religious.” Sectarian tenets were those judged to be extreme, bigoted, or otherwise out of the mainstream. A constitutional proscription against aid for “sectarian” purposes was not a ban on all aid to religion, but only a ban on disfavored religion.

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<sup>28</sup> *Id.*

<sup>29</sup> 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.—Bigetry [sic], n. Syn.—Prejudiced; intolerant; narrow-minded.

**III. Nineteenth century American and Montana newspapers confirm that “sectarian” designated only those religions the mainstream viewed pejoratively—including, but not limited to, Roman Catholicism.**

To obtain a representative sample of contemporaneous newspapers, *amicus* examined three databases: (1) The *New York Times* collection at ProQuest Historical Newspapers, (2) the Gale Group’s Nineteenth Century U.S. Newspapers, and (3) newspapers.com. Entering “sectarian” in the query lines generated thousands of usages confirming the word’s negative sense.<sup>30</sup>

The survey provided no evidence that when “sectarian” was inserted into Montana’s basic law the word meant merely “religious.” The terms “sectarian” and “religious” simply were not the same thing; the former was a disreputable subset of the latter. The non-identity is why an editor could criticize “sectarian” influence while mocking a proposal for dismissing religion from public life.<sup>31</sup> Montana writers made the same distinction.<sup>32</sup>

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<sup>30</sup> *Amicus* has collected representative examples discussed below in PDF format at <https://i2i.org/non-legal-materials-pertaining-meaning-sectarian-19th-century-state-constitutions/>.

<sup>31</sup> *Christianity in the Constitution*, DAILY ROCKY MTN. NEWS, Jan. 11, 1876, Gale Doc. No. GT3011719863.

<sup>32</sup> R.H. Howell, *Moral Teaching in the Public Schools*, HELENA WEEKLY HERALD, Aug. 10, 1882, at 3, <https://www.newspapers.com/image/343212048> (distinguishing religion from sectarianism); *State Orphan’s Home*, BUTTE WEEKLY MINER, Dec. 16, 1896, Gale Doc. No. GT3017405162 (“not strictly religious, much less sectarian”).

“Sectarian” had very negative associations. Newspapers paired *sectarian* with other disparaging words: “sectarian bigotry”<sup>33</sup> “sectarian bigot,”<sup>34</sup> “sectarian dogma,”<sup>35</sup> “sectarian prejudice,”<sup>36</sup> “sectarian fanatics,”<sup>37</sup> and “sectarian hatred.”<sup>38</sup>

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<sup>33</sup> In addition to the examples in the text, see also *Sectarian School Question*, BUTTE WEEKLY MINER, Apr. 23, 1896 (“sectarian bigotry”), Gale Doc. No. GT3011330055; *Telegraphic*, DAILY ROCKY MTN. NEWS, Aug. 10, 1876, Gale Doc. No. GT3011717001 (“sectarian bigotry”), and the results at <https://search-proquest-com.weblib.lib.umt.edu:2443/hnpnewyorktimes/results/DA689F95F7464754PQ/1?accountid=14593>.

<sup>34</sup> In addition to the examples in the text, see also [http://find.galegroup.com.weblib.lib.umt.edu:8080/ncnp/paginate.do?tabID=T003&currentPosition=1&searchId=R7&sort=DateDescend&src=bcrumb&inPS=true&userGroupOpName=mtlib\\_1\\_1195&prodId=NCNP&tabLimiterValue=&tabLimiterIndex=.](http://find.galegroup.com.weblib.lib.umt.edu:8080/ncnp/paginate.do?tabID=T003&currentPosition=1&searchId=R7&sort=DateDescend&src=bcrumb&inPS=true&userGroupOpName=mtlib_1_1195&prodId=NCNP&tabLimiterValue=&tabLimiterIndex=)

<sup>35</sup> *E.g.*, *Canadian Department*, BOSTON INVESTIGATOR, Dec. 27, 1876, Gale Doc. No. GT3015847924 (“Mr. Cook strongly urged the contemplation of the above subject . . . as . . . striking at the root of sectarian dogma. . . .”); *Dangerous Sectarians*, BILLINGS HERALD, Sept. 28, 1882, at 2, <https://www.newspapers.com/image/409431559> (referring to “fanatical sectarians” among Muslims). See also <http://find.galegroup.com.weblib.lib.umt.edu:8080/ncnp/advancedSearch.do?jsessionid=7807549EB6FBA644316540FC42E8A29E>.

<sup>36</sup> *E.g.*, *The Easter Festival*, DAILY ROCKY MTN. NEWS, Mar. 28, 1875, Gale Doc. No. GT3011711427; *The Electoral Vote*, DAILY ROCKY MTN. NEWS, Nov. 10, 1875, Gale Doc. No. GT3011712738; *An Historic Easter*, BUTTE WEEKLY MINER, April 22, 1897, Gale Doc. No. GT3011335070 (“sectarian prejudices”).

<sup>37</sup> *E.g.*, *Letter to the Editor*, BOSTON INVESTIGATOR, May 16, 1860, Gale Doc. No. GT3015813153.

<sup>38</sup> *Mr. Moody in recent sermon is reported to have said . . .*, DAILY ROCKY MTN. NEWS, Jan. 7, 1876, Gale Doc. No. GT3011719757 (“bad passions . . . sectarian hatred”).

Thus, an *Atlanta Daily Sun* story referred to “the narrow standpoint of the sectarian bigot, or that of the factious demagogue.”<sup>39</sup> In announcing the new academic year at Colorado College, a Congregationalist school, a professor assured readers that “The college had its origin, and is maintained in no narrow, exclusive or sectarian spirit.”<sup>40</sup> According to a book on the school’s history, the philosophy was that the governing board “should ever have a majority of Christian men to keep the college evangelical, non-sectarian, and in sympathy with the progress of the age.”<sup>41</sup>

A classified advertisement in a Boston newspaper coupled “Sectarian Revivals” with “Witchcraft” and other exotic phenomena.<sup>42</sup> In Montana, the *Bozeman Avant Courier* praised nondenominational Christianity while stating that the people of Montana were “perhaps as generous in their contributions and as little

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<sup>39</sup> *The Riot in New York on Wednesday*, ATLANTA DAILY SUN, July 14, 1871, Gale Doc. No. GT3017140662.

<sup>40</sup> Winthrop D. Sheldon, *Colorado College Announcement*, DAILY ROCKY MTN. NEWS, Dec. 22, 1876, Gale Doc. No. GT3011718433.

<sup>41</sup> Robert D. Loevy *Congregationalist Schools—Colorado College* in A COLORADO COLLEGE READER: SELECTED WRITINGS ON THE HISTORY OF COLORADO COLLEGE 4 (Robert D. Loevy ed. 2012). Colorado College was founded by an 1874 grant from the Congregational Conference. *Id.* at 3.

<sup>42</sup> *Multiple Classified Advertisements*, BOSTON INVESTIGATOR, Jan. 25, 1860, Gale Doc. No. GT3015812500.

given to sectarian bigotry as any community in the United States.”<sup>43</sup>

Thus, to cling to an unpopular religion in a way incomprehensible to the majority was to be “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.”<sup>44</sup>

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.<sup>45</sup> 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.<sup>46</sup> In an article discussing the “sectarian

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<sup>43</sup> *Denominational Tendencies—A Few Sunday Thoughts*, THE AVANT COURIER, (Bozeman, Mont.), Sept. 11, 1878, at 2, <https://www.newspapers.com/image/343189315>.

<sup>44</sup> Philo, *Plain Questions for Plain People*, DAILY NATIONAL INTELLIGENCER (Wash., D.C.), Nov. 11, 1814, Gale Doc. No. GT3017469883.

<sup>45</sup> 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.

<sup>46</sup> *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), Mar. 7, 1870, Gale Doc. No. GT3002354333.

Under the Catholic doctrine of the time, Catholics were forbidden to read the Bible under the supervision of teachers who were not Catholics. See *People ex rel. Vollmar v. Stanley*, 255 P. 610, 613 (Colo. 1927), overruled *Conrad v. City and County of Denver, Colo.*, 656 P.2d 662 (Colo. 1982) (Catholic public school

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 denied the right of the priest to interfere.<sup>47</sup> A Protestant minister wrote that readers should “rejoice in the increase of an unsectarian spirit”—but that for Protestants to point out differences among Protestant sects was not to be a “sectarian bigot.” Rather, failure to do so might result in tolerance being “extended to the extremist doctrines of Ritualism and Popery.”<sup>48</sup>

Attacks on Catholics as “sectarians” occurred in Montana, as elsewhere. For example, a newspaper in Anaconda, Montana reported on a Presbyterian minister’s warning of how an “Influx of Foreigners” with a “conception of religion which is narrow and sectarian” were threatening the “un-sectarian, free state

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student and her parents object to daily King James Bible readings in the public schools because the Roman Catholic Church “teaches that the King James translation is in part incorrect, is incomplete, and that the Scriptures ought not to be read indiscriminately nor without exposition by authorized teachers, and that other reading thereof is harmful rather than beneficial.”); BROTHERHOOD OF ST. VINCENT OF PAUL, 1 THE CLIFTON TRACTS ch. IV (Edward Dunigan & Bro., 1854), <https://archive.org/details/CliftonTractsV1> (expressing Catholic doctrine against Bible reading without appropriate Catholic teachers; as the front matter of the book indicates, the book was published with the approval of the regional Cardinal and Archbishop).

<sup>47</sup> *The “sectarian question” has invaded the Massachusetts State Prison at Charlestown*, THE CONGREGATIONALIST (Boston), Dec. 6, 1876, Gale Document No. GT3004399881.

<sup>48</sup> Rev. J.M. Sturtevant, *Indifferentism*, THE CONGREGATIONALIST (Boston), Sept. 20, 1876, Gale Doc. No. GT3004402810.

school.”<sup>49</sup> A lecturer at Memorial Day ceremonies in Butte, Montana, called on “Christians” to oppose the threats of “sabbath desecration” and “sectarian” (i.e., Catholic) schools.<sup>50</sup>

Although Catholics were frequently attacked as “sectarians,” the charge was launched against other religious minorities as well. A letter in a Boston paper attacked “sectarian bigots” of unspecified denominations.<sup>51</sup> Denver’s *Rocky Mountain News* referred to “Roman and other sectarian schools.”<sup>52</sup> Mormons were tarred as sectarians.<sup>53</sup> Among those so tarring them was President Rutherford B. Hayes.<sup>54</sup>

Some thought Jews could be sectarians.<sup>55</sup> But Jewish speakers could turn the slur back against others. An Ohio paper reported that “A Jew proposes starting

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<sup>49</sup> *Our Public Schools*, ANACONDA STANDARD, Mar. 7, 1892, at 4, <https://www.newspapers.com/image/354706775>.

<sup>50</sup> *Memorial Day Service*, BUTTE WEEKLY MINER, June 6, 1897, at 6, Gale Doc. No. GT3011337494.

<sup>51</sup> *Pugilistic Clergymen*, BOSTON INVESTIGATOR, Mar. 13, 1861 (letter to the editor), Gale Doc. No. GT3015815355.

<sup>52</sup> *At the church congress . . .*, DAILY ROCKY MTN. NEWS, Nov. 16, 1875, Gale Doc. No. GT3011712969 (emphasis added).

<sup>53</sup> *E.g., Quiet Revolutionary Movements in Mormondom*, FRANK LESLIE’S ILLUSTRATED NEWSPAPER, Apr. 1, 1871, Gale Doc. No. GT3012585419 (identifying the “Mormon system” as a “politico-sectarian concern”).

<sup>54</sup> *The Nation*, MILWAUKEE SENTINEL, Dec. 7, 1880, Gale Doc. No. GT3015636616 (referring to “The Mormon sectarian organization”).

<sup>55</sup> *Religious*, VERMONT CHRONICLE, Mar. 2, 1842, Gale Doc. No. GT3013286647 (referring to “Jewish sectarians”).

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."<sup>56</sup>

Mainstream Protestantism generally was immune from the charge of being "sectarian." Josiah Quincy, the president of Harvard College, explained that Unitarians, Quakers, Methodists, Baptists, Episcopalians, and the Orthodox Church were all non-sectarian. From these remarks, an Ohio editor deduced that "Roman Catholics and the Mohammedans" *were* sectarian.<sup>57</sup> Quincy did not mention Presbyterians, but they clearly were considered non-sectarian. A Helena, Montana newspaper explained that "sectarian" implied "the excess of '*partisan zeal*,' and '*bigotry*,'" and that "None but an ignorant or prejudiced person would think of applying the term to the Presbyterian church in the matter of education."<sup>58</sup> Not surprisingly, a charity named for a Christian saint could be described as "non-sectarian."<sup>59</sup>

Authors contrasted sectarianism unfavorably with "good" Christianity. The *New Hampshire Statesman*

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<sup>56</sup> *Religious Intelligence*, THE DAILY CLEVELAND HERALD, Feb. 2, 1870, Gale Doc. No. GT3005261957.

<sup>57</sup> *What is Sectarianism?*, OHIO OBSERVER, Mar. 26, 1845, Gale Doc. No. GT3004755960.

<sup>58</sup> *A Word to the "Friend of Education,"* HELENA WEEKLY HERALD, June 22, 1882, at 4, <https://www.newspapers.com/image/343211167> (italics in original).

<sup>59</sup> *A Woman's Letter*, DAILY ROCKY MTN. NEWS, Mar. 6, 1875, Gale Doc. No. GT3011710762.

praised a teachers training college for being “under a thoroughly Christian, not a sectarian, influence.”<sup>60</sup> A Colorado editorial rejoiced at Thanksgiving: “What was once sectarian is now christian; that which was provincial is now national.”<sup>61</sup> A Central City, Colorado, newspaper paper contrasted sectarian “rigidity” with Christian charity.<sup>62</sup> A writer in Deer Lodge, Montana, explained that “The tone of a college may be Christian in the best and highest sense, but not sectarian in any sense”; the author identified the College of Montana as “not in any sense sectarian, but Christian.”<sup>63</sup> Some newspapers printed articles on how to be a good Christian and avoid sectarianism.<sup>64</sup>

As Josiah Quincy’s list suggests, “sectarian” usually was not a synonym for denominational.<sup>65</sup> One

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<sup>60</sup> *Growth of the West*, NEW HAMPSHIRE STATESMAN, May 5, 1860, Gale Doc. No. GT3016204443.

<sup>61</sup> *Thanksgiving Day and What It Suggests*, DAILY ROCKY MTN. NEWS, Nov. 27, 1873, Gale Doc. No. GT3010660793; see also *The Quakers*, DAILY ROCKY MTN. NEWS, Dec. 5, 1875, Gale Document No. GT3011706705 (contrasting “sectarian infatuation” with “true christianity”).

<sup>62</sup> *Religious Tendency of the Times*, DAILY CENTRAL CITY REGISTER, Jan. 17, 1872, Gale Doc. No. GT3016040476.

<sup>63</sup> *The College of Montana*, THE NEW NORTH-WEST (Deer Lodge, Mont.), June 17, 1893, at 2, <https://www.newspapers.com/image/143614928>.

<sup>64</sup> *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).

<sup>65</sup> For one of the rare exceptions, see *The University Question*, HELENA INDEPENDENT-RECORD, June 17, 1882, at 3 (letter to the editor), <https://www.newspapers.com/image/524657266> (stating

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.”<sup>66</sup> Celebrating “The Denominational Spirit,” an Ohio paper quoted one 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 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. . . .<sup>67</sup>

As an alternative to sectarian spirit, Skinner argued, 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.”<sup>68</sup>

Such articles illustrate the distinction between “denominational” and “sectarian.” The former was, or could be, good; the latter was bad. Accordingly, there were good denominations and there were sectarian (bad) denominations. The difference helps explain why

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that if an organization is founded by a particular denomination, it is not non-sectarian).

<sup>66</sup> *The University*, DAILY ROCKY MTN. NEWS, Dec. 24, 1873, Gale Doc. No. GT3011372277.

<sup>67</sup> *The Denominational Spirit*, OHIO OBSERVER, Jan. 9, 1850, Gale Doc. No. GT3004766875.

<sup>68</sup> *Id.*

the Illinois, Missouri, and Colorado Constitutions did not ban aid to all denominations, but only to “sectarian denominations.”<sup>69</sup>

The distinction also explains an appearance of “sectarian” during discussions at the 1889 Montana Constitutional Convention. The clerk read a document that began with the words, “I herewith submit to your honors, the following, which I trust will receive at your hands the *unprejudiced and nonsectarian* consideration it merits.” PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, HELD IN THE CITY OF HELENA, MONTANA, JULY 4TH, 1889, AUGUST 17, 1889, at 67 (July 16, 1889) (emphasis added).

#### **IV. Later dictionary and newspaper usages show the 1972 Montana Constitution also used the word “sectarian” in a pejorative manner.**

The Department of Revenue argues that despite the nineteenth century meaning of “sectarian,” the word had a meaning different when inserted into the 1972 constitution. Brief in Opposition, at 4, 20 (citing Michael P. Dougherty, *Montana’s Constitutional Prohibition on Aid to Sectarian Schools: “Badge of Bigotry” or National Model for the Separation of Church and State?*, 77 MONT. L. REV. 41 (2016)). In the Department’s view, the constitutionally suspect word was “purged” by the passage of time. However, the historical record demonstrates that the 1972 document

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<sup>69</sup> *Supra* Part I.

fully intended to apply the 1889 meaning of “sectarian.”

When the convention delegates met in 1972, the difference between “sectarian” and “religious” had been applied in a legal context. The Montana attorney general had issued a legal opinion upholding Christmas celebrations in the schools against the claim that they were “sectarian.” *Galen Disputes Plea of Rabbi*, HELLENA INDEPENDENT RECORD, Dec. 22, 1907.<sup>70</sup> There is no evidence the 1972 delegates sought to alter the outcome or to distance the new constitution from it.

Moreover, in the time between 1889 and 1972, dictionaries continued to distinguish “sectarian” from “religious.” The former remained the narrower, more pejorative term. The 1989 *Oxford English Dictionary* reflected the continuing distinction: After listing as its first entry an “obsolete” definition,<sup>71</sup> the OED recited as its second entry the following: “2. Pertaining to a sect or sects; confined to a particular sect; bigotedly attached to a particular sect.” The OED added that “In recent use” the word “sectarian” was “often a pejorative synonym of *denominational*, esp. with reference to education.” 14 THE OXFORD ENGLISH DICTIONARY 843 (2d ed. 1989). The same definition appeared in THE NEW

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<sup>70</sup> <https://www.newspapers.com/image/525268033>.

<sup>71</sup> “Pertaining to a sectary or sectaries; ‘belonging to a schismatical sect’ (Phillips, ed. Kersey, 1706). *Obsolete* exc. *Historical*. Apparently first used in the Commonwealth period by the Presbyterians with reference to the Independents; subsequently by Anglicans with reference to Nonconformists.” (emphasis in original).

ENGLISH DICTIONARY 361 (James A.H. Murray ed., Oxford Univ. Pr. 1914).

Other dictionaries published during the period between the two constitutions also differentiated the broader concept of “religion” from narrower concepts of “sectarian”—often equating the latter with bigotry or heresy. Thus, *Webster’s New International Dictionary* defined the adjective “sectarian” as “Of or pert. to a sect or sects; devoted to, promotive of, the tenets and interests of a denomination: of, pert. to, or characteristic of, one devotedly or bigotedly attached to a sect or denomination; as *sectarian* principles, prejudices, education.” 2 WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1910 (W.T. Harris ed. 1911). “Heretic” was a synonym for the noun “sectarian.” *Id.*

A 1920 dictionary defined “sectarian” merely as “Pertaining, or peculiar to, a sect” and “One of a sect.” LAIRD & LEE’S WEBSTER’S NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 317 (1920). But the much larger and later 1955 and 1960 editions of *Webster’s International* described the adjective “sectarian” as “Denominational in character or interests, esp. narrowly so; characterized by bigotry; as, a *sectarian* mind.” This dictionary also listed “heretic” as a synonym for “sectarian.” WEBSTER’S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2262 (2d ed., 1955 & 1960).

A 1958 edition of Roget’s *Thesaurus* offered as synonyms for “sectarian” the words “denominational; nonconformist, unorthodox, heterodox, heretical; dissent, schismatic, recusant, iconoclastic.” NEW AMERICAN

ROGET'S COLLEGE THESAURUS 324 (1958). A 1971 dictionary said the first meaning of the adjective "sectarian" was "of our relating to one more sectaries . . ." followed by "2. : of, relating to, or having the characteristics of one more sects esp. of a religious character . . . 3a: confined to the limits of one religious group . . . b: limited in character or scope: of narrow interests; characterized by bigotry: PAROCHIAL. . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2052 (1971). A dictionary published the same year Montana's new constitution was drafted defined "sectarian" as "1. Of or characteristic of a sect. 2. devoted to, or prejudiced in favor of, some sect. 3. narrow-minded; limited; parochial." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1287 (David B. Guralik ed., 2d College ed. 1972).

During the period leading up to 1972, Montana newspapers continued to reflect the difference between religion (good) and sectarianism (bad). In 1968 Montana newspapers reported praise for the Catholic Church because it was "no longer sectarian"<sup>72</sup>—presumably conceding that the Church remained religious. Other articles published during that period called for "non-sectarian" religious observances in public schools<sup>73</sup> and

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<sup>72</sup> *Educators Hail Major Ecumenical Breakthrough*, HELENA INDEPENDENT-RECORD, June 28, 1968, at 5, <https://www.newspapers.com/image/393495118>; *Protestants, Catholics Found Alike*, GREAT FALLS TRIBUNE, July 1, 1968, at 10, <https://www.newspapers.com/image/240072548>.

<sup>73</sup> *Moral Training of Teen-Age Youth Said an Urgent Problem*, MONTANA STANDARD, Mar. 3, 1957, at 31, <https://www.newspapers.com/image/355438898>. See also *Calls for More Religion in Public Schools*, MONTANA STANDARD, May 17, 1957, at 5, <https://>

reported disputes as to whether the Bible—indisputably a religious book—was a “sectarian” one.<sup>74</sup> A Montana writer distinguished between sectarian and non-sectarian prayer.<sup>75</sup> A common use of the adjective was as a pejorative word for “denominational,”<sup>76</sup> as in “sectarian gangs”<sup>77</sup> and “sectarian hatred.”<sup>78</sup>

## V. The drafters and ratifiers of the 1972 constitution consciously retained the 1889 meaning of “sectarian.”

During the 1972 constitutional convention, dissenting delegates repeatedly pointed out that the 1889 ban on aid for “sectarian” purposes—which they called

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[www.newspapers.com/image/354299992](http://www.newspapers.com/image/354299992); *Is “In God We Trust” Our Motto*, HELENA INDEPENDENT RECORD, Dec. 28, 1961, at 16, <https://www.newspapers.com/image/528546357>.

<sup>74</sup> *“Is the Bible A Sectarian Book?” Ask Darby Parents and Educators*, RAVALLI REPUBLIC, Dec. 29, 1961, at 1, <https://www.newspapers.com/image/443103468>.

<sup>75</sup> *Prayers in Public Schools*, BILLINGS GAZETTE, July 4, 1962, at 4 (letter to the editor), <https://www.newspapers.com/image/409605078>.

<sup>76</sup> *How to Fractionate America*, HELENA INDEPENDENT-RECORD, Apr. 10, 1961, at 4, <https://www.newspapers.com/image/528403028> (referring to different denominations as sectarian); *Abortion ruling angers bishop*, BILLINGS GAZETTE, Jan. 27, 1973, at 2, <https://www.newspapers.com/image/415879299> (referring to denominational lines as sectarian lines).

<sup>77</sup> *A Child Pays for Bigotry*, MISSOULIAN, Dec. 10, 1972, at 9, <https://www.newspapers.com/image/350072311>.

<sup>78</sup> *E.g., Irish United In Prayer*, MISSOULIAN, Oct. 2, 1972 (“prayed . . . for an end to the sectarian hatred”), <https://www.newspapers.com/image/349772437>.

the “Blaine Amendment”—derived from religious discrimination. They labeled it a “badge of bigotry.” 6 1972 MONTANA CONSTITUTIONAL CONVENTION, VERBATIM TRANSCRIPT 2010 (remarks of Delegate Harbaugh), *id.* at 2012 (remarks of delegate Driscoll); *id.* (remarks of Delegate Schlitz); *id.* at 2022 (remarks of Delegate Kelleher); 2027 (remarks of Delegate Campell).

In contrast, key sponsors affirmed, repeatedly and without contradiction, that the legal force of the “new” language would be the same as the 1889 language. 6 *Id.* 2009-10 (comments of Delegate Burkardt, “keeping the section as it now stands”); *id.* at 2014 (Delegate Loendorf, stating of his later-adopted substitute, “It will continue to mean and do whatever it does now.”).<sup>79</sup> This position, also repeatedly and without contradiction, was presented to the ratifying public. This was done through:

- The official voter information pamphlet submitted by the Montana Constitutional Convention (“**Retained from Present Constitution:** Prohibition against . . . spending money for sectarian purposes”).<sup>80</sup>

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<sup>79</sup> Loendorf’s substitute retained the majority committee proposal for the “sectarian” language, but, like the minority report, it would have permitted the state to serve as a conduit for federal funds expressly designated for non-public schools. The Loendorf substitute was the version eventually adopted by the convention.

<sup>80</sup> Montana Constitutional Convention, *Proposed 1972 Constitution for the State of Montana: Official Text with Explanation* 4 (1972), available at *The Documentary History of the Ratification of the Montana Constitution*, <http://www.umt.edu/media/law/library/>

- A semi-official explanation printed and inserted in all Montana newspapers at public expense. THE PROPOSED 1972 CONSTITUTION FOR THE STATE OF MONTANA, at 5 (“Section 6 of the proposed Article contains the prohibition in the 1889 Constitution against state aid to sectarian schools with only minor style revisions”) & 11 (“The proposed Constitution retains the prohibition against state aid to sectarian schools”);<sup>81</sup>
- Summaries such as that offered by the Montana Taxpayers Association. *Many Changes Possible Under New Education Article*, MONTANA TAXPAYER (Apr. 1972), at 4 (“retained in the new constitution is the prohibition against spending any public money . . . for any sectarian institution”);<sup>82</sup> and
- Newspaper explanations, e.g., *Proposed Constitution’s Education Article Offers a Worthy Deal*, GREAT FALLS TRIBUNE, May 11, 1972, at 23 (“the draft constitution has continued the ban on state aid to sectarian schools”).<sup>83</sup>

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MontanaConstitution/Miscellaneous%20Documents/Const%20VIP.pdf  
(bolding in original).

<sup>81</sup> Available at *The Documentary History of the Ratification of the Montana Constitution*, <http://www.umt.edu/media/law/library%5CMontanaConstitution%5CCampbell/1972MTConstNewspaperSupp.pdf>.

<sup>82</sup> Available at <https://i2i.org/wp-content/uploads/Montana-Taxpayer-no-12-April-1972-ocr.pdf>.

<sup>83</sup> <https://www.newspapers.com/image/240175998>.

In short, the clear understanding of all concerned was that the 1972 language held the same discriminatory force as the 1889 language.

The 1972 constitution's advocates did not endorse bigotry explicitly. The convention's verbatim transcript contains no anti-Catholic tirade. Rather, the 1972 delegates said only that they wished to avoid change so as to reconcile (bigoted?) public opinion to the new constitution—to preserve the “historical balance.” They also stated they sought to maintain public schools and the “separation of church and state.” 2 1972 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT at 728-29; 6 *id.* 2009. However, true “separation of church and state” would have applied equally to all religious schools—as Rep. Blaine's proposed amendment did. Using language that, in 1972 and for well over a century before that, declared that some religions were inferior, is at war with the neutrality required by the First Amendment.

During the convention debates the leading spokesman for retaining Montana's “no-sectarian aid” language, Delegate Burkhardt, repeated the long-standing charge that “sectarian” religion was the product of prejudice. He spoke of the need to avoid “subjecting very young children to the sect prejudices of a particular teacher.” 6 1972 CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT, at 2037. Even if the delegates' purposes in 1972 were more nuanced, the fact remains that they were willing to retain prejudicial language to accomplish those purposes.

What occurred in 1972, therefore, was no purge of the 1889 meaning. On the contrary, it was a conscious re-affirmation and re-adoption of the 1889 meaning.

**VI. The Montana Constitution’s “No Sectarian Aid Clause” violates the First and Fourteenth Amendments to the U.S. Constitution.**

By mandating denial of aid to “sectarian” groups (and not to other religious groups), Article X, Section 6 of the Montana Constitution requires the state to discriminate against religions the government determines to be marred by prejudice, bigotry, or extremism. At one time, the targets included Roman Catholics, but the text discriminates against other unpopular religions as well.

Article II, Section 7 of the Montana Constitution protects “the freedom of speech.” Suppose, however, that the clause contained an exception for “the speech of extremists.” The exception would enable those controlling state government to deny speech rights to unpopular groups. If allowed to stand, Article X, Section 6 would have much the same effect.

Under the Fourteenth Amendment’s Equal Protection Clause, state discrimination among religions is subject to strict scrutiny. This is because equal treatment of religions is at the core of the First Amendment’s Religion Clauses, which are applied to the states through the Fourteenth Amendment’s Due Process Clause. *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); *Larsen 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 OF RIGHTS J. 73 (2005) (discussing the equal treatment principle underlying both of the First Amendment’s religion clauses).

A state’s violation of this “core” equal treatment standard triggers the requirements of strict scrutiny. *E.g.*, *City of Hialeah*, 508 U.S. at 531, 546. Nothing in this case suggests this burden has been met. *Cf. Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that wider separation of church and state did not meet a heightened scrutiny standard).

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## CONCLUSION

The decision of the Montana Supreme Court should be reversed.

Respectfully submitted, this 18th day of September, 2019,

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