



Court of Appeals Dissenting Opinion in Taxpayers for Public Education v. DCSD

The following is excerpted from pp. 88-116 of the dissenting opinion by Judge Bernard of the Colorado Court of Appeals. Only the citations to supporting legal authorities have been removed, in order to enhance the flow of reading. For the full opinion, please see http://www.courts.state.co.us/Courts/Court_Of_Appeals/Case_Announcements/Files/2013/253D4002-28-13.htm.

A. Public Schools in the Nineteenth Century

One of the contentions [of the appellants] here is that section 7 was brewed in a cauldron of anti-Catholic prejudice that was bubbling throughout the United States at the time that Colorado's constitutional convention was held. The principal basis for this contention is the controversy surrounding the so-called Blaine Amendment, a proposed, but ultimately defeated, amendment to the United States Constitution. But before I explain the Blaine Amendment, I must put it in context. And to put it in context, I must provide a short history of public schools in our country.

The concept of nonsectarian public schools, called "common schools" when they were originally introduced, was a product of early nineteenth century American leaders who thought that "the education of children was indispensable for the stability and ultimate success of the new republic." Because "public schools were seen as indispensable for inculcating the civic, moral, and religious virtues upon which the republic depended," there was a consensus for about the first half of the nineteenth century that the public school curriculum should contain a religious component.

This component was primarily Protestant, but, as the nineteenth century unfolded, “in order to ensure that the schools were accessible to children of all faiths, the curriculum would de-emphasize religious doctrine out of respect for liberty of conscience and the theological differences of various denominations.” The concept of “nonsectarian” public schools was designed to defuse “conflict among Protestant sects and to attract children excluded from the Protestant denominational schools.”

At the beginning of the nineteenth century, there was little conflict between Catholics and Protestants over the religious component of public school curriculums. The American Catholic population was relatively small.

However, as increasing numbers of Catholic and Jewish immigrants came to this country, attributes of the religious component of the public school curriculum became controversial. “[T]he Protestant prayer, Bible reading, hymn singing, and catechism found in books such as The McGuffey Reader became offensive to Catholics and the small number of American Jews.” The King James Version of the Bible was read in the common schools, which affronted Catholics. Catholics asked that the Bible not be read in public schools. Protestant nativists replied that Catholics wanted schools to be “irreligious.” There were significant expressions of anti-Catholic sentiment and some anti-Catholic violence. This already troublesome situation was exacerbated by the emergence of the anti-Catholic “Know-Nothing” movement in the 1850s. Partly in reaction to these expressions and this violence, Catholics established their own schools, which were “profoundly sectarian and exclusionary.” The Catholic Church argued that, if public tax money was to be allocated to public schools that read a Protestant Bible and taught Protestant principles, then Catholic schools should also be funded with public tax money.

There were also people who believed that no religious schools should be funded with public money. This “no-funding” concept arose out of several complementary rationales:

Foremost, public school officials sought to prevent the division of school funds in order to secure the financial stability of the nascent common schools. In the early nineteenth century, public commitment to a system of public education did not come naturally and had to be earned. Competing educational options stood in the way of gaining this public commitment. Closely related, public officials viewed the no-funding principle as a means to standardize education and to ensure financial accountability.

A de-emphasis of the Protestant religious component in public schools began with reformers like Horace Mann. He encouraged a “shift from instruction in nondenominational Protestantism toward an emphasis on universal religious values.” Although Mann believed that schools should teach the basics of Christianity, he thought that schools should go no further “out of respect for freedom of conscience.” Mann’s reforming instincts were not motivated by anti-Catholicism. Rather, he thought that, because Catholics and Protestants were Christians, both groups should participate in public schools instead of building their own school systems.

A second reform movement began after the Civil War. It “sought to make public education not simply nondenominationally religious but truly nonsectarian, in that only universally acknowledged moral principles would be taught and religious devotion eliminated.” One way in which this goal would be accomplished would be by eliminating the reading of the Bible from public schools.

Thus, “educational leaders and public officials increasingly came to identify the no-funding principle with principles of religious non-establishment.” And these leaders and officials saw several ways in which funding religious schools would violate the concept of non-establishment: such funding would “violate[] rights of conscience to force one person to pay for another’s religious instruction; . . . would bring about religious dissension over the competition for funds; and . . . would result in ecclesiastical control over public monies.”

In summary,

[t]he Nation's rapidly developing religious heterogeneity, the tide of Jacksonian democracy, and growing urbanization soon led to widespread demands throughout the States for secular public education. At the same time strong opposition developed to the use of the States' taxing powers to support private sectarian schools. Although the controversy over religious exercises in the public schools continued into [the Twentieth Century], the opponents of subsidy to sectarian schools had largely won their fight by 1900. In fact, after 1840, no efforts of sectarian schools to obtain a share of public school funds succeeded. Between 1840 and 1875, 19 States added provisions to their constitutions prohibiting the use of public school funds to aid sectarian schools, and by 1900, 16 more States had added similar provisions. In fact, no State admitted to the Union after 1858, except West Virginia, omitted such provision from its first constitution.

B. The Blaine Amendment

With this understanding of the context, I turn to the controversy surrounding the proposed Blaine Amendment.

By 1875, many members of the Republican Party thought their party was in political trouble. The nation had tired of the failures associated with Reconstruction and with the corruption in President Grant's administration. Democrats had gained control of the House of Representatives in 1874, and it appeared that a Democrat might win the White House in 1876, with the assistance of the reconstructed, and strongly Democratic, southern states. Republicans "needed an issue," and they found it in the controversy over the funding of public schools.

In September 1875, President Grant, a Republican, gave a speech in which he stated that church and state should be kept "forever separate" and that "not one dollar" should be "appropriated in support of sectarian schools."

The President followed this speech with an address to Congress in which he proposed a constitutional amendment that would require "each of the several States to establish and forever maintain free public schools adequate to the education of all the children." This amendment would have also

barred the use of “any school funds, or school taxes . . . for the benefit or in aid . . . of any religious sect or denomination.”

James G. Blaine, the Republican Speaker of the House of Representatives, sponsored the amendment that the President had proposed. His amendment was easily approved by the House of Representatives, but it died in the Senate, where it failed to muster the necessary two-thirds majority.

The amendment was attacked as being anti-Catholic, and some of its supporters made unambiguously anti-Catholic statements. For example, at least one senator argued that the amendment was necessary because the Catholic Church discouraged liberty of conscience. Another senator countered that the amendment was motivated by religious bias against Catholics. Some commentators argue that anti-Catholic prejudice, which undoubtedly existed and which undoubtedly still exists in the minds of some people, was the sole, or at least the primary, motivating factor for the Blaine Amendment.

However, other commentators take a more nuanced view, arguing that there was much more going on with the Blaine Amendment than anti-Catholic bigotry. For example, one professor argues that the Blaine Amendment arose as “part of a larger controversy over the responsibility and role of government in public education”; that this “larger controversy” involved people of all faiths, who struggled over whether public education should be “secular, nonsectarian, or more religious”; and that “[i]dentifying a singular motive for the Blaine Amendment is impossible.” Blaine maintained that he was not anti-Catholic, and no evidence suggests that he had any personal animosity toward Catholics. Blaine’s mother was Catholic and his daughters were educated in Catholic schools. Publicly, Blaine maintained that the amendment was merely meant to settle the ‘School Question,’ the day’s most heated political issue. Certainly no attempt to make sense of the legacy of non-sectarianism ought to ignore the strains of anti-Catholicism that run through its reception. But one of [the author’s purposes] has been to

consider another, parallel legacy of non- sectarianism – particularly, the aspiration to imparting shared moral values through the identification of common foundational commitments.”

And there were those who supported the Blaine Amendment because they thought it would defuse the conflict between Protestants and Catholics over school funding that had been simmering for decades. For example, the Democratic New York Tribune observed that

[t]hinking men of all parties see much more to deplore than to rejoice over, in the virulent outbreak of discussions concerning the churches and the schools, and welcome any means of removing the dangerous question from politics as speedily as possible.

C. Colorado’s Constitutional Convention

In 1875, Congress passed an enabling act that, in section 1, authorized inhabitants of the Territory of Colorado to “form . . . a state government . . . which, when formed, shall be admitted into the Union.” As pertinent here, the enabling act required that the drafters of Colorado’s Constitution

provide by an ordinance irrevocable without the consent of the United States and the people of [the State of Colorado] . . . [t]hat perfect toleration of religious sentiment shall be secured, and no inhabitant of [the State of Colorado] shall ever be molested in person or property, on account of his or her mode of religious worship.

The constitutional convention passed such an ordinance on the first day that it met.

The constitutional convention engaged in three heated debates over religious matters. Should property owned by religious institutions be taxed? Should God be mentioned in the constitution’s preamble? Should public school funds be allocated to private religious schools?

The issue of taxation of churches eventually resulted in a moderate compromise: “unless the legislature acted to the contrary, lots with buildings used solely for religious worship, for schools, and for charitable purposes, as well as cemeteries not used for profit, [won] tax immunity.” The compromise was embedded in Colorado Constitution, article X, section 5.

The issue of mentioning God in the Preamble also resulted in a compromise, with Catholics and Protestants cooperating. As a result, the Preamble refers to the “Supreme Ruler of the Universe.”

Turning to the issue of funding religious schools with public money, early in the constitutional convention, on January 5, 1876, a resolution was referred to the Committee on Education, which contained the concepts, and almost all the language, that became section 7.

Throughout the convention, members of the public presented proposals to the delegates in the form of petitions. Some of these petitions requested a complete separation of church and state in public schools. Groups of Protestant churches submitted petitions that made various requests, including that public schools remain “nonsectarian”; that the Bible should be read to students; or that the Bible should neither be “excluded from nor forced into” public schools.

Catholic Bishop Joseph Machebeuf twice addressed the convention in writing. The first petition that he submitted suggested that, if the state constitution denied Catholic schools public funds, Colorado’s Catholics would feel “bound in conscience” to oppose the constitution’s ratification. According to one commentator, Bishop Machebeuf “opened the door to anti-Catholic fulminations by sending [this] rather tactlessly-worded resolution.”

Bishop Machebeuf’s second written presentation sought to mollify the delegates. He wrote of anti-Catholic prejudice, and he apologized for any “threats and aggressive tone” that the delegates may have perceived in his first submission. However, he did not back away from his argument that Colorado’s Constitution should not prohibit the state from funding Catholic schools.

Bishop Machebeuf’s written comments expressed a sincere, important, and strong commitment to opposing anti-Catholic bigotry. However, there is evidence that suggests that he was also motivated by financial considerations. Since the enabling act set aside two sections in every township to support the public schools, one-eighteenth of the territory’s public lands was at stake. By this same act such land

could not be sold for less than \$2.50 an acre. Even with much of the public land depleted by sale, the value of the school lands was at least \$5,000,000, an unusually tempting prize.

There was immediate and strong reaction to the Bishop's comments. One commentator expressed the opinion that Bishop Machebeuf "imperiled the constitution's ratification with his intimidations." An editor of a Denver newspaper "wondered what would happen if the Baptists, Methodists, or Jews threatened to defeat the constitution unless it allowed their dogmas to be taught at public expense."

A motion to strike the entire text of what was to become section 7 failed, three votes in favor, twenty-four votes against. The language was then approved, twenty-five votes in favor, three votes against.

When the delegates finished their work in March 1876, they had decided that parochial schools could not share in the public school fund, and that public schools could not teach sectarian religious dogma. On these two issues alone the convention refused to compromise contending factions. The Protestant majority saw to that. To strengthen the separation of church and state, Coloradans had to pay an initial price of animosity to avoid later and more corrosive bitterness.

The ratification vote was held on July 1, 1876. Two days before the vote, "Catholics conducted a pro-constitution rally in Denver." The final vote tally was 19,505 votes: 15,443 Coloradoans voted for ratification; 4,062 voted against it. On August 1, 1876, President Grant issued a proclamation stating that "the admission of the State of Colorado into the union is now complete."

Section 7 was not, and is not, unique. Although different commentators produce different figures, the constitutions of between thirty-five and forty states contain similar sections limiting or prohibiting funding of religious schools. Of these sections, seventeen were in place before the controversy over the Blaine Amendment erupted. These could have "easily served as models for the post-Blaine provisions." The delegates to Colorado's constitutional convention were aware of at least some of these other sections.

IV. Free Exercise Clause and Equal Protection Attacks on Section 7

Some of the parties supporting the school district's position contend that section 7 was a product of anti-Catholic prejudice. They submit that section 7 violates the Free Exercise and the Equal Protection Clauses because its drafters, either overtly or covertly, wrote section 7 with the reprehensible intent of "oppress[ing] a religion [and] its practices."

I respectfully disagree with these arguments for two reasons. First, when the language of constitutional sections is clear, as is the case with section 7, I question the appropriateness of proceeding further analytically. Second, I do not read the historical record in Colorado as clearly supporting the thesis that section 7 was the direct, ineluctable, and sole product of anti-Catholic animosity.

It is well-established law in Colorado that, if the language of a constitutional section is clear and unambiguous, we do not resort to other modes of interpretation to determine its meaning. And I cannot read the plain language of section 7 as espousing a narrowly anti-Catholic view. Rather, I read the language as having a different, and broader, scope: it applies to all religious institutions. As our supreme court observed, "[s]ectarian meant, to the members of the [constitutional] convention and to the electors who voted for and against the Constitution, "pertaining to some one of the various religious sects," and the purpose of . . . section 7 was to forestall public support of institutions controlled by such sects.

Section 7 refers to "*any* church or sectarian society"; to "*any* school [or] academy. . . controlled by *any* church or sectarian denomination *whatsoever*"; and to "*any* church, or for any sectarian purpose." Even assuming, for the purposes of argument, that the use of the word "sectarian" refers either to the teachings of the various Protestant sects, or that it is code for "anti-Catholic," section 7 accompanies the word "sectarian" with much broader words: "denomination," "church," "any," and "whatsoever." And section 7's prohibition of distributions to all religious schools controlled by churches

or sectarian denominations is categorical. A school district cannot “ever” make an appropriation; it cannot pay from “any public fund or money’s whatever, [or] anything in aid.”

And, if we are to look to the statements, events, and history behind these constitutional sections to determine whether they were the products of anti-Catholic animus, to what do we look, and upon whose intent do we focus? This is a difficult, perhaps impossible, task in a context like the one we face here. “[I]t is virtually impossible to determine the singular ‘motive’ of a collective legislative body, and this Court has a long tradition of refraining from such inquiries.”

Are we concerned with the intent of the delegates at the convention? At least as far as I can tell, the historical record of Colorado’s constitutional convention does not contain their speeches or their verbatim or summarized comments about the substance of section 7. If we do not know their thoughts, at least as expressed by their words, how can we tar all, or many, or a few, of them with the brush of religious bias?

Or are we to determine the intent of the voters who ratified the Colorado Constitution? What was their understanding of section 7? Did all 15,443 Coloradans who voted for ratification think that section 7 discriminated against Catholics, and did they wish to achieve such discrimination? Did all 4,062 Coloradans who voted against ratification oppose it because they understood section 7 to be the product of bigotry? We do not know.

And even if a historical inquiry is necessary to determine whether section 7 was produced by “animosity toward the class of persons affected,” the historical record indicates that many forces were at work during our constitutional convention. Although the congressional debate about the Blaine Amendment occurred essentially contemporaneously with our constitutional convention, that debate concerned much more than religious bigotry. How can Republican political interests best be preserved against growing Democratic power? How should public schools be funded? Should the evolution of

public schools toward becoming entirely secular continue? Is it important to have public schools that teach common values? Is it important to keep public schools free of religious control and churches free of government control?

It is undeniable that anti-Catholic prejudice existed in Colorado at the time of our constitutional convention, and that there was friction between Catholics and Protestants. However, the following factors convince me that it is not clear that such bias was the sole motivation, or even the primary driving force, behind the drafting and ratifying of section 7.

- ❖ The congressional enabling act that authorized the citizens of Colorado to proceed to become a state expressly required that any state constitution contain an ordinance stating that “perfect toleration of religious sentiment shall be secured, and no inhabitant of [the State of Colorado] shall ever be molested in person or property, on account of his or her mode of religious worship.”

- ❖ A proposal containing the language that became section 7 was submitted by a subcommittee to the convention’s delegates before the records of the convention refer to any dispute about its subject matter. Section 7’s language is substantially the same as the language contained in the initial proposal. The various petitions concerning the issue of funding religious schools espoused substantially different views. These included petitions from Protestants, Catholics, and those who expressed a desire for secular schools.

- ❖ The language of section 7 applies to all religious institutions, not only the Catholic Church. It uses words such as “sectarian,” “church,” “denomination,” “any,” and “whatsoever.”

- ❖ The delegates decided against taxing all church property. They did not vote for taxing Catholic Church property.

❖ Although there had historically been conflict between Catholics and Protestants over which version of the Bible should be read in public schools, the delegates did not mandate that the King James Version should be read in public schools.

❖ There is evidence to suggest that Bishop Machebeuf fanned the flames of the dispute between Catholics and Protestants in the course of the convention; the dispute might well not have arisen had he not attempted to “intimidate” the delegates; and, although he was rightfully concerned about religious bias against Catholics, he was also motivated by a desire to gain access to the public school fund. Further, shortly before the ratification vote, at least some Catholics participated in a rally in support of the constitution’s ratification.

❖ Section 7 was passed during a time of educational reform, in which “educational leaders and public officials increasingly came to identify the no-funding principle with principles of religious non- establishment.”

❖ Many other states’ constitutions contain sections similar to section 7. A goodly portion of these preceded the controversy over the Blaine Amendment. It is difficult to believe that so many states, for over more than one hundred years, would deliberately enshrine anti- Catholic prejudice in their constitutions.

As a result, I would reject the arguments that section 7 violates either the Free Exercise or Equal Protection Clauses.

Conclusion

Lest anyone believe that the position I espouse here is a “legalistic swipe at religion,” I respectfully submit that the history of religious oppression and conflict throughout the course of our grand American experiment, is a cautionary tale that should never be forgotten. “[O]ur fundamental belief as a nation that religion and state should co-exist in harmony with each other, but along distinct and

separate tracks” allows religion “to breathe free of the enervating drag of government regulation, taxation and control.”

This religious freedom is, in my view, an admirable product of “the constitutional division of church and state” that has allowed [r]eligious schools [to be] free to exist and function in accordance to their own moral and theological dogma. This includes the right to restrict their memberships and their campus academia to strict, sometimes even unpopular, religious views and activities. When state involvement and support begins to be part of their operations, this freedom goes away.

Applying section 7 as written in this case would reduce the problems associated with funding private elementary, middle, and high schools that are controlled by any church or sectarian denomination “whatsoever,” while carefully protecting the right of Colorado’s citizens to exercise their religious conscience in their homes, churches, synagogues, temples, and private religious schools.

We have, in the years since this nation was founded, become breathtakingly diverse in a religious sense. At least fifty-five major religious groups and subgroups now have roots here, and some of these groups contain sects that express enormously different beliefs. It is this diversity, I respectfully suggest, that most starkly points out the great risks in the school district program at issue here.

School voucher programs finance the religious education of the young. And, if widely adopted, they may well provide billions of dollars that will do so. Why will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools? Why will they not want to examine the implementation of the programs that provide this money – to determine, for example, whether implementation has biased a program toward or against particular sects, or whether recipient religious schools are adequately fulfilling a program’s criteria? If so, just how is the State to resolve the resulting controversies without provoking legitimate fears of the kinds of religious favoritism that, in so religiously diverse a Nation, threaten social dissension?