

2014

# "So Help Me?": Religious Expression and Artifacts in the Oath of Office and the Courtroom Oath

Frederick B. Jonassen  
*Barry University*

Follow this and additional works at: <https://lawpublications.barry.edu/facultyscholarship>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Legal History Commons](#), and the [President/Executive Department Commons](#)

---

## Recommended Citation

Frederick B. Jonassen, So Help Me: Religious Expression and Artifacts in the Oath of Office and the Courtroom Oath, 12 Cardozo Pub. L. Pol'y & Ethics J. 303 (2014)

This Article is brought to you for free and open access by Digital Commons @ Barry Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Digital Commons @ Barry Law.

# “SO HELP ME?”: RELIGIOUS EXPRESSION AND ARTIFACTS IN THE OATH OF OFFICE AND THE COURTROOM OATH

*Frederick B. Jonassen\**

INTRODUCTION .....	303
I. THE HISTORY OF THE OATH .....	310
A. <i>The Judicial Oath from its Origins to Omychund v. Barker</i> .....	311
B. <i>Conscientious Objections to the Oath to the American Constitution</i> .....	318
II. THE ENGLISH OATHS OF LOYALTY .....	322
III. THE NO RELIGIOUS TEST CLAUSE .....	326
A. <i>The States at the Time of the Founding</i> .....	326
B. <i>The State Constitutional Ratifying Debates</i> .....	330
C. <i>The Abbott-Iredell Debate</i> .....	337
D. <i>Two Muslim Oaths</i> .....	342
i. Syidah Matteen .....	345
ii. Keith Ellison .....	353
IV. RELIGIOUS EXPRESSION IN THE AGE OF DIVERSITY ....	358
A. <i>Religious Expression in Testamentary and Other Courtroom Oaths</i> .....	358
B. <i>Religious Expression in the Oath of Office</i> .....	366
CONCLUSION .....	372

## INTRODUCTION

On February 5, 2003, NBC broadcast episode 81 of *The West Wing*.<sup>1</sup> The episode dramatized preparations for President Bartlet’s second inauguration during a crisis that could result in military operations in Africa.<sup>2</sup> One of the subplots concerned choosing the Bible upon which the President would take his oath of office. “I don’t have a bi-

---

\* Associate Professor, Barry University School of Law. B.A., 197, Columbia University; Ph.D., 1983, Cornell University; J.D., 1997, *magna cum laude*, Indiana University School of Law. The author thanks Dean Leticia M. Diaz and the Barry University School of Law for awarding him a summer grant to write this Article. Also, thanks to Neelum Arya for pointing out the Bible episode from *The West Wing*.

<sup>1</sup> *The West Wing: Inauguration: Part 1* (NBC television broadcast Feb. 5, 2003).

<sup>2</sup> *Id.*

ble,” the President says to his aide Josh.<sup>3</sup> The following dialogue then takes place:

JOSH: You know, there’s nothing that says you have to be sworn in on a bible.

BARTLET: Is that true?

JOSH: You can be sworn in on a *Sports Illustrated* swimsuit issue.

BARTLET: You think that’s a good idea?

JOSH: No.<sup>4</sup>

The dialogue introduces a recurring series of vignettes in which the President tries to decide on which Bible he will use for his inauguration oath.<sup>5</sup>

In his initial search he discovers that the White House library has a copy that was once the property of “Donnie’s Hotel.”<sup>6</sup> President Bartlet, who comes from old New England stock, considers using his family Bible, which he had donated to the New Hampshire Historical Society.<sup>7</sup> But the Society’s Director, Mr. Cravenly, must regretfully deny the request because, taken out of its climate controlled vault, the Bible would warp.<sup>8</sup> The President then considers the Bible of Jonathan Edwards.<sup>9</sup> However, this Bible, containing four translations, Hebrew, Greek, Aramaic and English, turns out to be extremely large, “the size of a Volkswagen.”<sup>10</sup> Bartlett suggests that holding this Bible while he takes the oath would require “the First lady, the Chief Justice, and the Second Circuit Court of Appeals.”<sup>11</sup> The President eventually asks for the Bible on which Washington took the first oath of office.<sup>12</sup> However, the New York Freemasons, who own that Bible, have rules that the Bible cannot

---

<sup>3</sup> *Transcript of Episode 81, Inauguration: Part I*, WEST WING TRANSCRIPTS (Feb. 26, 2003) [hereinafter *Transcript of Episode 81*], <http://www.westwingtranscripts.com/search.php?flag=getTranscript&id=81&keyword=bible>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* See also *The West Wing: Inauguration: Part 2 – Over There* (NBC television broadcast Feb. 5, 2003) [hereinafter *Inauguration: Part 2*].

<sup>6</sup> *Transcript of Episode 81*, *supra* note 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Inauguration: Part 2*, *supra* note 5.

travel by plane, and three masons must accompany it wherever it goes – requiring four train tickets, including one for the Bible.<sup>13</sup> The Freemasons do not make it to the inauguration on time when the Metroliner gets stuck in Philadelphia because of frozen tracks.<sup>14</sup> And so the President's aides have to scramble to find a copy,<sup>15</sup> much as the organizers of the first inauguration are said to have done when they realized at the last minute that they did not have a Bible handy for Washington to swear upon.<sup>16</sup>

As it happens, *The West Wing's* playful look at the role of the Bible in the President's oath of office anticipated a slight, but definite, dislodging of the Bible as the presumptive choice upon which such oaths are sworn. On January 3, 2013, Tulsi Gabbard took her ceremonial oath of office as the newly elected representative for the second congressional district of Hawaii.<sup>17</sup> Representative Gabbard thus became the first Hindu to serve in the United States House of Representatives, swearing her oath on the Bhagavad Gita, the scripture of the Vaishnavite branch of the Hindu religion.<sup>18</sup> *USA Today* noted that when a Hindu priest first offered a Hindu prayer in the U.S. House of Representatives in 2000, the Family Research Council denounced the event as "one more indication that our nation is drifting from its Judeo-Christian roots."<sup>19</sup> And when another Hindu priest from Nevada offered the first

---

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* The story that the organizers of the first inauguration overlooked providing a Bible until the last minute is probably apocryphal. See Winthrop Clarence Bowen, *The Inauguration of Washington*, 37 CENTURY MAG. 803, 828-29 (1889) ("Just before the oath was to be administered it was discovered that no Bible was in Federal Hall. Luckily Livingston, a Grand Master of Free Masons, knew that there was one at St. John's Lodge in the City Assembly Room nearby, and a messenger was dispatched to borrow the Bible. . ."). See also *George Washington Inaugural Bible*, MASONIC LEADER (Nov. 23, 2010), <http://themasonicleader.com/?p=325> ("[T]he George Washington Inaugural Bible has been used for the Inaugurations of Warren G. Harding, Dwight D. Eisenhower, Jimmy Carter, and George H.W. Bush."). Perhaps the appearance of the Bible at the inaugurations of Jimmy Carter in 1977 and George H.W. Bush in 1989 inspired the treatment of the theme in *The West Wing*.

<sup>17</sup> Stephen Prothero, *A Hindu Moment for Congress: Swearing In of New House Member Holds Lesson for Politicians*, USA TODAY, Jan. 4, 2013, at 8A, available at 2013 WLNR 243697.

<sup>18</sup> *Id.* For background on the relationship between the Bhagavad Gita and the Vaishnavite branch of Hinduism, see K.P. Nayar, *America Cocks Ear for Tulsi's Gita – Hindu, not Indian, a Frontrunner*, TELEGRAPH (INDIA), Nov. 4, 2012, available at 2012 WLNR 23408842; see also *Vaishnavism: An Overview*, in 14 ENCYCLOPEDIA OF RELIGION 9498-501 (Lindsay Jones, ed. in chief, 2d ed. 2005).

<sup>19</sup> Prothero, *supra* note 17.

Hindu prayer in the Senate in 2007, protesters from the anti-abortion group, Operation Save America, interrupted him, calling on Jesus to forgive the nation "for allowing a prayer of the wicked."<sup>20</sup> But as to Ms. Gabbard's swearing in ceremony, there was little controversy: "[T]he nation simply shrugged."<sup>21</sup> This grudging acceptance of Hinduism in the hallowed precincts of the American government encapsulates a far larger struggle by which religious minorities have achieved the acceptance of their faiths in one of the most commonplace ceremonies of government: the oath.

It was not very long before, six years to be exact, that the ceremonial inauguration of Keith Ellison, the first Muslim elected to the House of Representatives, set off controversy over his intention to swear his oath of office on the Qur'an, when his choice was strongly criticized by the conservative radio talk show host Dennis Prager,<sup>22</sup> by a member of Congress, Virgil Goode,<sup>23</sup> and by the American Family Association.<sup>24</sup> The hoopla about Representative Ellison overshadowed the election of the first two Buddhists to Congress in 2006, Mazie Hirono from Hawaii and Hank Johnson from Georgia,<sup>25</sup> as well as the second Muslim to be elected to the House, Andre Carson of Indiana.<sup>26</sup>

Some questioned whether Mitt Romney might choose to swear the presidential oath of office on the Book of Mormon had he won the election of 2012.<sup>27</sup> This, in spite of Mitt Romney's own words from his

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See *infra* notes 272-290 and accompanying text.

<sup>23</sup> See *infra* note 278.

<sup>24</sup> See *infra* note 278.

<sup>25</sup> Luis Lugo, *Congress Looks Like the People: When It Comes to Religious Affiliation, Diversity Reigns on Capitol Hill*, USA TODAY, Jan. 5, 2009, at 11A, available at 2009 WLNR 209537; Sahar Said, *Diversity in Government: On Taking Oaths*, FOREIGN POL'Y BLOGS NETWORK, Nov. 20, 2012, available at 2012 WLNR 2467542.

<sup>26</sup> Lugo, *supra* note 25; Said, *supra* note 25.

<sup>27</sup> See, e.g., Dennis Williamson, *Perspective: Letters to the Editor*, J. GAZETTE, Oct. 14, 2012, at 14A, available at 2012 WLNR 21904178 ("Even if [Romney] takes the oath of office with his hand on the Book of Mormon, he will be swearing upon the book of his religious convictions, not someone else's, which is a sacred oath we can hold him to."); William Marsden, *Presidential Inauguration Marks America's Rebirth: Fireworks and Music Usher In Obama's New Term*, MONTREAL GAZETTE, Jan. 19, 2013, at A23, available at 2013 WLNR 1449284 ("If Mitt Romney had won, would he have sworn his oath on the Book of Mormon? How would that have gone over?"); Andy Johnston, *Q&A on the News*, ATLANTA J. & CONST., Jan. 29, 2013, at B2, available at 2013 WLNR 2224383 ("Jana Riess, a religion scholar and co-author of 'Mormonism for Dummies,' told CNN.com before the election that she didn't think Romney would have used the Book of Mormon to take the oath of office. Romney used a Bible when he was sworn in as

2008 address about his religion: "When I place my hand on the Bible and take the oath of office, that oath becomes my highest promise to God."<sup>28</sup> Of course, Romney's speech was notably reminiscent of John F. Kennedy's speech in 1960 to address questions about whether his Catholic faith would affect his presidential decisions.<sup>29</sup> Indeed, regarding Kennedy's inauguration, it was widely noted that he swore his oath on the Douay Bible, the official Catholic translation of the Bible.<sup>30</sup> In 2005, Representative Debbie Wasserman Schultz refused to take her oath of office on the copy of the Bible proffered by House Speaker Dennis Hastert.<sup>31</sup> The refusal set off a search for a copy of the Tanakh, the Jewish Old Testament, which Representative Gary Ackerman pro-

---

governor of Massachusetts in 2003; it reportedly was the same one his father, George, used when he was sworn in as Michigan's governor in 1963."); James Rudin, *Our Presidents Should Leave Their Bibles at Home*, THE STAR-LEDGER, Feb. 3, 2013, at 6, available at 2013 WLNR 2716205 ("If Mitt Romney had been elected president, it is possible he would have sworn his oath while holding the Book of Mormon.").

<sup>28</sup> Linda Feldman, *Romney Moves to Allay Mormon Concern Directly*, CHRISTIAN SCI. MONITOR, Dec. 7, 2007, at 1, available at 2007 WLNR 24109437. For the text of the speech, see Romney's "Faith in America" Address, N.Y. TIMES, Dec. 6, 2007, available at, <http://www.nytimes.com/2007/12/06/us/politics/06text-romney.html?pagewanted=all>. The Mormon faith reveres the Bible as well as the Book of Mormon as sacred scripture, so it is acceptable for a Mormon to swear an oath on the Bible. See Jessica Ravitz, *What Would a Mormon White House Look Like?*, CNN BELIEF BLOG (Nov. 2, 2013), <http://religion.blogs.cnn.com/2012/11/02/if-mormons-move-into-the-white-house/>. See also Bible, 1 ENCYCLOPEDIA OF MORMONISM 105-11 (1992) ("The Bible stands at the foundation of the Church of Christ of Latter-Day Saints, constitutes one of its standard works, and is accepted as the word of God.").

<sup>29</sup> The comparison was noted by Romney himself in his address. "Almost 50 years ago another candidate from Massachusetts explained that he was an American running for President, not a Catholic running for President. Like him, I am an American running for President. I do not define my candidacy by my religion. A person should not be elected because of his faith nor should he be rejected because of his faith." Romney's "Faith in America" Address, *supra* note 28.

<sup>30</sup> See, e.g., Edward T. Folliard, *Kennedy Takes Oath of Office: Proclaims a New "Quest for Peace"*, WASH. POST, Jan. 21, 1961, at A01, available at <http://www.washingtonpost.com/wp-srv/national/longterm/inaug/history/stories/ken61.htm> ("His left hand rested on a Douay version of the Bible, the basic English translation done in the 16th century by Catholic scholars in the English College at Douay, France."); *Inaugurals of the President of the United States*, LIBRARY OF CONGRESS, <http://memory.loc.gov/ammem/pihtml/pinotable.html> (last visited March 4, 2014) (indicating that this was the first time a Douay Bible was used for the oath of office at a presidential inauguration: "As the first Catholic elected president, Kennedy was the first to use a Catholic (Douay) version of the Bible for his oath."). On the origins and development of the Douay Bible, see Bernard Ward, *Douay Bible*, 5 CATHOLIC ENCYCLOPEDIA (1901), available at <http://www.newadvent.org/cathen/05140a.htm>. See also 4 THE NEW CATHOLIC ENCYCLOPEDIA 879-80, s.v. Douai (2003).

<sup>31</sup> Gabrielle Banks, *As Legislative Ranks Become More Diverse, So Do the Books and Words Used to Affirm Duty to Office*, PITTSBURGH POST-GAZETTE, Nov. 19, 2012, at A9, available at 2012 WLNR 24655112. On the differences between the Tanakh and the Christian presenta-

vided.<sup>32</sup> For congressional oaths taken on January 23, 2013, lawmakers could request a text from the Library of Congress, or they could choose from at least nine alternatives on hand for the one-on-one ceremonial oath with the House Speaker, John Boehner.<sup>33</sup> These included: Catholic, Protestant, and Eastern Orthodox Bibles, the Torah, the Qur'an, the Book of Mormon, Hindu Vedas, an ornate box holding Buddhist Sutras, and copies of the U.S. Constitution.<sup>34</sup>

And a couple of months after Ms. Gabbard's oath, when John Brennan took the oath of office as Director of the Central Intelligence Agency, he chose not to swear on any religious text at all, but rather swore his oath of office on a 1789 draft of the Constitution, containing notes taken by George Washington.<sup>35</sup> Mr. Brennan apparently made this choice not to suggest any rejection of religion, but rather to demonstrate that "the United States is a nation of laws."<sup>36</sup> This unobjectionable purpose did not escape the criticism that the particular copy of the Constitution he used did not yet provide for the rights to freedom of speech or religion, which were not added to the Constitution until it was amended in 1791 with the Bill of Rights.<sup>37</sup> Mr. Brennan's choice was not without precedent. In 1825, John Quincy Adams may have taken the presidential oath of office on a volume of laws.<sup>38</sup> Kyrsten

---

tion of the Old Testament, see The Tanakh, THE JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsourc/Judaism/Tanakh.html>.

<sup>32</sup> Banks, *supra* note 31. The late Mayor of New York City, Ed Koch, swore his oath upon the Tanakh when he served as a Member of Congress, as did Henry Waxman. *Id.*

<sup>33</sup> Stephan Dinan & Tom Howell, Jr., *Religious Diversity in Congress Expands List of Holy Texts*, WASH. TIMES, Jan. 4, 2013, at A01, available at 2013 WLNR 287750.

<sup>34</sup> *Id.*

<sup>35</sup> *New CIA Director Can't Escape Controversy*, PITTSBURGH TRIBUNE REVIEW, March 10, 2013, available at 2013 WLNR 6002198.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Donald Kennon, *Historical Perspectives on the Inaugural Swearing In Ceremony*, U.S. DEPARTMENT OF STATE (January 14, 2009), <http://fpc.state.gov/114510.htm>, states: "Adams in his diary notes that he swore the oath on a book of laws. Again, why did he do that? John Quincy Adams was a deeply religious person, but my interpretation is that he did so because as he points out in his diary, he was swearing the oath to uphold the Constitution and laws of the United States, so he took the oath on a book of laws." However, what Quincy Adams wrote in his diary is as follows: "The Senate adjourned, and from the Senate-chamber, accompanied by the members of that body, and by the judges of the Supreme Court, I repaired to the Hall of the House of Representatives, and after delivering from the Speaker's chair my inaugural address to a crowded auditory, I pronounced from a volume of the laws held up to me by John Marshall, Chief Justice of the United States, the oath faithfully to execute the office of the President of the United States, and, to the best of my ability, to preserve, protect, and defend the Constitution of the United States." THE DIARY OF JOHN QUINCY ADAMS, 1794-1848, at 343 (Allan Nevins

Sinema, the only member of the House who admits to no religious affiliation at all, took her 2013 oath of office on the Constitution.<sup>39</sup> Indeed, some members of Congress do not hold any text at all for their swearing in.<sup>40</sup>

For the purpose of taking an oath, the use of the Christian Bible, which includes both the Old Testament (the Jewish scriptures) and the New Testament (the scriptures relating to Jesus Christ), or the use of the New Testament alone, has been traditional and commonplace in Western culture because Christianity was historically the West's predominant religion.<sup>41</sup> However, as non-Christians were permitted to participate more fully in legal proceedings and to work as government officials, the use of other religious texts or symbols, or the non-use of any religious artifact at all, has become more common.<sup>42</sup> Although Prager, who is Jewish, argued that non-Christians could swear on the Bible as the source of the values that animate the American government, the imposition of the Bible as the only means of taking an oath is unacceptable. Such a rule would be a religious test, specifically prohibited by the Constitution,<sup>43</sup> as well as a violation of the Free Exercise and Establishment Clause. But aside from this, for many an oath is a personal commitment to tell the truth or keep a promise, so it is appropriate that the oath-taker not be coerced into professing a religious belief she does not have.

For most people, the oath long ago became a perfunctory form of asserting the truth of a statement or promise with little regard for the religious text that supported the truth of the declaration. Nevertheless, the Biblical text that accompanies the oath creates a difficulty for the oath-taker who places no credence in Christianity. The act of swearing upon the religious text conveys the appearance of a personal faith or belief in the religion represented by the text. For the individual who does not believe in Biblical revelation, the deception is hardly consistent

---

ed., reprinted 1969). The quotation suggests Quincy Adams may have simply been reading the oath of office from a law book that contained the words of the oath as they are set out in the Constitution.

<sup>39</sup> Anita Little, *Here's to the Women Who Won*, MS. MAGAZINE, January 1, 2013, at 28, available at 2013 WLNR 5003005. Although Representative Sinema states she has no religious affiliation, she does not hold herself out as an atheist. Elizabeth Flock, *Noise Control*, U.S. NEWS WEEKLY, Jan. 4, 2013, at 2, available at 2013 WLNR 277762.

<sup>40</sup> Dinan, *supra* note 33.

<sup>41</sup> See *infra* notes 55-66 and accompanying text.

<sup>42</sup> See *infra* notes 74-107 and accompanying text.

<sup>43</sup> See *infra* notes 284-285 and accompanying text.



with a ceremony meant to represent a commitment to truth telling. Indeed, any commitment to be truthful based on a religious belief that one does not hold would appear to be of little value. In the times that required oaths to be sworn upon the Bible, conscientious non-Christians, as well as Christians with religious objections to oath taking, refused to take an oath on the Christian scriptures, and as a result were effectively excluded from legal procedures or public offices.<sup>44</sup>

This Article reviews the history of the struggle to remove the obligation to swear an oath with the Bible or with any religious text or artifact. In view of that history, the Article concludes that the freedom to choose from a variety of religious or secular texts is consistent with arguments that favored the adoption of the No Religious Test Clause of the Constitution at the ratifying conventions of the states. However, the acceptance of this freedom of choice and diversity raises issues of jury bias in regard to courtroom oaths and of political manipulation by religious symbols in regard to oaths of office. The Article concludes that while religious choice may be appropriate for the oath of office, such choice for the oaths of witnesses and jurors is likely to create difficulties that necessitate the complete removal of religious artifacts and expression from the courtroom oath.

## I. THE HISTORY OF THE OATH

Commentators have classified oaths in a variety of ways.<sup>45</sup> In regard to this Article, it will suffice to make use of two broad categories.<sup>46</sup> The first is the testamentary or assertatory oath, which is the oath that a

---

<sup>44</sup> See *infra* notes 74-107 and accompanying text.

<sup>45</sup> BLACK'S LAW DICTIONARY (6th ed. 1990), for example, provides definitions for the following categories of oath: assertatory oath, corporal oath, decisory oath, extrajudicial oath, false oath, judicial oath, loyalty oath or oath of allegiance, oath of office, official oath, poor debtor's oath, promissory oath, purgatory oath, solemn oath, suppletory oath, and voluntary oath. Many of these are specific to ancient judicial systems or judicial procedures that are no longer in use.

<sup>46</sup> The division into two general categories of oaths is common among commentators. See, e.g., JAMES ENDELL TYLER, *OATHS; THEIR ORIGIN, NATURE AND HISTORY* 262 (London, J.W. Parker 1834) (quoting Puffendorf, "[T]his division of oaths into promissory and assertatory may comprehend [all categories] with regard to the two ends or uses now mentioned."); 4 SAMUEL PUFFENDORF, *OF THE LAW OF NATURE AND NATIONS* 352 (Basil Kennett trans., 1729); see also, Thomas Raeburn White, *Oaths in Judicial Proceedings and Their Effect Upon the Competency of Witnesses*, 51 AM. L. REG. 373, 383-84 (1903); Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1334 (1959); Eugene L. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1, 2 (2009); MATTHEW A. PAULEY, *I DO SOLEMNLY SWEAR: THE PRESIDENT'S CONSTITUTIONAL OATH* 117 (1999).

witness takes to guarantee the truth of the witness's testimony. The second is the promissory or loyalty oath, of which the oath of office and the oath of allegiance are types. By such an oath, a person, upon entering public office, promises to faithfully carry out the duties of that office.<sup>47</sup> In this type of oath, the oath-taker often pledges loyalty to a person, state, document, ideal, or religion. These types of oaths are separated by a functional distinction, rather than one of much substance, for they share an underlying similitude based on the oath-taker's commitment to speak the truth: a testamentary oath is in theory a guarantee that what the oath-taker says will be factually truthful, while an oath of office guarantees that what the oath-taker does will be true to the office.<sup>48</sup>

#### A. *The Judicial Oath from its Origins to Omychund v. Barker*

The oath originated as a ritual long before recorded history or established religions.<sup>49</sup> It operated on the basis of imitative magic, the belief that words and gestures could control nature and fate.<sup>50</sup> The primeval oath-taker might have called upon some beast or natural force to harm or destroy her if what she said were false. Such an oath-taker may well have expected, along with her contemporaries, a bad fate for bad

---

<sup>47</sup> PUFFENDORF, *supra* note 46, at 352 ("The two principal Ends to which Oaths may be, and commonly are, applied, are either to strengthen and confirm a Promise by such a solemn Act of Religion; or to open a way to the clearing some Fact, which is at present doubtful, and cannot be conveniently made out any other way.").

<sup>48</sup> Silving, *supra* note 46, at 1334 ("This amorphous concept of truth constitutes the link between the promissory and the assertive or judicial oath.").

<sup>49</sup> *Id.* at 1330 ("The familiar oath of the present-day courtroom has been traced to a pre-religious, indeed, pre-animistic period of our culture."). Scholars derive the evidence and understanding of the prehistoric oath from the practices of primitive communities today. White, *supra* note 46, at 374 ("The evidence of the customs of prehistoric times must be found largely in survivals of those customs, particularly among primitive tribes as they now exist."); Milhizer, *supra* note 46, at 6 ("Oaths are a virtually universal custom, which precede the type of recorded history that would allow for a complete analysis of their origin. The evidence of oaths among prehistoric cultures survives today only to the extent that the custom itself has endured, often through the venerable practices of primitive tribes.").

<sup>50</sup> Silving, *supra* note 46, at 1330 ("Supernatural beings were unknown, and man believed that he possessed magic power which could produce any desired result. A vehicle of this power was the curse, which could kill as effectively as physical force. It worked through the magic inherent in the word or the magic act. . . . The oath as self-curse continued to operate automatically, by virtue of the inherent magic of word or gesture, after the onset of the animistic period and even after the 'discovery' of divine beings.").

faith.<sup>51</sup> With the development of the belief in divine beings, the oath came to depend upon the gods to act as the agents of punishment for the perjurer.<sup>52</sup> The Greek Zeus and the Roman Jupiter were both thought to strike perjurers with lightning.<sup>53</sup> As Helen Silving put it, "In all its forms, . . . the oath remains essentially a self-curse, even when disguised as a blessing or an invocation of God's testimony. The curse 'is part of the oath, as the threat of punishment is part of the law.' The oath, then, is in origin and essence, a conditional self-curse or imprecation."<sup>54</sup>

According to the medieval English jurist, Henry Bracton (1210-1268), jurors were sworn with the words, "So help me God and these hallowed things."<sup>55</sup> He later explains that if the judges do not know how to judge a case, they must have "recourse to a greater counsel."<sup>56</sup> He then describes an oath "which is tendered by a party to a party in judgment or by a judge to a party, in which there is no conviction. For it is sufficient for them to wait for the vengeance of God."<sup>57</sup> Another medieval jurist, John de Britton, defined the oath as "an affirmation or denial of anything, whereby a person is charged upon peril of his soul to speak the truth; and it was provided on account of people difficult of

<sup>51</sup> Milhizer, *supra* note 46, at 6 ("The ancient manner of making an oath typically involved an individual calling upon a beast or thing of nature (the sun, a river, etc.) to witness the truth of what was spoken and wreak havoc on the individual – through consumption or some other form of destruction – if his words were false."); White, *supra* note 46, at 374 ("It is said that in Siberia, when a member of the wild tribe of Ostyaks is to be a witness, the head of a wild boar is brought into court. The Ostyak will then imitate the actions of the boar in eating and call upon wild boars in general to devour him if he does not speak the truth.").

<sup>52</sup> Silving, *supra* note 46, at 1331 ("As divine beings gained significance, the curse ceased to exist as an independent being and gods became the tools whereby the oath was caused to operate.").

<sup>53</sup> *Id.* at 1330-31.

<sup>54</sup> Silving, *supra* note 46, at 1336 (quoting RUDOLF HIRZEL, *DER EID, EIN BEITRAG ZU SEINER GERSCHICHTE* 139 (1902)). Cf. MICHAEL GAGARIN & ELAINE FANTHAM, eds., 5 *THE OXFORD ENCYCLOPEDIA OF ANCIENT GREECE AND ROME* 83 (2010) ("An oath is, in effect, a conditional self-curse . . ."). See also, Milhizer, *supra* note 46, at 6 ("Oaths are a virtually universal custom, which precede the type of recorded history that would allow for a complete analysis of their origin. . . . These self-curse customs acted as a guarantor of truth insofar as the witness believed that a false statement would result in his imminent peril; . . .").

<sup>55</sup> Milhizer, *supra* note 46, at 21 n.88 (quoting 3 HENRY OF BRACTON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 187 (Travers Twiss trans., 1880)).

<sup>56</sup> *Id.* at 21 (quoting 3 HENRY OF BRACTON, *supra* note 55, at 407).

<sup>57</sup> *Id.*

belief that oaths should be taken upon the holy Gospels of God for avoidance of idolatry."<sup>58</sup>

In England, then, the oath was predicated on the idea that God would favor the truthful and punish the false, and was taken upon the Holy Scripture or other religious artifacts to indicate the source of this justice and the oath-taker's hope for salvation, which would be lost if the person lied. Because the efficacy of the oath in eliciting truth was based upon the oath-taker's belief in God and God's justice and the hope of salvation promised in the Gospels, only those who had this belief and hope based on the Bible, that is, Christians, could take the oath to be jurors, witnesses, or government officials. The most significant English legal authority following Bracton was Lord Edward Coke (1552-1634).<sup>59</sup> He defined the oath as an affirmation or denial by a Christian.<sup>60</sup> He argued that an oath "ought to be accompanied with the fear of God."<sup>61</sup> Indeed, the oath of a witness is "so sacred, as he calleth Almighty God (who is truth itself and cannot be deceived, and hath knowledge of the secrets of the heart) to witness that which he shall depose."<sup>62</sup> Because the non-Christian did not believe the Christian promise of salvation, taking an oath on the Bible would not instill any fear of damnation and therefore fail to obligate such a person to tell the truth. Citing Bracton for the proposition that an "alien infidell" cannot be a witness, Coke excluded all non-Christians from taking an oath.<sup>63</sup> Coke also found it unacceptable for any non-Christian to take an oath on scriptures or by ceremonies which were not Christian because such

---

<sup>58</sup> BRITTON: AN ENGLISH TRANSLATION AND NOTES 501 (Francis Moran Nichols trans., 1901) (Britton describes the oath procedure: "[L]et the first juror, touching the Gospels, swear after this manner, 'Hear this, ye Justices, that I will speak the truth . . . and I will not fail for anything to speak the truth, so help me God and the Saints.' Then let the Gospels be kissed with all reverence as our faith and salvation.").

<sup>59</sup> Milhizer, *supra* note 46, at 22 ("Although more than 350 years and many important developments in the law separate Bracton and Lord Edward Coke, no other writer made as significant or authoritative contributions to the common law as the latter.").

<sup>60</sup> 22 EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 164 (London, W. Clarke & Sons 1809) ("An oath is an affirmation or deniall by any Christian of anything lawfull and honest, before one or more, that have authority to give the same for advancement of truth and right, calling Almighty God to witnesse, that his testimony is true.").

<sup>61</sup> EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 278 (London, W. Clarke & Sons 1809) [hereinafter COKE, THE FOURTH PART OF THE INSTITUTES].

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* ("Bracton saith that an alien born cannot be a witnesse: which is to be understood of an alien infidel.").

an oath would be a form of idolatry, and it would be impermissibly sinful for Christians to induce anyone to swear by idolatrous gods and false beliefs.<sup>64</sup> The only exception to this rule, Coke notwithstanding, were the Jews, who were allowed to testify based on the common heritage of the Old Testament they shared with Christians.<sup>65</sup> Finally, Coke held that only Parliament could modify or change the ancient form of the oath.<sup>66</sup>

This discrimination based on religion, odious as it may be to the contemporary sensibility, was the common logic and practice until the early modern period.<sup>67</sup> The leaders of states insisted on religious conformity because they assumed they were adhering to the one true religion, and believed they were honoring God and furthering the spiritual well being of their subjects by forcing them to accept the religion of the state.<sup>68</sup> Such leaders also thought that religious conformity was beneficial to the state because it maintained political stability and social peace.<sup>69</sup> The first influential rejection of these policies was *A Letter Con-*

---

<sup>64</sup> COKE, THE FOURTH PART OF THE INSTITUTES, *supra* note 61, at 155. Coke believed that if an “infidel or pagan prince may swear in the case by false gods, seeing he thereby offends the true God by giving divine worship to false gods,” and “a Christian should any way induce another to swear by them, herein he should grievously sin.” *Id.*

<sup>65</sup> See White, *supra* note 46, at 388 & n.27 (“As a matter of fact, however, [Jews] were admitted even before the authority of Coke’s statement was finally overthrown.”); Milhizer, *supra* note 46, at 22 n.92 (“Recognizing a common heritage and shared faith in the same God, Jews were allowed to testify as witnesses.”). White adds, “Lord Coke, who is said to have been an ardent hater of Catholics, even went so far as to exclude popish recusants and all excommunicated persons from being witnesses.” COKE, THE FOURTH PART OF THE INSTITUTES, *supra* note 46, at 388 n.28.

<sup>66</sup> EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, 479 (London, E. & R. Brooke, 1797) (“A new oath cannot be imposed upon any judge, commissioner, or any other subject without authority of parliament, as here it was but the giving of every oath must be warranted by act of parliament, or by the common law time out of mind.”).

<sup>67</sup> Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundation of American Religious Liberty*, 32 CARDOZO L. REV. 1755, 1757-58 (2011) (“Prior to . . . ‘the Lockean revolution,’ governments in the Western world tended toward regimes of coerced religion. . . . Many maintained formal religious establishments, complete with coerced religious conformity, taxes supporting the established religion, and compelled religious observance.”).

<sup>68</sup> *Id.* at 1758 (“[I]t was widely understood that there is but one true religion, and the leaders of each nation-state . . . believed that their own version of Christianity was that one. . . . By insisting on religious conformity, the states themselves were honoring God by using the power of the state to force all citizens – and therefore the polity as a whole – to honor God’s will. In addition, they were furthering, paternalistically, the individual religious well-being of their citizens, including dissenters, by leading them down the one true path to religious salvation.”).

<sup>69</sup> *Id.* (“[I]t was believed that enforcing a common religion promoted the state’s interest in political stability and social peace . . . . First, the religion served as a type of social glue, unifying

*cerning Toleration* by John Locke.<sup>70</sup> In regard to the spiritual welfare of those subject to the state, Locke argued that forced conversion is a worthless, if not counterproductive, means of saving souls. Only the voluntary acceptance of a religion can be efficacious for salvation.<sup>71</sup> As to the stability of the state, Locke argued that it was the very persecution of religious dissenters that contributed to sedition and rebellion.<sup>72</sup> For these and other reasons, Locke argued for a separation between the interests of the church and the state in which,

[t]he care of each man's soul and of the things of heaven, which neither does belong to the commonwealth nor can be subjected to it, is left entirely to every man's self. Thus the safeguarding of men's lives and of the things that belong unto this life is the business of the commonwealth: and the preserving of those things unto their owners is the duty of the magistrate.<sup>73</sup>

Religious tolerance would be the result of this separation, so that the magistrate would not exercise any power over religious practice and belief that did not affect the security and safety of the state, and the church did not attempt to use the power of the state to impose any religious practice or belief on others.

The judges who presided in the case of *Omychund v. Barker*, decided in 1744, reflect a great deal of the spirit and thinking of Locke's *Letter Concerning Toleration*. *Omychund* swept away the exclusivity of the Christian oath in English courts.<sup>74</sup> The question in this case was

---

society by giving citizens a uniform sense of meaning and purpose. Second, the state's promotion of this religion encouraged a reciprocal, religion-based motivation for supporting and obeying the governing regime.").

<sup>70</sup> JOHN LOCKE, A LETTER CONCERNING TOLERATION 33 (J. Cockin, ed., William Popple trans., 1796) (1689).

<sup>71</sup> *Id.* ("How great soever . . . may be . . . concern for the salvation of men's souls, men cannot be forced to be saved whether they will or no. And therefore, when all is done, they must be left to their own consciences.").

<sup>72</sup> *Id.* at 69. "[T]here is only one thing which gathers people into seditious commotions, and that is oppression. . . . It is not diversity of opinions, . . . but the refusal of toleration to those that are of different opinion . . . that has produced all the bustles and wars that have been in the Christian world upon account of religion." *Id.* at 59.

<sup>73</sup> *Id.* at 52.

<sup>74</sup> *Omychund v. Barker* (1744) 26 Eng. Rep. 15 (K.B.). See White, *supra* note 46, at 389 ("However the error may have arisen, it was recognized to be an error by the great case of *Omychund v. Barker* in 1744, by which all preceding authorities were swept aside."); Milhizer, *supra* note 46, at 24 ("*Omychund v. Barker* marks a major change in the common law and presages modern Western oath practices. *Omychund* set aside the extant common law practice,

whether to admit the testimony of two witnesses who were members of the "Gentoo" or Hindu religion.<sup>75</sup> In his opinion, Chief Justice Willes stated, "[I]t would be absurd for [a non-Christian] to swear according to the Christian oath, which he does not believe; and therefore, out of necessity, he must be allowed to swear according to his own notion of an oath."<sup>76</sup> He held that the oath was not a uniquely Christian ritual. "[O]aths are as old as the creation; look into sacred history, and you will find a variety of instances . . ."<sup>77</sup> Furthermore, "[t]he nature of an oath is not at all altered by Christianity, but only made more solemn from the sanction of rewards and punishments being more openly declared."<sup>78</sup> In regard to the form of the oath, Chief Baron Parker stated, "It is plain that by the policy of all countries, oaths are to be administered to all persons according to their own opinions, and as it most affects their conscience, and laying the hand was originally borrowed from the pagans."<sup>79</sup> Regarding Coke's rule, Chief Justice Willes observed, "the notion [that non-Christians cannot be sworn], though advanced by so great a man, is contrary to religion, common sense, and

---

endorsed by Coke, which allowed only Christian oaths sworn by Christians so that *any believer in a superior being may be sworn on whatever oath is most binding on his conscience.*"

<sup>75</sup> *Omychund*, 26 Eng. Rep. at 15 (The case arose in Calcutta. The plaintiff, Mr. Omychund, claimed that he had advanced Mr. Barker a sum of money for buying goods and in consideration was to receive interest of 12%. Having sold the goods, Barker did not pay Omychund. Omychund filed a claim for a sum of 67,955 rupees, or £ 7,600. Barker left Calcutta and died on the voyage. The suit continued against Barker's estate. The plaintiff's two witnesses, Ramkissenseat and Ramchurnecooborage, were adherents of the Gentoo or Hindu religion. They presented their testimony as follows: "[T]he oath prescribed to be taken by the witnesses was interpreted to each witness respectively; after which they did severally with their hands touch the foot of the bramin or priest of the *Gentoo* religion, being also before us with another bramin or priest of the same religion, the oath prescribed to be taken by the witnesses was interpreted to him; after which *Neenderam Surmah*, being himself a priest, did touch the hand of the bramin, the same being the usual and most solemn form, in which oaths are most usually administered to witnesses who profess this *Gentoo* religion, and the same manner in which oaths are usually administered to such witnesses in the courts of justice, erected by letters patents of the late king at Calcutta."). The court uses the term "gentoo," which the OXFORD ENGLISH DICTIONARY (2d ed. 1989) defines as, "A pagan inhabitant of Hindostan, opposed to Mohammedan; a Hindoo."

<sup>76</sup> *Omychund*, 26 Eng. Rep. at 31.

<sup>77</sup> *Id.* at 30 (As to earlier authority, Chief Justice Willes stated, "I lay no stress upon the authority of *Bracton*, *Briton*, and *Fleta*, for they lived in popish times, when no other trade was carried on except the trade of religion; and I hope such times will never come over again; it is very plain too, those ancient authorities spoke only of Christian oaths.").

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 29.

common humanity, and I think the devils themselves, to whom he has delivered them, could not have suggested anything worse."<sup>80</sup>

As a result, the court ordered "the deposition of witnesses of the Gentoo religion, sworn according to their ceremonies, ought upon the special circumstances of this case to be read as evidence in the cause."<sup>81</sup> The particular ceremony for taking a "Gentoo" oath was to touch the foot of a Brahmin or a priest while testifying.<sup>82</sup> The *Omychund* decision led to the frequent recitation, in later court opinions and handbooks on evidence, of a list of religious ceremonies by which non-Christians could take an oath. The following is typical: "A Jew may be sworn on the Pentateuch or Old Testament, with his head covered, a Mohammedan on the Koran, a Gentoo, touching with his hand the foot of a Brahmin or priest of his religion, a Chinese, by breaking a china saucer."<sup>83</sup> However, the court's liberality did not extend to nonbelievers, as the *Omychund* court found that "such infidels (if any such there be) who either do not believe in a God, or if they do do not think that He will either reward or punish them in this world or in the next, cannot be witnesses."<sup>84</sup> The exception reflected a limitation that Locke favored as

<sup>80</sup> *Id.* at 30.

<sup>81</sup> *Id.* at 15.

<sup>82</sup> See *supra* note 75.

<sup>83</sup> Milhizer, *supra* note 46, at 60 (quoting *United States v. Miller*, 236 F. 798, 799-800 (W.D. Wa. 1916)). Compare other early examples: "But to this, it has been answered . . . that other legal proof, is put in opposition to solemn affirmation . . . whether administered upon the Gospels to a Christian, or upon the Pentateuch to a Jew; whether with the solemnity of an uplifted hand, according to some sectaries; or with the ceremonial of the hand placed beneath the thigh, as it is practiced by the Gentoo nations." *Lewis v. Maris*, 1 U.S. 278, 288 (1788). "By the law of *England*, which has been adopted in this state, it is fully and clearly settled, *that* . . . *Mahometans* may be sworn on the *Koran*; *Jews* on the *Pentateuch*, and *Gentoo*s and others, according to the ceremonies of their religion, whatever may be the form. It is appealing to *God* to witness what we say, and invoking punishment, if what we say be false. (*Willes's Rep.* 549. 1 *Atk.* 45. *Str.* 1104. *Morgan's case*, *Leach's Cr. C.* 64.)." *Jackson, ex dem. Tuttle v. Gridley*, 18 Johns. 98 (N.Y. Sup. 1820). See also *Wellborn v. Younger*, 3 Hawks 205, 1824 WL 346, at \*2 (N.C. 1824); *Atwood v. Welton*, 7 Conn. 66, 1828 WL 50, at \*3 (Conn. 1828); and *Harvey v. Boies*, 1 Pen. & W. 12, 1829 WL 2642 at \*2 (Pa. 1829).

<sup>84</sup> White, *supra* note 46, at 391 (quoting ADJUDGED CASES IN THE COURT OF COMMON PLEAS DURING THE TIME OF LORD CHIEF JUSTICE WILLES 549 (1802)). The version in the English Reports is slightly different. "Though I have shown that an Infidel in general cannot be excluded from being a witness, and though I am of opinion that infidels who believe a God, and future rewards and punishments in the other world, may be witnesses; yet I am as clearly of opinion, that if they do not believe a God, or future rewards and punishments, they ought not to be admitted as witnesses." *Omychund*, 26 Eng. Rep. at 31. The Report from *Adjudged Cases* quoted by White makes it clear that belief in punishment during life or after death is immaterial, while the English Report does not.



well. "[T]hose are not at all to be tolerated who deny the being of God."<sup>85</sup> Indeed, Locke considered the oath to be essential to civil society, and the inability of the atheist to take an oath for lack of belief in God was a major reason for Locke's intolerance. "Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of god, though but even in thought, dissolves all."<sup>86</sup> Another reason Locke did not favor the toleration of non-religion was that he regarded it as corrosive to religion. "[T]hose that by their atheism undermine and destroy all religion, can have no pretense of religion whereupon to challenge the privilege of a toleration."<sup>87</sup> Thus, after *Omychund*, the common law still considered atheists incompetent to testify because their guarantee of truthfulness was not supported by a belief in a higher power that would punish them if they testified falsely.

#### B. *Conscientious Objections to the Oath to the American Constitution*

In a separate development that was later to resolve this issue for atheists, the rise of the Quakers, or the Society of Friends, in the mid-seventeenth century presented a distinct problem for English jurisprudence.<sup>88</sup> Quakers believed it was sinful to swear an oath because of its obligatory invocation of the name of God and self-curse.<sup>89</sup> Because they refused to swear an oath, English courts barred Quakers from giving testimony or being jurors, even fining them, despite their reputation for

---

<sup>85</sup> LOCKE, *supra* note 70, at 56.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> George Fox (1624-1691) is credited as the chief founder of the Society of Friends, or Quakers. As a young man he traveled around the midlands speaking with ministers and priests, and eventually acquired the vision of a more genuine Christian practice through "openings" or insights into the Bible which he experienced in 1646-47. 5 ENCYCLOPEDIA OF RELIGION, *supra* note 18, at, 3180-81, s.v. Fox, George (2005). See also GEORGE FOX, THE JOURNAL OF GEORGE FOX (Cambridge 1911).

<sup>89</sup> On the Quaker objection to oaths, see HUGH BARBOUR & U.J. WILLIAM FROST, THE QUAKERS 41-42 (1988). The early Christians were reluctant to swear because of the apparent prohibition against swearing in Matthew 5:33-37. "Again, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you, Swear not at all; neither by heaven; for it is God's throne: Nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil." *Matthew* 5:33-37 (King James). See also *James* 5:12 (King James) ("But above all things, my brethren, swear not, neither by heaven, neither by the earth, neither by any other oath: but let your yea be yea; and your nay, nay; lest ye fall into condemnation.").

honesty.<sup>90</sup> In 1688, Parliament passed a statute providing some relief by allowing Quakers to substitute a "declaration of fidelity" for the oath of allegiance to the British government.<sup>91</sup> In 1696, Parliament passed another statute that allowed Quakers to testify in court by affirmation in certain cases.<sup>92</sup> This form of affirmation was not completely acceptable to the Quakers because it still contained a reference to God.<sup>93</sup> Parliament again acted and in 1721 revised both the oath of loyalty and the judicial oath to be taken by Quakers.<sup>94</sup> Later acts of Parliament extended the affirmation to Moravians and Separatists and to persons of any denomination who claimed to have a conscientious objection to the oath.<sup>95</sup> Finally, in 1888, British law extended permission to testify upon affirmation to atheists.<sup>96</sup>

The laws of Great Britain were brought to the colonies and enforced there as well.<sup>97</sup> Because of its Quaker founding, the colony of

---

<sup>90</sup> White, *supra* note 46, at 420 & n.85; Milhizer, *supra* note 46, at 37-38.

<sup>91</sup> White, *supra* note 46, at 420; Milhizer, *supra* note 30, at 38; 1 W. & M., c. 18 (1688) (Eng.).

<sup>92</sup> 7 & 8 Will. 3, c. 34 (1696) (Eng.) ("I, A.B., do declare in the presence of Almighty God the Witsse of the Truth of what I say."); White, *supra* note 46, at 421; Milhizer, *supra* note 46, at 38.

<sup>93</sup> White, *supra* note 46, at 421.

<sup>94</sup> 8 Geo. 2, c. 6 (1721) (Eng.) ("I, A.B. do solemnly, sincerely and truly declare and affirm.")

<sup>95</sup> 12 Geo. 2, c. 13 (1739) (Eng.) (permitting Quakers to be admitted as attorneys or solicitors upon affirmation rather than oath); 22 Geo. 2, c. 46 (1749) (Eng.) (extending affirmation of Quakers to all circumstances requiring an oath); 9 Geo. 4, c. 32 (1828) (Eng.) (extending the right to affirm in civil and criminal cases to Moravians as well as Quakers); 3 & 4 Will. 4, c. 49 (1833) (Eng.) (extending the right of affirmation to Quakers and Moravians in all instances where an oath is required); 1 & 2 Vict., c. 77 (1838) (Eng.) (permitting former Quakers and Moravians to affirm); 6 & 7 Vict., c. 22 (1843) (Eng.) (allowing colonial legislation permitting admissibility of testimony by non-Christian inhabitants); 17 & 18 Vict., c.125 (1854) (Eng.) (permitting anyone who has a religious objection to taking an oath, to affirm instead with the words, "I, A.B. do solemnly, sincerely, and truly affirm and declare, That the taking of any Oath is according to my religious Belief, unlawful, and I do also solemnly, sincerely, and truly affirm and declare *etc.*"); 32 & 33 Vict., c. 68 (1869) (Eng.) (permitting any person called to give evidence in any court of justice to state under penalty of perjury, "I promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth.").

<sup>96</sup> 51 & 52 Vict., c. 46 (1888) (Eng.) (extending the right of affirmation to anyone with a conscientious objection, including atheists: "Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law.").

<sup>97</sup> White, *supra* note 46, at 422; Milhizer, *supra* note 46, at 38.

Pennsylvania had an interest in modifying the form of the oath, and, indeed, in 1682, William Penn and his followers agreed to a statute requiring that testimony be given in court by affirmation alone, and not oath, without any religious reference at all.<sup>98</sup>

All witnesses, coming or called to testify their knowledge in or to any matter or thing in court, or before any lawful authority within the said province, shall there give or deliver in their evidence or testimony, by solemnly promising to speak the truth, the whole truth, and nothing but the truth, to the matter or thing in question.<sup>99</sup>

In 1903, White characterized this law to be "far in advance of any English law of that day and indeed of this day."<sup>100</sup> Perhaps that statement still holds. The British Parliament repealed the colonial law in 1693, only to replace it with the Act of 1696, for Quakers in both Britain and America.<sup>101</sup>

From *Omychund* the colonies inherited as common law the rule that non-Christians may take oaths according to the ceremonies of their respective religions.<sup>102</sup> American courts followed this rule.<sup>103</sup> Presumably, late colonial and early state courts would apply that rule, as in *Lewis v. Maris*, decided in 1788.

But to this, it has been answered . . . that other legal proof, is put in opposition to solemn affirmation, . . . whether administered upon the Gospels to a Christian, or upon the Pentateuch to a Jew; whether with

---

<sup>98</sup> White, *supra* note 46, at 422; Milhizer, *supra* note 46, at 38.

<sup>99</sup> White, *supra* note 46, at 422 (quoting 1 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 40 (1852)).

<sup>100</sup> The statute continues, "And in case any person so called to evidence shall be convicted of willful falsehood, such person shall suffer and undergo such damage or penalty, as the person or persons against whom he or she bore false witness, did or should undergo; and shall also make satisfaction to the party wronged, and be publicly exposed as a false witness, never to be credited in any court, or before any magistrate, in the said province." 1 MINUTES OF THE PROVINCIAL COUNCIL, *supra* note 99, at 40.

<sup>101</sup> White, *supra* note 46, at 422; Milhizer, *supra* note 46, at 38.

<sup>102</sup> White, *supra* note 46, at 422-23; Milhizer, *supra* note 46, at 38.

<sup>103</sup> Milhizer, *supra* note 46, at 27 & n.112 (citing, among others, Herbert Pope, *the English Common Law in the United States*, 24 HARV. L. REV. 6, *passim* (1910) (finding that the English common law was persuasive rather than mandatory authority in the colonies); and Harlan Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 10-13 (1936)) ("[T]he common law practice of allowing a witness to be sworn by whatever means were most binding on his conscience would be brought to the New World. . . . English common law was the law of colonial America.").

the solemnity of an uplifted hand, according to some sectaries; or with the ceremonial of the hand placed beneath the thigh, as it is practiced by the Gentoo nations.<sup>104</sup>

By the time of the Declaration of Independence, most of the colonies also had provided for the right of Quakers and other religious dissenters to affirm rather than take an oath by statute.<sup>105</sup> However, statutes allowing affirmation were strictly construed so as to apply to the members of the religious sects specifically accommodated by law and no others. Thus, a person who had a conscientious objection to the oath but who did not belong to a religious denomination exempt by statute from taking the oath was not allowed to provide testimony by affirmation.<sup>106</sup> As for an avowed atheist, the *Omychund* case made it clear that the right to take an oath in accordance with the ceremonies of one's religion did not allow nonbelievers to testify since they had no religion.<sup>107</sup> In any event, even before the founding of the United States, the common law allowed non-Christians to swear by their equivalent religious ceremonies in a judicial proceeding and allowed Christians with conscientious objections to the oath to affirm. The issue of the loyalty oath, however, was not as clear.

---

<sup>104</sup> *Lewis v. Maris*, 1 U.S. 278, 288 (1788). See also other opinions cited, *supra* note 83; and *infra* notes 189-203 and accompanying text concerning the arguments of Charles Iredell.

<sup>105</sup> White, *supra* note 46, at 423 ("At the time of the Declaration of Independence the law in England allowed only 'Quakers' to affirm . . . in brief, the thirteen original colonies provided for the affirmation of Quakers; some included Dunkers and Mennonites, and a few all persons having religious scruples against swearing. Some had no express provision, but in their absence the law would stand as it was before the Declaration of independence, *i.e.* Quakers only could affirm.").

<sup>106</sup> Milhizer, *supra* note 46, at 39 n.163, cites cases: *In re McIntire's Case*, 1 D.C. (1 Cranch) 157 (1803) (affirmation by a juror not a Quaker, and not attached to any particular religious sect, was not permitted); *In re Bryan's Case*, 1 D.C. (1 Cranch) 151 (1804) (juror not allowed to make affirmation in lieu of oath, on the ground that he was a Methodist, where it was not contrary to the principles of that religious society to take an oath); *King v. Fearson*, 3 D.C. (3 Cranch) 435 (1829) (affirmation instead of oath permitted where the witness had applied for admission to full participation in the membership of the society of Quakers, and usually met with them for worship). See also *Scott v. Hooper*, 14 Vt. 535, 537-38 (1842) ("Nor does the case of Quakers, or persons admitted by statute to testify under affirmation have any bearing on the question submitted. They are admitted by statute. And, moreover, the pains and penalties of perjury comprised in the oath of affirmation are not limited to the statute punishment, but extend to divine punishment denounced against bearing false witness. . . . It having been proved that the witness, several months before the trial, repeatedly and seriously declared his disbelief in the existence of a God, his recantation, at the time and under the circumstances detailed in the bill of exceptions, did not restore his competency.").

<sup>107</sup> See *supra* notes 84, 106 and accompanying text.

## II. THE ENGLISH OATHS OF LOYALTY

The peculiar history of the loyalty oath in Great Britain was to have a very specific influence on the Constitution of the United States. With the rise of the modern British state, the English monarch, and later Parliament, attempted to exact greater control over the people than the old feudal system provided. In 1534, Henry VIII modified the Coronation Oath to make obedience to the King unconditional,<sup>108</sup> and replaced the feudal oath of allegiance with the Oath of Succession and the Oath of Supremacy, both of which had the effect of renouncing the religious authority of the Pope and of making the King of England the head of the Church in England.<sup>109</sup> His successors followed this example. Elizabeth enacted another Oath of Supremacy of 1559.<sup>110</sup> James I provided for the Oath of Allegiance of 1606.<sup>111</sup> Parliament later attempted to arrogate allegiance to itself with A Solemn League and Covenant of 1643<sup>112</sup> and A Sacred Vow and Covenant of 1645.<sup>113</sup> During the Protectorate, Parliament claimed allegiance by means of the Engagement of 1649, and then Oliver Cromwell did likewise through the Protectorate Oath of 1654.<sup>114</sup> During the Restoration, Charles II reinstituted the Oaths of Succession and Supremacy and added other oaths from 1661 to 1665.<sup>115</sup> When the Glorious Revolution ousted King James II, Parliament placed William and Mary on the throne, and

---

<sup>108</sup> Supremacy of the Crown Act 1534, 26 Hen. 8, c. 1 (Eng.). By “[n]egating the element of popular consent in the coronation oath,” Tudor officials conveyed “to subjects that the monarch owed his appointment directly to God and that he exercised an authority for which he was accountable to God alone.” DAVID MARTIN JONES, *CONSCIENCE AND ALLEGIANCE IN SEVENTEENTH CENTURY ENGLAND: THE POLITICAL SIGNIFICANCE OF OATHS* 26 (1999). See also EDWARD VALLANCE, *REVOLUTIONARY ENGLAND AND THE NATIONAL COVENANT* (2005); and CONAL CONDREN, *ARGUMENT AND AUTHORITY IN EARLY MODERN ENGLAND* (2001).

<sup>109</sup> JONES, *supra* note 108, at 30-31 (the Oath of Succession, “implicitly renounced the spiritual supremacy of the Pope,” and the Oath of Supremacy accepted “the King’s majesty as the only supreme head in earth of the Church of England.”).

<sup>110</sup> *Id.* at 48, 271-72 (with this oath Queen Elizabeth continued Henry VIII’s effort to extract recognition that the English monarch was the head of the Church of England).

<sup>111</sup> *Id.* at 44, 272-73 (with this oath, James I attempted to separate politically disloyal Catholics from those who accepted the Protestant monarchy).

<sup>112</sup> *Id.* at 125, 275-78 (this oath attempted to impose reforms on the Church of England modeled on Scottish Presbyterianism in order to bring the Scots into the Civil War on the side of Parliament).

<sup>113</sup> *Id.* at 274-75 (by this oath Parliament attempted to exact allegiance to itself rather than to the King).

<sup>114</sup> *Id.* at 278-79.

<sup>115</sup> *Id.* at 279-80 (these oaths indicated there were no circumstances under which subjects could lawfully resist the King).

enacted oaths to secure allegiance to them.<sup>116</sup> Thus, English subjects were successively required to take oaths of loyalty to the King, then to Parliament, then to the dictator Cromwell, then to the King again, and then to Parliament's choice for King and Queen. At various times, virtually anyone could be required to take the oaths, and the punishment for refusal ranged from fines, to exclusion from public office, to confiscation of property, to the death penalty for high treason in the event of a second refusal.<sup>117</sup>

The English colonists who settled in America had to take the same oaths.<sup>118</sup> In 1634, Massachusetts developed a loyalty oath to the colony that the English government suppressed in 1684.<sup>119</sup> At the outset of the American Revolution, every one of the colonies developed its own loyalty oath.<sup>120</sup> As the war went on, the British military authorities demanded that Americans living in areas occupied by the British take oaths to the crown, while the American military authorities demanded oaths supporting the revolutionary forces.<sup>121</sup>

Many British oaths included explicit religious statements, which made it difficult, if not impossible, for Catholics, Jews, and minority Protestant sects to take the oaths for public office. These were religious tests. For example, the Oath of Supremacy, instituted by Elizabeth I, required the oath-taker to swear that the Queen was "the only supreme governor of this realm . . . in all spiritual or ecclesiastical things or causes, and that no foreign prince, person, prelate, state or potentate

---

<sup>116</sup> *Id.* at 280-81 (these oaths directed loyalty to William and Mary, who were not in the line of succession, but rather were chosen by Parliament upon the forced abdication of James II).

<sup>117</sup> JONES, *supra* note 108, at 270-71. Sir Thomas More was executed for treason in 1539 because he refused to take the Oath of Supremacy. 4 THE NEW CATHOLIC ENCYCLOPEDIA, *supra* note 30, at 890.

<sup>118</sup> HAROLD M. HYMAN, TO TRY MEN'S SOULS: LOYALTY TESTS IN AMERICAN HISTORY 11 (1959) ("[W]hether as members of the initial commercial organization of the Anglican Virginia colony or under its later royal control, as participants in the search for an independent theocracy which the Calvinist Puritans pursued in New England, or as adventurers in the Catholic proprietary colony of Maryland, new Americans carried their heritage of England's loyalty problems with them.").

<sup>119</sup> *Id.* at 40-46.

<sup>120</sup> *Id.* at 85 ("Each state had, by 1778, created a loyalty test for all its residents to swear.").

<sup>121</sup> *Id.* at 74-75, 78 (Hyman relates how, in late 1775 to 1776, "George Washington and the Continental Army entered the loyalty-testing business" and "launched loyalty-testing expeditions into the heavily Tory and strategically important Rhode Island and Long Island areas." A year later, "General Howe's redcoats flooded across Long Island, New York City, and New Jersey . . . . In the areas abandoned in the face of British might, thousands of civilians, firmly sworn to Whig allegiance, welcomed the royal forces with no apparent taint of conscience.").

hath or ought to have any jurisdiction, power, superiority, pre-eminence or authority ecclesiastical or spiritual within this realm.”<sup>122</sup> The Oath of Abjuration that Parliament passed during the Interregnum, required the oath-taker to renounce Catholic doctrines, such as Transubstantiation, the existence of Purgatory, and Salvation by Works.<sup>123</sup> The Corporation Act of 1661 and legislation amending it passed in 1673 and 1678 required members of both the House of Commons and the House of Lords and anyone who was to fill any other civil or military office to receive the sacrament of communion of the Church of England within a year of election or appointment.<sup>124</sup> This excluded religious minorities from government office, Parliament most notably.<sup>125</sup>

In 1716, Thomas Bede, writing on the history of oaths in Great Britain, stated that certainly “no nation in the world has invented more variety of oath.”<sup>126</sup> John Selden facetiously commented in 1686: “Oaths are so frequent, they should be taken like Pills, swallowed whole;

---

<sup>122</sup> Act of Supremacy, 1558, 1 Eliz. 1, c. 1, § 9 (Eng.) (this oath was to be taken by “clergy, justices, mayors and other lay officers). See also Act of Supremacy, 1562, 5 Eliz. 1 (Eng.) (imposing a revised version of the oath on “all persons in Holy Orders, university graduates, schoolmasters, lawyers, and court officials, and all future Members of the House of Commons.”); CHRIS SEAR, HOUSE OF COMMONS LIBRARY, THE PARLIAMENTARY OATH 16 (Dec. 14, 2001), available at <http://www.parliament.uk/briefing-papers/RP01-116> (the first Oath of Supremacy was instituted by Henry VIII, “essentially as a political weapon against Roman Catholics.”). The 1609 Oath of Allegiance under James I stated, “[a]nd I do further swear that I do from my heart abhor, detest, and abjure, as impious and heretical this damnable doctrine and position,—that princes which be excommunicated by the pope may be deposed or murdered by their subjects or by any other whatsoever.” Popish Recusants’ Act 1605, 3 Jac. 1, c. 4 (Eng.). See also Oath of Allegiance Act 1609, 7 Jac. 1, c. 6 (Eng.).

<sup>123</sup> An Ordinance for Explanation of a Former Ordinance for Sequestration of Delinquents Estates with Some Enlargements, August, 1643, in *ACTS AND ORDINANCES OF THE INTERREGNUM, 1642 – 1660* (C.H. Firth & R.S. Rait eds., 1911), available at <http://www.british-history.ac.uk/report.aspx?compid=55851> (“I . . . Do abjure and renounce the Pope’s Supremacy and Authority over the Catholic Church in General, and over myself in Particular; And I do believe that there is not any Transubstantiation in the Sacrament of the Lords Supper, or in the Elements of Bread and Wine after Consecration thereof, by any Person whatsoever; And I do also believe, that there is not any Purgatory, Or that the consecrated Host, Crucifixes, or Images, ought to be worshipped, or that any worship is due unto any of them; And I also believe that Salvation cannot be Merited by Works, and all Doctrines in affirmation of the said Points; I do abjure and renounce, without any Equivocation, Mental Reservation, or secret Evasion whatsoever, taking the words by me spoken, according to the common and usual meaning of them. So help me God.”).

<sup>124</sup> Corporation Act 1661, 13 Car. 2, c. 1 (Eng.); First Test Act, 1673, 25 Car. 2, c. 2 (Eng.); Second Test Act, 1678, 30 Car. 2, c. 1 (Eng.).

<sup>125</sup> SEAR, *supra* note 122, at 18.

<sup>126</sup> JONES, *supra* note 108, at 11 (quoting T. BEADE, *THE HISTORY OF PUBLICK AND SOLEMN STATE OATHS FROM THE CONQUEST TO THE PRESENT TIME* 6 (1716)).

if you chew them you will find them bitter; if you think what you swear, 'twill hardly go down."<sup>127</sup> The readiness and frequency with which the British government imposed contradictory oaths forced subjects to betray religious beliefs, political loyalties, and, of course, previous oaths. This could not but only result in cynicism and contempt. In 1662, an Anglican declared that Quakers had been:

Scared from all Swearing by the frequent forfeited Oaths and repeated perjuries of those Times, in which the cruel Ambitions and disorderly Spirits of some men, like the Demoniactal in the Gospel brake all bonds of lawful Oaths, by which they were bound to God and the king; daily imposing, as any new Partie or Interest prevailed the Superfoetations of new and illegal Oaths, monstrous vows, factitious Covenants, desperate Engagements, and damnable Abjurations.<sup>128</sup>

This was the legacy that the American colonists received, many of whom were religious dissenters themselves.<sup>129</sup> The result was the No Religious Test Clause of the Constitution.

<sup>127</sup> CONDREN, *supra* note 108, at 233 (quoting JOHN SELDEN, TABLE TALK 95 (1786) (1686))

<sup>128</sup> VALLANCE, *supra* note 108, at 153-54 (quoting JOHN GAUDEN, A DISCOURSE CONCERNING PUBLICK OATHES, AND THE LAWFULNESS OF SWEARING IN JUDICIAL PROCEEDINGS 8 (1662)). The satirist, Samuel Butler (1612-1680) wrote:

As soon as a Man hath taken an oath against his Conscience and done his Endeavour to damn himself, He is capable of any Trust or Employment in the Government. So excellent a Quality is Perjury to render the most perfidious of men most fit and proper for publick Charges of the greatest Consequence . . . and this is the Modern Way of Test as they call it – to take measure of Men's abilities and Faith by their Alacrity in Swearing – And is indeed the most compendious way to exclude all those that have any conscience, and to take in such as have none at all.

SAMUEL BUTLER, PROSE OBSERVATIONS 6 (H. McQuehen, ed., 1979). Cf. JONES, *supra* note 108, at 147 (citing Algernon Sydney's comment that the Engagement Oath was likely "to prove a snare to every honest man whilst every knave would slip through it."). JOHN LILBOURNE, RASH OATHS UNWARRANTABLE (1647):

Oaths . . . now are nothing but cloaks of knavery, and breeders of strife and mischief. Therefore for shame lay them all down and press them no more upon any man whatsoever, for he that conscientiously makes nothing of an oath, will make as little of breaking his oath, whensoever it shall make for his profit, ease, or preferment, whereas to him that conscientiously scruples an oath, his bare word . . . is the sincerest tie in the world.

<sup>129</sup> The religious tests for serving in Parliament were gradually removed during the course of the nineteenth century. In 1829, Catholics could take an oath that omitted denial of Catholic doctrines and they could therefore serve in Parliament. Roman Catholic Relief Act of 1829, 10 Geo. 4, c. 7, § 2 (Eng.). In 1833, Quakers were similarly allowed to omit "So Help me God,"



## III. THE NO RELIGIOUS TEST CLAUSE

A. *The States at the Time of the Founding*

Article VI of the Constitution states, “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” This was, in fact, the only religious clause in the unamended draft of the Constitution.<sup>130</sup> The No Religious Test Clause, however, originally referred only to offices in the federal government. Much like the Establishment Clause, which, by a strict literal reading, prohibited only the federal government from establishing a religion, the No Religious Test Clause prohibited only the federal government, and not the states, from imposing a religious test.<sup>131</sup> Unlike the Establishment Clause, however, the Supreme Court has never applied the No Religious Test Clause to the states through the Fourteenth Amendment.<sup>132</sup>

---

opening service in Parliament to them as well. Quakers and Moravians Act 1833, 3 & 4 Will. 4, c. 4 (1835) (Eng.). The House Lords in 1858 agreed to a Bill permitting Jews to take a modified version of the Oath of Abjuration without the words, “on the true faith of a Christian, Oaths of Allegiance etc. and Relief of the Jews Act 1858, 21 & 22 Vict., c. 48 (Eng.).

<sup>130</sup> Winston E. Calvert, Note, *Judicial Selection and the Religious Test Clause*, 82 WASH. U. L.Q. 1129, 1145 (2004).

<sup>131</sup> See Notes, *An Originalist Analysis of the No Religious Test Clause*, 120 HARV. L. REV. 1649, 1660-61 (2007) [hereinafter *Originalist Analysis*] (“Although judicial interpretations of the No Religious Test Clause are scarce, history makes clear what the Founders understood the clause to prohibit: a test forcing individuals seeking certain positions in the federal government to bind themselves through an oath or affirmation to a particular religious belief or sacrament in order to be qualified to hold office. The placement of the clause in Article VI, immediately after the Oath Clause – and connected by the conjunction ‘but’ – confirms this understanding, as do the ratification debates.”); Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 693 (1996-97) (“The deep discontinuity between the Framers’ convictions, as revealed in their shaping of state regimes, and the federal church-state order is confirmed by the wording of Article VI itself. It subjects all officers – state and federal – to the oath requirement, but only federal officers to the test ban.”).

<sup>132</sup> *Originalist Analysis*, *supra* note 131, at 1660 (“Judicial interpretations of the No Religious Test Clause are virtually nonexistent.”); Bradley, *supra* note 131, at 714 (“Article VI, section 3 itself has never itself been ‘incorporated’ or otherwise declared applicable to the states. [S]ave for one holding, . . . that a particular oath was *not* a religious test, no judicial decision has rested upon the clause, and so there is no judicial littering upon this seemingly pristine landscape.”). See also *Originalist Analysis*, *supra* note 131, at 1660 (“The closest any federal court has come to deciding a case under the No Religious Test Clause was in *Torcaso v. Watkins*.”); *Torcaso v. Watkins*, 367 U.S. 488, 489 (1961) (The Court noted that the plaintiff charged that Maryland was violating the First and Fourteenth Amendments of the Constitution. But the Court then stated, “Appellant also claimed that the State’s test oath requirement violates the provision of Art. VI of the Federal Constitution . . . . Because we are reversing the judgment on other

Despite the Establishment Clause's ban of federal religious establishment, the following states maintained religious establishments, some of which endured long after the state had ratified the Constitution: North Carolina, until 1776; New York, until 1777; Virginia, until 1785; South Carolina, until 1790; Georgia, until 1798; Maryland, until 1810; Connecticut, until 1818; New Hampshire, until 1819; and Massachusetts, until 1833.<sup>133</sup> It should not be surprising, then, that during the early years of the Union, the states had religious requirements for state office. In fact, all of them had either direct or indirect religious tests.<sup>134</sup>

A 1784 Connecticut Statute denied public office to anyone who believed "there are more Gods than one," or who denied "the Being of God," that "any One of the Persons in the Holy Trinity to be God," or that "the Holy Scriptures of the Old and New Testament to be of Divine Authority."<sup>135</sup> The Connecticut Constitution of 1818, Article 10, Section 1, obliged officeholders to utter, "So help me God," in the oath of office.<sup>136</sup> According to Delaware's Constitution of 1776, Article 22, all members of the legislature or any office of trust had to declare, "I, A B, do profess faith in God, the Father, and in Jesus Christ his only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration."<sup>137</sup>

Georgia's 1777 Constitution, Article VI provided that state officials "shall be of the Protestant religion."<sup>138</sup> Maryland's 1776 Constitution, Article LV, required an office holder to "subscribe a declaration of his belief in the Christian religion."<sup>139</sup> The Massachusetts Constitution of 1780, Article I, required the declaration, "I, A. B., do declare, that I

---

grounds, we find it unnecessary to consider appellant's contention that this provision applies to state as well as federal officers." The Court then proceeded to find the Maryland requirement violative of the religious clauses of the First Amendment.).

<sup>133</sup> STEVEN G. GEY, *RELIGION AND THE STATE* 17 (2d ed. 2006).

<sup>134</sup> Calvert, *supra* note 130, at 1146 ("Early state constitutions mimicked the breadth of the European tests: thirteen states with religious tests limited public office on the basis of denomination or theology.").

<sup>135</sup> *THE FIRST LAWS OF THE STATE OF CONNECTICUT* 67 (John D. Cushing ed., 1982).

<sup>136</sup> 1 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 546 (Francis Newton Thorpe ed., 1909) [hereinafter *THE FEDERAL AND STATE CONSTITUTIONS*].

<sup>137</sup> *Id.* at 566.

<sup>138</sup> 2 *id.* at 779.

<sup>139</sup> 3 *id.* at 1700.

believe the Christian religion, and have a firm persuasion of its truth."<sup>140</sup> The New Hampshire Constitutions of 1784 and 1792 required representatives and the chief executive, or president, to be "of the Protestant religion."<sup>141</sup> New Jersey's Constitution of 1776, Article XIX, provided, "all persons, professing a belief in the faith of any Protestant sect, . . . shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature."<sup>142</sup> Article 52 of the New York State Constitution of 1777 allowed the state legislature discretion to naturalize only those persons who "abjure and renounce all allegiance and subjection to all and every foreign king, prince, potentate, and State in all matters, ecclesiastical as well as civil," clearly an effort to exclude Catholics.<sup>143</sup>

North Carolina's Constitution of 1776, Part XXXII, provided "[t]hat no person, who shall deny the being of God, or the Truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this State."<sup>144</sup> In the Pennsylvania Constitution of 1776, Article XVI, Section 10, an office holder had to declare, "I do believe in one God, the creator and governor of the universe, the rewarder of the good, and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration."<sup>145</sup> The Constitution of South Carolina of 1778, Articles III, XII, and XIII, required the governor, lieutenant governor, members of the privy council, senators, and representatives to be of the Protestant religion.<sup>146</sup> Vermont's 1777 Constitution Chapter II, Section XII, required members of the House of Representatives to make the same declaration already quoted for Pennsylvania, with the additional words, "and own and profess the Protestant religion."<sup>147</sup> Until 1786, a non-Christian in Virginia would have to

---

<sup>140</sup> 3 *id.* at 1908.

<sup>141</sup> 4 *id.* at 2460-63.

<sup>142</sup> 5 *id.* at 2597-98.

<sup>143</sup> 5 *id.* at 2637-38.

<sup>144</sup> 5 *id.* at 2793.

<sup>145</sup> 5 *id.* at 3085.

<sup>146</sup> 6 *id.* at 3249-52.

<sup>147</sup> 6 *id.* at 3757.

keep his religious opinions to himself because of a statute that made it a criminal offence to publically utter a non-Christian view.<sup>148</sup>

Only Rhode Island did not impose a religious test for public office. Its first Constitution, which was ratified in 1842, Article I, Section 3, stated, "[N]o man shall be . . . disqualified from holding any office; nor otherwise suffer from holding any religious belief."<sup>149</sup> However, the same Constitution still required office holders to swear with, "So help me God."<sup>150</sup>

The limitation upon religious freedom represented by these religious tests was not lost on the few non-Christians who lived in the colonies. Near the end of the Constitutional Convention, Jonas Phillips, a Jew who resided in Philadelphia, raised the issue of the religious test in a letter dated September 7, 1787, addressed to the President and members of the Convention.<sup>151</sup> Phillips quoted the religious test oath in the Constitution of Pennsylvania requiring an acknowledgement that the New Testament was divinely inspired, and argued, "to swear and believe that the new testement was given by devine inspiration is absolutely against the religious principle of a Jew, and is against his Conscience to take any such oath – By the above law a Jew is deprived of holding any publick office or place of Government."<sup>152</sup>

The backdrop of religious test oaths, which flourished in Great Britain and the incipient states, indicates the remarkable novelty of the

---

<sup>148</sup> "Virginia was uniquely tolerant, setting up no doctrinal obstacle either by the Constitution of 1776 or by subsequent statutes. There is no doubt that had a professed atheist, polytheist, or unorthodox Christian (like a Unitarian) been elected, he had a legal right to the post. But he would have had to serve from jail, because both by common law and statute Virginia criminalized at least the public utterance of such views." Bradley, *supra* note 131, at 683 (citing Rhys Isaac, *Evangelical Revolt: The Nature of the Baptists' Challenge to the Traditional Order in Virginia 1765-1775*, 31 WM. & MARY Q. 345 (1974)).

<sup>149</sup> 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 136, at 3223.

<sup>150</sup> 6 *id.* at 3231-32.

<sup>151</sup> *Originalist Analysis*, *supra* note 131, at 1653. (citing Letter from Jonas Phillips to President and members of the Convention (Sept. 7, 1787) in 4 THE FOUNDERS' CONSTITUTION 638 (Philip B. Kurland & Ralph Lerner eds., 1987)).

<sup>152</sup> *Id.* See also A Declaration of the Rights of the Inhabitants of the Commonwealth, or State of Pennsylvania, in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 136, at 3082 (Phillips goes on to note that the religious test contradicts Article II of the Pennsylvania Constitution. He furthermore recalls the support that Jews gave to the Revolutionary effort, and expresses his own prayers "that the people of these States Rise up as a great young Lion" and that "the almighty God of our father Abraham Isaac and Jacob endue this Noble Assembly with wisdom Judgement and unanimity in their Councells."). Cf. Petition of the Philadelphia Synagogue to Council of Censors of Pennsylvania (Dec. 23, 1783), in 4 THE FOUNDERS' CONSTITUTION art. 6, cl. 3, no. 6

prohibition against religious tests, which the drafters of the Constitution proposed. The subsequent controversy regarding this ban that occurred in the individual state ratifying conventions further revealed the vision and innovation of this decision.

### B. *The State Constitutional Ratifying Debates*

In 1996, Steven B. Epstein published an article in the Columbia Law Review entitled, *Rethinking the Constitutionality of Ceremonial Deism*.<sup>153</sup> He began by imagining the United States in the year 2096, which, because of "radically altered immigration and birth patterns" now possesses a population which is seventy percent Muslim and only twenty-five percent Christian and Jewish.<sup>154</sup> In this future country, school children recite a version of the Pledge of Allegiance containing the phrase one nation "under Allah."<sup>155</sup> The national currency possesses the newly coined motto of, "In Allah we trust."<sup>156</sup> Government officials take their oaths of office on the Qur'an and utter, "So help me Allah."<sup>157</sup> Epstein's purpose in presenting this scenario was to demonstrate the exclusionary effect of a "ceremonial deism" that privileged Muslim rather than Christian religious expression.<sup>158</sup> Whatever force this introduction may have lent his thesis about the unconstitutionality of ceremonial deism would not have been lost on the state representatives who debated ratification of the Constitution with its prohibition on religious tests. That is because more than two hundred years ago these representatives contemplated a very similar scenario in which the Protestant population of the country would be overwhelmed by the adherents of other religions who could impose their religious beliefs and ceremonies on the rest.

---

<sup>153</sup> Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996).

<sup>154</sup> *Id.* at 2084.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 2085.

<sup>158</sup> *Id.* at 2086 ("In sponsoring the practices described in the opening paragraph, is the government not conveying a message that religion generally, and the Islamic religion in particular, is favored or preferred? Would the average Christian or Jew seriously contend that this America of 2096 would not make them feel like outsiders in their own country? How then can Christians and Jews reconcile this feeling of exclusion with approval of a state of affairs in 1996 in which non-Christians, non-Jews, and nonreligionists have no constitutional basis for attacking 'ceremonial' Christian or Judeo-Christian forms of government expression?").

The No Religious Test Clause received little discussion at the Constitutional Convention itself.<sup>159</sup> When Charles Pinkney of South Carolina proposed the clause, Roger Sherman of Connecticut, "thought it unnecessary, the prevailing liberality being a security ag[ain]st such tests."<sup>160</sup> Gouverneur Morris of Pennsylvania voiced approval, and the No Religious Test Clause to Article VI passed unanimously.<sup>161</sup>

Some believed that the oath to support the Constitution, which was required of federal and state office holders by Article VI, was itself a religious test.<sup>162</sup> At the Connecticut Ratifying Convention, Oliver Wolcott did not "see the necessity of a test. . . . [t]he Constitution enjoins an oath upon all the officers of the United States. This is a direct appeal to that God who is the avenger of perjury. Such an appeal to him is a full acknowledgment of his being and providence."<sup>163</sup> It seems Wolcott was not taking into account the choice of oath or affirmation, which made the oath, and any test it may imply, a constitutional option rather than a requirement. An optional oath could not therefore function as a religious test. The state representatives of South Carolina, also thinking that an oath of allegiance to the Constitution would be a religious test, "[r]esolved that the third section of the Sixth Article ought to be amended by inserting the word 'other' between the word 'no' and 'religious.'"<sup>164</sup> The relevant portion of Article VI would then have read, "but

---

<sup>159</sup> 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 461 (Max Farrand ed., 1911) [hereinafter RECORDS].

<sup>160</sup> 2 *id.* at 468 (*Madison's Notes* for that day indicate that Pinkney made the motion and that Sherman made this observation). See also *Introduction*, 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 159, at xi-xiv, xv-xix (a journal of the deliberations of the Constitutional Convention was kept, and several delegates also kept notes, among which were *Madison's Notes*).

<sup>161</sup> 2 RECORDS, *supra* note 159, at 468 (*Madison's Notes* record Gouverneur Morris's approval. The journal entry for August 30, 1787, indicates the motion to add the words of the No Religious Test Clause was passed unanimously, with no debate. However, the journal of the Convention indicates that in the vote for the entire Article VI, North Carolina opposed it, and the delegations from Connecticut and Maryland were divided. Madison also recorded North Carolina as opposed, but only Maryland divided. It may be that the journal's addition of Connecticut is correct, due to the observations of Sherman who was from Connecticut.).

<sup>162</sup> *Originalist Analysis*, *supra* note 131, at 1655-56.

<sup>163</sup> 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 203 (Jonathan Elliot ed., 1836) [hereinafter THE DEBATES IN THE SEVERAL STATE CONVENTIONS].

<sup>164</sup> Philip Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 849 (1986). See also Proposed Amendment, South Carolina Ratifying Convention, 4 THE FOUNDERS' CONSTITUTION, *supra* note 152, at art. 6, cl. 3, no. 23, [http://presspubs.u-chicago.edu/founders/documents/a6\\_3s23.html](http://presspubs.u-chicago.edu/founders/documents/a6_3s23.html).

no *other* religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”<sup>165</sup>

Madison argued that the oath of office itself could function as a religious test, at least a private one based on a personal belief in God as opposed to a public declaration of belief:<sup>166</sup>

Is not a religious test as far as it is necessary, or would operate, involved in the oath itself? If the person swearing believes in the supreme Being who is invoked, and in the penal consequences of offending him, either in this or a future world, or both, he will be under the same restraint from perjury as if he had previously subscribed a test requiring this belief. If the person in question be an unbeliever in these points and would notwithstanding take the oath, a previous test could have no effect. He would subscribe it as he would take the oath, without any principle that could be affected by either.<sup>167</sup>

This discussion also sidesteps the point made above, that an optional oath could not serve as a religious test. But Madison’s discussion is somewhat more subtle and provocative. He recognized that a religious test professing a particular religious belief accomplishes nothing more than what an oath accomplishes. No one can know if a public declaration of religious belief reflects what the person sincerely believes. Any religious test separate from the oath of office would add no further guarantee of the declarant’s truthfulness or religiosity that the oath itself did not provide. But, if no one except the test- or oath-taker knows of the sincerity of his declaration, then it is difficult to see how the oath itself provides any guarantee or confidence that what has been said is true.<sup>168</sup>

---

<sup>165</sup> Bradley, *supra* note 131, at 698 (“In fact, this change was proposed in both the House and in the Senate during the First Congressional session which passed the Bill of Rights.”).

<sup>166</sup> *Originalist Analysis*, *supra* note 131, at 1656.

<sup>167</sup> James Madison to Edmund Pendleton, 4 THE FOUNDERS’ CONSTITUTION, *supra* note 152, at art. 6, cl. 3, no. 13 (1787), available at [http://press-pubs.uchicago.edu/founders/documents/a6\\_3s13.html](http://press-pubs.uchicago.edu/founders/documents/a6_3s13.html).

<sup>168</sup> In an essay defending the No Religious Test Clause, Oliver Ellsworth, a delegate to the Constitutional Convention, entertains the possibility that a non-sectarian statement of belief in God and the scriptures would be “the least exceptionable” and create a “greater confidence in [the officeholder’s] integrity.” Oliver Ellsworth, Landholder, no. 7, 4 THE FOUNDERS’ CONSTITUTION, *supra* note 152, at art. 6, cl. 3, no. 14, available at [http://press-pubs.uchicago.edu/founders/documents/a6\\_3s14.html](http://press-pubs.uchicago.edu/founders/documents/a6_3s14.html). But he goes on to reject this:

His making a declaration of such belief is no security at all. For suppose him to be an unprincipled man, who believes neither the word nor the being of God; and to be governed merely by selfish motives; how easy is it for him to dissemble! How easy is it

The oath, then, like the religious test, had no real efficacy in assuring that what the oath taker said was true, or what he promised was reliable. Furthermore, if the oath is, in effect, a religious test, then, like the religious test, it should never be required, since either would impose a burden on nonbelievers.

William Williams,<sup>169</sup> a signer of the Declaration of Independence and participant in the Connecticut ratification debates, expressed dissatisfaction with the prohibition of a religious test. He pursued the logical extreme of Madison's suggestion that religious tests and oaths were equivalent, and made the point that the arguments against the religious test, "would apply with equal force against requiring an oath from any officer of the united or individual states; and with little abatement, to any oath in any case whatever."<sup>170</sup> If religious tests add nothing to the oath because such declarations are meaningless, why even retain the oath? However, Williams also noted, "divine and human wisdom, with universal experience, have approved and established them [oaths] as useful, and a security to mankind."<sup>171</sup>

Among the members of the founding generation, the notion that religious tests were illiberal, unnecessary or useless, was by no means unanimous. Many were concerned that in the absence of religious tests, the country's leaders would not be exemplars of Protestant belief and virtue. This view hearkens back to the pre-Lockean notion that a nation should be unified in regard to religion.<sup>172</sup> The American corollary would be that only Protestants were fit to rule a nation that was overwhelmingly Protestant.<sup>173</sup> In protesting that the oath of office of the 1780 Massachusetts Constitution only required a profession of Christi-

---

for him to make a public declaration of his belief in the creed which the law prescribes, and excuse himself by calling it a mere formality. This is the case with the test-laws and creeds in England.

*Id.* The arguments of Madison and Ellsworth echo the cynical and sometimes satirical comments made regarding the oaths imposed on the British people during the seventeenth century. See *supra* notes 126-128 and accompanying text. But their comments also anticipate the arguments of many subsequent commentators that the oath itself, insofar as it makes use of a private religious belief which could easily be dissembled, is a useless guarantor of truthfulness and, as part of a reform of judicial procedure, should be abolished.

<sup>169</sup> Bruce P. Stark, *WILLIAMS, William, (1731-1811)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG. (1975), <http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000546>.

<sup>170</sup> William Williams, Letter, 4 THE FOUNDERS' CONSTITUTION, *supra* note 152, at art. 6, cl. 3, no. 21 (1788), [http://press-pubs.uchicago.edu/founders/documents/a6\\_3s21.html](http://press-pubs.uchicago.edu/founders/documents/a6_3s21.html).

<sup>171</sup> *Id.*

<sup>172</sup> See *supra* notes 67-73 and accompanying text.

<sup>173</sup> See Bradley, *supra* note 131, at 681-84.



anity, and not Protestant Christianity, the town of Springfield argued, "As the People of this Commonwealth are generally, if not universally, of the Protestant reformed religion, it would be a matter of Great and General Concern that any person might be elected . . . over them or their Posterity, who should not be of the Protestant Religion."<sup>174</sup> For many Americans, being a Protestant Christian was likely to be a guarantee of the good character desired in a ruler. As Colonel Jones stated at the Massachusetts Constitutional Convention,

[R]ulers ought to believe in God or Christ; and . . . however a test may be prostituted in England, . . . if our public men were to be those who had a good standing in the church, it would be happy for the United States . . . . [A] person could not be a good man without being a good Christian.<sup>175</sup>

The issue of whether non-Protestants could serve as public officials particularly worried the opponents of the Constitution, the anti-federalists.<sup>176</sup> They raised the fear that without a religious test, nothing in the Constitution prevented a non-Protestant from becoming president, so that believers in any religion, or even non-believers, could come to occupy that office. This became a strong tactical argument against approval of the newly drafted Constitution, and the anti-federalists were doggedly imaginative in exploiting it. "One New Hampshire anti-federalist objected that a 'Turk, a Jew, a Roma[n] Catholic, and what is worse than all, a Universal[ist] may be President of the United States.' . . . 'Pagans,' 'deists,' 'heathens,' and 'Mahometans' were variously added to the list."<sup>177</sup> In North Carolina, Henry Abbott expressed the fear that

---

<sup>174</sup> *Id.* at 684 (citing C. ANTIEAU, A. DOWNER & E. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT* 95 (1964) (citing 276 Massachusetts Archives 66)).

<sup>175</sup> *Id.* at 709 (citing *DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, 1788*, at 221 (1856) (speech of Colonel Jones) [hereinafter *DEBATES AND CONVENTIONS, MASS.*]).

<sup>176</sup> *Id.* at 694-713.

<sup>177</sup> *Id.* at 696-97 (citing for Turk, Jew, Roman Catholic and Universalist, 2 H.C. WINGATE, *LIFE AND LETTERS OF PAINE WINGATE* 487 (1930) (Letter of Sullivan to Belknap on February 26, 1788)). Bradley also notes similar arguments at the Virginia and North Carolina Conventions, 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS*, *supra* note 163, at 631 (Virginia) (speech of James Innes), and 4 *id.* at 191-205 (North Carolina). For "pagans," see *id.* at 198 (speech of Governor Samuel Johnston); for "deists," see *DEBATES AND CONVENTIONS, MASS.*, *supra* note 175, at 219; for "heathens," see 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS*, *supra* note 163, at 199 (speech of David Caldwell); and "'Mahometans," see 4 *id.* at 194 (speech of James Iredell). Universalism is a religious view that affirms the ultimate salvation of

the federal government might use its treaty-making power to engage "with foreign powers to adopt the Roman Catholic Religion in the United States, which would prevent the people from worshipping God according to their own consciences."<sup>178</sup> Also in North Carolina, David Caldwell saw in the absence of a religious test, "an invitation for Jews and pagans of every kind to come among us, at some future period, . . . this might endanger the character of the United States."<sup>179</sup> In Virginia, there were those who argued "that Turks, Jews, Infidels, Christians, and all other sects, may be Presidents, and command the fleet and army, there being no test to be required."<sup>180</sup> In Massachusetts, Reverend Thatcher "shuddered at the idea that Roman Catholics, Papists, and Pagans may be introduced into office; and that Popery and the Inquisition may be established in America."<sup>181</sup>

Of particular note was the hostility and fear the founders had for Muslims and Catholics. The historic struggles between Christendom and Islam, and between Protestants and Catholics, lay behind this fear. Some Protestant propaganda linked Catholics and Muslims as mortal enemies of true religion. During the Reformation, woodcuts of the twin-headed monster of Protestant thought depicted the Ottoman Sultan as the Anti-Christ on one side, and the Pope on the other.<sup>182</sup> One had a turban, the other a mitre, "but both projected threat and apocalyptic intent for the Protestant world."<sup>183</sup>

Even the champion of religious toleration, Locke, aside from his intolerance for atheists, had reservations about extending religious freedom to Catholics and Muslims. Locke was concerned about loyalties to foreign religious authorities that could affect temporal matters. "That Church can have no right to be tolerated by the magistrate which is

---

all humans. *Unitarian Universalist Association*, 14 *ENCYCLOPEDIA OF RELIGION*, *supra* note 18, at 9470.

<sup>178</sup> 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 163, at 191-92 (speech of Henry Abbott).

<sup>179</sup> 4 *id.* at 199 (speech of David Caldwell) ("I think, then, . . . that, in a political view, those gentlemen who formed this Constitution should not have given this invitation to Jews and heathens. All those who have any religion are against the emigration of those people from the eastern hemisphere.").

<sup>180</sup> 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 163, at 635 (speech of James Innes).

<sup>181</sup> DEBATES AND CONVENTIONS, MASS., *supra* note 175, at 251.

<sup>182</sup> Denise A. Spellberg, *Could a Muslim be President? An Eighteenth Century Constitutional Debate*, in 39 *EIGHTEENTH CENTURY STUDIES* 485, 488 (2006).

<sup>183</sup> *Id.*

constituted upon such a bottom that all those who enter into it do thereby ipso facto deliver themselves up to the protection and service of another prince."<sup>184</sup> Thus, Locke indirectly referred to Catholics and accorded them "no right to be tolerated by the magistrate" for asserting "that kings excommunicated forfeit their crowns and kingdoms" and for arrogating "unto themselves the power of deposing kings, because they challenge the power of excommunication, as the peculiar right of their hierarchy."<sup>185</sup> And regarding Muslims, he wrote,

It is ridiculous for anyone to profess himself to be a Mohametan only in his religion, but in everything else a faithful subject to a Christian magistrate, while at the same time he acknowledges himself bound to yield blind obedience to the Mufti of Constantinople, who himself is entirely obedient to the Ottoman Emperor and frames the feigned oracles of that religion according to his pleasure.<sup>186</sup>

While all those who debated the acceptability of the Constitution in the various state ratifying conventions might have conceded the unlikelihood that a non-Protestant could be elected president in the near future, it was nevertheless understood that the Constitution would serve as the blueprint for governing the nation into the distant and unforeseeable future when the population of the nation could change profoundly. In the North Carolina debate, Charles Lancaster dismissed the idea of a

<sup>184</sup> LOCKE, *supra* note 70, at 55.

<sup>185</sup> *Id.* at 54. See also Bradley, *supra* note 131, at 699 ("In the American mind, Catholics were spiritually tyrannized by a Romish clergy, and the lack of autonomous moral judgment characteristic of Protestants rendered Catholics ill-suited and, to many, completely unfit to be Americans. . . . That the founders' anti-Catholicism would be difficult to overestimate can be gleaned from the ratification debate over article VI.").

<sup>186</sup> LOCKE, *supra* note 70, at 56. Though Muslims may have been more exotic, they were, if anything, more despised, for at the time, "[R]eal American struggles with the Muslim states of North Africa continued, and remembered European military conflict with the Ottoman Empire endured . . ." Spellberg, *supra* note 182, at 486. Professor Bradley discusses the prejudices that the various Protestant sects had towards each other as well as towards non-Protestants:

[T]he Episcopal Church . . . was disdained and resented by many who had experienced the sting of its colonial establishment. Baptists were widely viewed as enemies of good government, a disposition satisfactorily evidenced (to most minds) by the political lunacy of that Baptist refuge, Rhode Island. All this supplemented the enduring hostility to Jews among the founders, as demonstrated by Morton Borden. Attitudes towards Catholics were no better. 'Turks,' 'Infidels,' 'heathens,' and their peers lay totally behind the horizons of civility.

Bradley, *supra* note 131, at 701-02 (citing MORTON BORDEN, *JEWS, TURKS, AND INFIDELS*, 3-22 (1984)).

Pope president, but also expressed keen awareness about the future significance of a Constitution lacking a religious test:

For my part, . . . I did not suppose that the Pope could occupy the President's chair. But let us remember that we form a government for millions not yet in existence. I have not the art of divination. In the course of four or five hundred years, I do not know how it will work. This is most certain, that Papists may occupy that chair, and Mohometans may take it. I see nothing against it. There is a disqualification, I believe, in every state in the Union – it ought to be so in this system.<sup>187</sup>

In the Massachusetts debate, Amos Singletary complained that under the Constitution, "a papist or an infidel were as eligible [for public office as a Christian]," and lamented, "[In] this instance we were giving great power to – we know not whom."<sup>188</sup>

### C. *The Abbott-Iredell Debate*

The fear of the "other" represented by non-Protestants who would immigrate and overwhelm the Protestant population provoked the defining confrontation between Henry Abbott and Charles Iredell in the North Carolina debate. With bitter sarcasm, Abbott laid down the challenge:

The exclusion of religious tests is thought by many to be dangerous and impolitic. They suppose that if there be no religious test required, pagans, deists, and Mahometans might obtain offices among us, and that senators and representatives might all be pagans. . . . Some are desirous to know how and by whom they are to swear, since no religious tests are required – whether they are to swear by Jupiter, Juno, Minerva, Proserpine, or Pluto. . . . I would be glad some gentleman would endeavor to obviate these objections.<sup>189</sup>

James Iredell,<sup>190</sup> a future Supreme Court Justice, took up the challenge. First, Iredell reminded the North Carolinian representatives, many of

<sup>187</sup> 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 163, at 215.

<sup>188</sup> Bradley, *supra* note 131, at 710-11 (citing DEBATES AND CONVENTIONS, MASS., *supra* note 175, at 143).

<sup>189</sup> 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 163, at 192.

<sup>190</sup> See James Iredell, Sr., NORTH CAROLINA HISTORY PROJECT, <http://www.northcarolinahistory.org/commentary/105/entry> (James Iredell (1751-1799) was a North Carolina superior court judge, and attorney general, and political essayist who espoused the cause to ratify the

whom were not Anglicans, of the "utmost cruelties" that existed in Great Britain "[u]nder color of religious tests: In [England] no man can be a member of the House of Commons, or hold any office under the crown, without taking the sacrament according to the rites of the Church."<sup>191</sup> He spoke of how this rule "must degrade and profane the rite," and of the hypocrisy whereby "dissenters qualify themselves for office [by taking the sacrament] though they never conform to the church on any other occasion; and men of no religion at all have no scruple to make use of this qualification."<sup>192</sup> With some humor and sarcasm of his own, Iredell addressed the question of whether a Pope could ever become the President of the United States:

A native of America must have very singular good fortune, who, after residing fourteen years in his own country, should go to Europe, enter into Romish orders, obtain the promotion of cardinal, afterwards that of pope, and at length be so much in the confidence of his own country as to be elected President. It would be still more extraordinary if he should give up his popedom for our presidency.<sup>193</sup>

"But," Iredell responded, "it is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices."<sup>194</sup> He continued:

But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for. . . . If you admit the least difference, the door to persecution is open. . . . It would be happy for mankind if religion was permitted to take its own course, and maintain itself by the excellence of its own doctrines. The divine Author of our religion never wished for its support by worldly authority. Has he not said that the gates of hell shall not prevail against it? It made much greater progress for itself, than when supported by the greatest authority upon earth.<sup>195</sup>

---

Constitution. In 1791, President George Washington appointed him one of the original justices of the Supreme Court.).

<sup>191</sup> 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 163 at, 192-93.

<sup>192</sup> 4 *id.* at 193.

<sup>193</sup> 4 *id.* at 196.

<sup>194</sup> *Id.* at 194.

<sup>195</sup> *Id.*

Thus Iredell contemplated the independence of religious and political activity so that no particular religion, nor religion in general, would have support from the government, but rather religious belief would survive on its own merits. Along with this, Iredell envisaged the possible election to public office, not only of non-Protestants, but of non-Christians, specifically, Muslims, and those "who have no religion at all."<sup>196</sup>

It is plausible to see such liberal advocacy of religious toleration expressed during the ratification controversy as disingenuous speechifying, calculated merely to win the debate over acceptance of the Constitution, or as silly theorizing about the ascent of non-Protestants to high political offices at a time when, realistically speaking, no representative really thought he would ever see the election of a Catholic, Jew, Muslim, or atheist rise to any significant position in the government of the United States.<sup>197</sup> The next part of the Abbott/Iredell debate, however, must moderate this view.

---

<sup>196</sup> *Id.* In referring to those "who have no religion at all" was Iredell including non-believing atheists as possible holders of public office? "During the eighteenth and nineteenth century in the young United States, Deists, Universalists, Transcendentalists, and others were labeled as atheists and even new religions that self-described themselves as Christian, such as the Mormon church, were regarded with suspicion, if not outright hostility. . . . [i]nvectives against atheists were relatively rare; the closest thing to an atheist most commentators even considered was the deist, that is, someone who believed in a divine creator but not in the divinity of Christ." Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early America*, 63 GEO. WASH. L. REV. 931, 936 (1995). Whatever its significance, the term "atheist" arises elsewhere in the state debates regarding the Constitution. Judge Samuel Spencer also spoke on the topic of the religious test in the North Carolina debate and commented, "It is feared, . . . that persons of bad principles, Deists, Atheists, & etc., may come into this country; and there is nothing to restrain them from being eligible to offices." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 163, at 200. Like Iredell, he believed religion should stand on its own, without government support. "[A]s there is not a religious test required, it leaves religion on the solid foundation of its own inherent validity, without any connection with temporal authority; . . . I cannot object to this part of the Constitution. I wish every other part was as good and proper." *Id.* In the Massachusetts debate, the issue of atheists was also specifically raised. Theophilus Parsons noted the objection, "that the Constitution provides no religious test by oath, and we may have in power unprincipled men, atheists and pagans." DEBATES AND CONVENTIONS, MASS., *supra* note 175, at 190. Parsons also committed himself to the democratic ideal, "[I]t must remain with the electors to give the government this security." *Id.*

<sup>197</sup> Bradley argues that the Anti-Federalists blundered in raising the possibility that a non-Protestant population could take power in the United States and install a non-Protestant government. The assumption worked to the advantage of the Federalists who argued that a prohibition on religious tests would protect rather than endanger Protestants. Bradley maintains that the argument was not based on an idealistic philosophy of religious toleration, but rather on Madison's notion that sectarian variety maintained the peace by preventing any one sect from becoming dominant over the others. "The submission here is that our present regime of relig-

Abbott, not quite ready to give up on his argument, reminded Iredell that he had neglected to address his earlier query regarding the form of the oath.<sup>198</sup> In response to this second challenge, Iredell provided a definition of an oath: "a solemn appeal to the Supreme Being, for the truth of what is said, by a person who believes in the existence of a Supreme Being and in a future state of rewards and punishments, according to that form which will bind his conscience most."<sup>199</sup> He then went on to deliver a creditable history of the oath, in which he outlined how at one time only Christians could swear an oath on the New Testament, and how an exception was made for the Jews, though "heathens were excluded altogether."<sup>200</sup> "At length," Iredell explained, "by the operation of principles of toleration, these narrow notions were done away with."<sup>201</sup> He then declared, "[i]n regard to the form of an oath, that ought to be governed by the religion of the person taking it," and went on to provide a detailed summary of the *Omychund* case:

---

ious liberty . . . is a political outcome due to historically prevailing conditions of religious pluralism. Most importantly, it is not the product of a commitment by the people, their representatives, or by the Supreme Court to toleration or to religious liberty as a matter of abstract principle." Bradley, *supra* note 131, at 678. See also Spellberg, *supra* note 182, at 502 ("Although federalists such as Iredell and Johnston created this discursive possibility [a place for Muslims in the polity], they never believed the rights for which they argued in principle would ever come to be tested by real Muslims in practice. . . . [I]n defense of the Constitution, federalists were forced to concede any possibility of a Muslim president in 1788. That they did so, however reluctantly, suggested that Americans might proceed differently to define their national ideals despite the inherited prejudices of their day."). Although Iredell and others argued that government should not support religion, they also believed that the people would not allow non-Protestants in office. Iredell said, "[b]ut it is never to be supposed that the people of America will trust their dearest rights to persons who have no religions at all, or a religion materially different from their own." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 163 at 198-94. But in his speech supporting Iredell, Johnston conceded, "[t]hose who are Mahometans, or any others who are not professors of the Christian religion, can never be elected to the office of President, or other high office, but in one of two cases. First, if the people of America lay aside the Christian religion altogether, it may happen. Should this unfortunately take place, the people will choose such men as think as they do themselves. Another case is, if any persons of such descriptions should, notwithstanding their religion, acquire the confidence and esteem of the people of America by their good conduct and practice of virtue, they may be chosen." 4 *id.* at 198-99. Johnston added one other sentence indicating some skepticism that this could happen, . "I leave it to gentlemen's candor to judge what probability there is of the people's choosing men of different sentiments from themselves." 4 *id.*

<sup>198</sup> 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS *supra* note 163, at 196.

<sup>199</sup> 4 *id.*

<sup>200</sup> 4 *id.* at 196-97.

<sup>201</sup> 4 *id.* at 197.

A very remarkable instance also happened in England, about forty years ago, of a person who was admitted to take an oath according to the rites of his own country, though he was a heathen. Not believing either in the Old or the New Testament, he could not be sworn in the accustomed manner, but was sworn according to the form of the Gentoo religion, which he professed, by touching the foot of a priest. . . . It was accordingly held by the judges, . . . that the oath ought to be received; they considering that it was probable those of that religion were equally bound in conscience by an oath according to their oath of swearing, as they themselves were by one of theirs; and that it would be a reproach to the justice of the country, if a man, merely because he was of a different religion, should be denied redress of an injury he had sustained. Ever since this great case, it has been universally considered that, in administering an oath, it is only necessary to inquire if the person who is to take it, believes in a Supreme Being, and in a state of rewards and punishments. If he does, the oath is to be administered according to that form which it is supposed will bind his conscience most.<sup>202</sup>

Iredell's conclusion was that the form of the oath "may well be entrusted to the general government, to be applied on the principles I have mentioned."<sup>203</sup> Thus he demonstrated that the right to swear an oath by non-Christian ceremonies was already part of the common law and accepted in the courts of England and the American states. Furthermore, Iredell linked the right to swear a testamentary oath in this manner to the oath of office because of the very context in which he raised the *Omychund* case: a debate regarding religious tests for public office. The prospect of a non-Christian swearing an oath by non-Christian scriptures and ceremonies was not merely a hypothetical that might occur in some distant future time. His argument, based on straightforward legal precedent, showed that neither the religion nor the form of oath should disqualify a candidate for public office, so that someone who is not a Protestant or even a Christian may hold any office in the federal government of the new nation.

It was for Isaac Backus in the Massachusetts debate to articulate what was probably the most compelling argument for the No Religious Test Clause. Backus argued, "Some serious minds discover a concern lest, if all religious tests should be excluded, the Congress would hereaf-

---

<sup>202</sup> 4 *id.* at 198.

<sup>203</sup> 4 *id.*



ter establish Popery, or some other tyrannical way of worship. But it is most certain that no such way of worship can be established without any religious test."<sup>204</sup> If, indeed, Roman Catholics or members of any other religion became numerous in the United States, the religious test would be the ready means to make the majority faith the required religion of office holders. Not only would a religious test fail to guarantee the good character of future office holders, but it would also fail to protect American Protestantism. It is instead the prohibition of any religious test that guaranteed for Protestants free exercise should they ever become a minority.<sup>205</sup> As Bradley put it, the No Religious Test Clause may well have passed because "the instinct to be free of oppression is stronger than the temptation to oppress."<sup>206</sup>

#### D. *Two Muslim Oaths*

The state debates regarding the No Religious Test Clause recognized that approval of the Constitution, and, in particular, approval of the No Religious Test Clause, was a commitment to ending the requirement that public officials subscribe to any particular religious belief. The debates and the resulting approval of the Constitution were an important advance in the long and difficult struggle to extend the right to testify at court or take an oath of office without religious coercion. But the struggle was, and is, by no means over.<sup>207</sup> There remained the dis-

---

<sup>204</sup> DEBATES AND CONVENTIONS, MASS., *supra* note 175, at 250-51.

<sup>205</sup> 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 163, at 204. *Cf. id.* at 330 (Madison's argument) ("Happily for the states, they enjoy the utmost freedom of religion. This freedom arises from that multiplicity of sects which pervades America, and which is the best and only security for religious liberty in any society; for where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest."); *and* Bradley, *supra* note 131, at 703 ("The tonic of Federalist 10 – that a multiplicity of antagonistic, aggressive sects was the only guarantee of spiritual freedom – was reiterated by Federalists in the ratifying Conventions, in the newspapers, and wherever religious freedom was thought to be endangered by the new Constitution."); *and* JAMES MADISON, THE FEDERALIST NO. 10, at 84 (Mentor 1961) ("A religious sect may degenerate into a political faction in a part of the Confederacy, but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. .").

<sup>206</sup> Bradley, *supra* note 131, at 703 ("Federalists said, in effect: article VI prevents you from subordinating the despicable sect of your choice. So it does. But it also protects you from the oppressive designs of all the other sects, who think that your views are despicable and would subordinate you – as you would them – if an instrument of oppression such as religious tests were available.").

<sup>207</sup> The exclusion of atheists from the tolerance expressed by Locke and in *Omychund* cast its shadow many years into the future. See *supra* notes 84-87 and accompanying text for the exclusion stated by Locke and *Omychund*.

crimination against atheists. *Omychund* left the common law unchanged in the requirement that a witness must believe in God and an order of punishment for bearing false witness.<sup>208</sup> Indeed, in spite of the Constitution, a general religious test often remained in place, one that replaced a declaration of belief in a particular sectarian creed with a more general belief in a Supreme Being who provided awards for the good and punishments for the bad. Though the British resolved the issue in the late nineteenth century,<sup>209</sup> testimony and qualifications for public office of avowed atheists could be barred or challenged in the courts of many American states well into the twentieth century.<sup>210</sup> It

---

<sup>208</sup> White, *supra* note 46, at 391-92 ("The final conclusion of the common law, therefore is that an unbeliever is incompetent to take an oath because it cannot have any binding effect upon him, and without the oath no person can be heard to give evidence, for, unless he invokes the vengeance of God for false swearing, there is no security that he will tell the truth.").

<sup>209</sup> See SEAR, *supra* note 122, at 21 (only after an extensive struggle was Charles Bradlaugh, an atheist, permitted to make an affirmation allowing him to serve in Parliament in 1888). Acts that Parliament passed in 1858, 1866, and 1868 reduced the three oaths to one and permitted Jews, Quakers, Moravians, and Separatists to make an affirmation in place of the oath. See Oaths of Allegiance etc. and Relief of the Jews Act 1858, 21 & 22 Vict., c. 48 (Eng.); Parliamentary Oaths Act 1866, 29 Vict., c. 19, § 1, (Eng.); Promissory Oaths Act 1868, 31 & 32 Vict., c. 72 (Eng.). However, atheists and agnostics, since they did not belong to these religious categories, were still not permitted to take the Parliamentary Oath. SEAR, *supra* at 122, at 21 (Charles Bradlaugh, well-known in his time for his radicalism and atheism, was elected to the House of Commons five times beginning in 1880. Bradlaugh argued that the Evidence Amendment Acts of 1869 and 1870, which permitted him to make an affirmation in place of a testamentary oath in court, should allow him to make an affirmation in place of an oath of allegiance to take his seat in Parliament. However, it was decided that the acts that concerned judiciary oaths did not apply to the Parliamentary Oath. He agreed to take the Oath but publically declared, "I shall, taking the oath, regard myself as bound not by the letter of its words, but by the spirit which the affirmation would have conveyed had I been permitted to use it." An objection was raised that because of these public statements, the oath Bradlaugh took was not binding and therefore invalid for admission to parliament. The House rejected a motion that he should have been allowed to make an affirmation and when he came to the House to argue his case and refused to withdraw, he was removed by the Sergeant-at-Arms. Twice Bradlaugh attempted to administer the oath to himself and was ejected. In 1886, however, the Speaker of the House refused to hear any objection to his seating, so he was allowed to take his seat without swearing the oath in its official form.). The Evidence Further Amendment Act 1869 32 & 33 Vict., c. 68, (Eng.); The Evidence Further Amendment Act 1870 33 & 34 Vict., c. 49 (Eng.); Oaths Act 1888, 51 & 52 Vict. c. 46 (Eng.).

<sup>210</sup> When Thomas Raeburn White published his article on Oaths in 1903, he found "[i]n thirty-three states and territories atheists or unbelievers have been made competent witnesses. The same is probably true of three others, but in fourteen and probably fifteen the common law rule [requiring belief in God and an order of rewards and punishments] is still unchanged." White, *supra* note 46, at 395. See also B.H. Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 YALE L.J. 659, 666-673 (1930) (statutory and case law regarding requirement of religious belief for testamentary oaths and oaths of office);

was not until 1961 in the case of *Torcaso v. Watkins*<sup>211</sup> that the Supreme Court ruled all requirements of religious belief or expression unconstitutional. The Federal Rules of Evidence, adopted in 1975, eliminated religion as a consideration in assessing the competence or credibility of a witness.<sup>212</sup> Yet, there are some state statutes current today whose interpretation may lead to a violation of the Constitution because there is no provision for affirmation as an alternative to the oath, or because, even

---

J. Crawford Biggs, *Religious Belief as Qualification of a Witness*, 8 N.C.L. REV. 31, 39 (1929-1930) (stating "In the following States, a witness must believe in Divine punishment or in the existence of a Supreme Being to be competent to testify: Alabama, Arkansas, Delaware, Maryland, New Hampshire, New Jersey, North Carolina, Pennsylvania, and South Carolina."). See generally Paul W. Kaufman, Note, *Disbelieving Nonbeliever: Atheism, Competence, and Credibility in the Turn of the Century American Courtroom*, 15 YALE J.L. & HUMAN. 395 (2003) (providing a review of state courts which before 1950 limited the courtroom testimony of atheists. According to Kaufman, several states maintained rules disqualifying atheists well into the twentieth century. Nine states held atheists competent to testify, but allowed them to be cross-examined about their beliefs for purposes of disputing their credibility.).

<sup>211</sup> 367 U.S. 488 (1961) (addressing the constitutionality of Article 37 of the Maryland Declaration of Rights, which stated, "[N]o religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God.") Roy R. Torcaso had been appointed to the office of Notary Public by the governor of the state but was refused a commission because he would not declare his belief in God. He then brought suit in Maryland to compel the issuance of his commission, claiming that the requirement to declare this belief was unconstitutional under the First and Fourteenth Amendments. The Supreme Court of Maryland stated, "[I]t seems clear that under our Constitution disbelief in a Supreme Being, and the denial of any moral accountability for conduct, not only renders a person incompetent to hold public office, but to give testimony, or serve as a juror. The historical record makes it clear that religious toleration, . . . was never thought to encompass the ungodly." *Torcaso v. Watkins*, 162 A.2d 438, 444 (Md. 1960). The Supreme Court reversed, holding, "This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him."

<sup>212</sup> FED. R. EVID. 601 (Rule 601 establishes inclusivity by making all persons presumptively competent to testify, unless incompetence can be demonstrated: "Every person is competent to be a witness unless these rules provide otherwise."). Rule 603 provides for choice, "Before testifying, a witness must give an oath or affirmation to testify truthfully." FED. R. EVID. 603. It does not require a particular form of oath, but instead establishes that the oath or affirmation, "must be in a form designed to impress that duty on the witness's conscience." *Id.* The Advisory Committee Note to Rule 603 explains that the Rule affords "the flexibility required in dealing with religious adults," as well as "atheists [and] conscientious objectors." FED. R. EVID. 603 advisory committee's note. Rule 610 states, "Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility," thereby prohibiting the disqualification of witnesses on the basis of religious belief or the introduction of the witness's religious belief or the lack of such belief to discredit the witness. FED. R. EVID. 610. See generally Milhizer, *supra* note 46, at 32 ("The Federal Rules were developed by the Supreme Court and formally adopted in 1975. The Rules applied directly to the federal courts and served as model rules for the states, where they were widely incorporated in varying degrees.").

though such an alternative is provided, the proffered affirmation, like the oath, includes a religious reference.<sup>213</sup>

Within the last decade, there have been two instances, one involving a testamentary oath and the other an oath of office, in which oaths taken by Muslims on the Qur'an were questioned. The latter was the case of Keith Ellison, mentioned in this Article's Introduction. Though that oath did not raise serious legal issues, it provoked a significant measure of immediate controversy and opposition, followed by eventual acceptance of the highly visible use of the Qur'an in an oath of office. The case of Syidah Matteen's proffered testamentary oath on the Qur'an, however, did lead to litigation, which, in regard to the state's opposition to allowing her to swear by the Qur'an, proved highly ironic in the light of the North Carolinian history reviewed above.<sup>214</sup>

#### i. Syidah Matteen

It's gotten way out there. They've got everything from the Book of Mormon to the Book of Wicca on the list. Our position is that the statute governs not only the type of oath, but the manner and administration of the oath, and that it's now a legislative matter to straighten out.<sup>215</sup>

In August 2003, a Muslim woman named Syidah Matteen was called as a witness in a court proceeding in Guilford County, North Carolina.<sup>216</sup> Matteen did not wish to swear on the Bible, and so she

---

<sup>213</sup> See Jonathan Belcher, *Religion-Plus Speech: The Constitutionality of Juror Oaths and Affirmations Under the First Amendment*, 34 WM. & MARY L. REV. 287, 298 nn.84 & 86 (1991) (listing state statutes which do not have affirmation as alternatives for juror oaths (note 84) or which have both oaths and affirmations which reference God (note 86)). Those which are still current are: GA. CODE ANN. §§ 15-12-132, -138, -139 (West 2012) (voir dire oath, civil juror oath, and criminal juror oath with no affirmation alternative); ALA. CODE §§ 12-16-170, -171 (2012) (jurors swear or affirm with reference to God); FLA. STAT. ANN. § 905.10 (West 2012); MISS. CODE ANN. § 13-5-71 (West 2012); N.H. REV. STAT. ANN. § 606:2 (2012)(criminal).

<sup>214</sup> See *supra* notes 189-203 and *infra* notes 246-261 and accompanying text.

<sup>215</sup> Patrik Jonsson, *Raise Your Right Hand and Swear to Tell the Truth . . . on the Koran?*, CHRISTIAN SCI. MONITOR (July 20, 2005), <http://www.csmonitor.com/2005/0720/p02s02-usju.html> (Senior Superior Court Judge of Guilford County, W. Douglas Albright, explaining why he would not permit a witness to swear on the Qur'an in his courthouse).

<sup>216</sup> ACLU of N.C. v. North Carolina, 639 S.E.2d 136, 137 (N.C. App. 2007). See also Daniel Blau, *Holy Scriptures and Unholy Strictures: Why the Enforcement of a Religious Orthodoxy in North Carolina Demands a More Refined Establishment Clause Analysis of Courtroom Oaths*, 4 FIRST AMEND. L. REV. 223, 223 (2006); Nadine Farid, *Oath and Affirmation in the Court: Thoughts on the Power of a Sworn Promise*, 40 NEW ENG. L. REV. 555, 558 (2006); Milhizer, *supra* note 46, at 1 & n.4.

requested that she be allowed to swear on the Qur'an.<sup>217</sup> Because there was no Qur'an available, she agreed to make an affirmation.<sup>218</sup> Later that month, Ms. Matteen returned to the courthouse with copies of the Qur'an, which the nearby Al-Ummil Ummat Islamic Center offered to donate to the Guilford County courts so that Muslim jurors and witnesses could be sworn on them.<sup>219</sup> The Guilford County judges declined to accept the donation, stating that an oath on the Qur'an would not be a legal oath under North Carolina State law.<sup>220</sup> In June 2005, Ms. Matteen was a witness in another matter before another judge at the Guilford County Court.<sup>221</sup> She again requested to be sworn on the Qur'an, and was again refused.<sup>222</sup>

Under North Carolina law, there are three alternatives that a person may choose in taking an official oath.<sup>223</sup> North Carolina General Statute, § 11-2, a law, which dates back to 1777, provided the first alternative:

[T]he party [shall] . . . lay his hand upon the Holy Scriptures, in token of his engagement to speak the truth and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of that holy book and made liable to that vengeance which he has imprecated on his own head.<sup>224</sup>

---

<sup>217</sup> *ACLU of N.C.*, 639 S.E.2d at 137.

<sup>218</sup> *Id.*

<sup>219</sup> Gary D. Robertson, *Quran-in-Court Case Can Advance State Panel Rules*, STARNEWS ONLINE (January 17, 2007, 12:30 am) StarNews Online, <http://www.starnewsonline.com/apps/pbcs.dll/article?p=2&tc=pg&AID=/20070117/NEWS/701170440/-1/State> ("The issue surfaced after Muslims from the Al-Ummil Ummat Islamic Center in Greensboro tried to donate copies of the Quran to Guilford County's two courthouses.").

<sup>220</sup> *Id.* ("Two Guilford judges declined to accept the texts, saying an oath on the Quran is not a legal oath under state law."); Amended Complaint ¶ 58, at 2-3, *ACLU of N.C. v. North Carolina*, No. 05 CVS 9872 (N.C. Sup. Ct. Nov. 29, 2005) ("The Al-Ummat Islamic center of Greensboro, North Carolina, in June 2005, offered to donate copies of the Quran to the Guilford County court system so that Muslim witnesses and jurors could be sworn in on their holy text; however, Guilford County judicial officials refused this request."); Eric Collins, *Judges Question Use of Quran in Taking Oath*, AM. MUSLIM PERSP. (June 18, 2005), [http://archives2005.ghazali.net/html/taking\\_oath.html](http://archives2005.ghazali.net/html/taking_oath.html) ("There appears to have been a misunderstanding about whether the court would accept the Qur'ans for the purpose of oaths.").

<sup>221</sup> Farid, *supra* note 216, at 558.

<sup>222</sup> *Id.*

<sup>223</sup> Blau, *supra* note 216, at 224.

<sup>224</sup> N.C. GEN. STAT. ANN. § 11-2 (West 2013) (the statute is still on the books).

The second alternative accommodates a person who is "conscientiously scrupulous of taking a book oath."<sup>225</sup> It excuses such a person from "laying hands upon, or touching the Holy Gospel,"<sup>226</sup> but requires the witness to "stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth he would draw down the vengeance of heaven upon his head."<sup>227</sup> The person would then state, "I, A.B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known (etc., as the words of the oath may be)."<sup>228</sup> The third choice permits an affirmation for a person who has "conscientious scruples against taking the oath" as prescribed by the first two alternatives.<sup>229</sup> Such a witness "shall be permitted to be affirmed. In all cases the words of the affirmation shall be the same as the words of the prescribed oath, except that the word 'affirm' shall be substituted for the word 'swear' and the words 'so help me God' shall be deleted."<sup>230</sup>

The Senior Superior Court Judge of Guilford County, W. Douglas Albright, interpreted the reference to "Holy Scriptures" in North Carolina General Statute, section 11-2, as referring to the Christian Bible alone.<sup>231</sup> He therefore maintained, "An oath on the Quran is not a lawful oath under our law."<sup>232</sup> Because of this position, the Guilford County judges refused to allow Ms. Matteen to take her oath upon the Qur'an and refused to accept the Qur'ans offered by the Islamic Center.<sup>233</sup> The only choices open to her were the oath of section 11-3, in which the oath-taker swears to "the Supreme God" with raised right hand,<sup>234</sup> or the affirmation of section 11-4, designed for those who did

---

<sup>225</sup> *Id.* § 11-3.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* § 11-4. *See generally id.* § 11-7 (concerns the State oath of office).

<sup>230</sup> *Id.* § 11-4.

<sup>231</sup> Collins, *supra* note 220.

<sup>232</sup> Jonsson, *supra* note 215.

<sup>233</sup> Blau, *supra* note 216, at 224 (citing Amended Complaint, ACLU of N.C. v. North Carolina, No. 05 CVS 9872 (N.C. Sup. Ct. July 26, 2005)) (the Complaint stating, "Guilford County Senior Resident Court Judge W. Douglas Albright and Guilford County Chief District Judge Joseph E. Turner have stated that the Christian Bible is the only religious text which can be used to swear in individuals pursuant to N.C.G.S. § 11-2 in Guilford County.").

<sup>234</sup> The form of taking an oath with uplifted hand rather than with scripture is associated with Scotland and dissenting Christian sects. "Even among the different sects of Christians, there may be different forms of taking the oath. . . . S. 5 of the *Oaths Act*, 1888 (51 & 52 *Vict.*

not wish to make any reference to God at all. But North Carolina law provided no alternative, which sanctioned an oath on the Qur'an.

On June 28, 2005, the American Civil Liberties Union (hereinafter "ACLU") requested the North Carolina Administrative Office of the Court (hereinafter "NCAOC") to adopt a policy that would allow "members of different faiths to be sworn in on the religious text honored by their faith if they choose."<sup>235</sup> On July 14, the NCAOC declined to interpret section 11-2, "as it is within the purview of the General Assembly and the Courts to determine how oaths are to be administered pursuant to Chapter 11 of the General Statutes of North Carolina."<sup>236</sup> On July 26, 2005, the ACLU of North Carolina filed suit against the State of North Carolina seeking a declaratory judgment "that the exclusive use of the Christian Bible in North Carolina courts was discriminatory towards non-Christians and seeking a declaratory judgment that the term 'Holy Scriptures' as set out in N.C.G.S. 11-2 includes not just the Christian Bible, but other religious texts, including but not limited to, the Quran, the Old Testament and the Bhagavad-Gita."<sup>237</sup> In the alternative, if the term "Holy Scriptures" did not include "all religious texts," the ACLU of North Carolina asked the Court to declare the statute unconstitutional and a violation of the Establishment Clause of the U.S. Constitution and Article 1, Section 13 of the North Carolina Constitution.<sup>238</sup>

The State sought to dismiss the case for lack of standing, arguing that no case or controversy existed because Ms. Matteen had decided to affirm when called as a witness in 2003, thereby resolving the contro-

---

c. 46), which enacts that 'if any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, (a) he shall be permitted to do so, and the oath shall be administered to him in such form and manner without further question,' appears only to be declaratory of the common law." SIR JOHN JERVIS, *ARCHBOALD'S PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES* 406 (1905).

<sup>235</sup> Blau, *supra* note 216, at 225 & n.10 (citing Letter from Sheleigh Kenney, Staff Attorney, American Civil Liberties Union of N.C. (ACLU-NC), and Seth Cohen, General Counsel, ACLU-NC Legal Foundation, to Ralph Walker, Director, North Carolina Administrative Office of the Courts (June 28, 2005)).

<sup>236</sup> Complaint and Request for Declaratory Judgment ¶ 7, at 2, ACLU of N.C., v. North Carolina, No. 05 CVS 9872 (N.C. Sup. Ct. July 26, 2005).

<sup>237</sup> *Id.* ¶ 11, at 3.

<sup>238</sup> *Id.* ¶ 12, at 3. Article I, section 13 of the North Carolina Constitution states, "All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience." N.C. CONST. art. 1, § 13.

versy.<sup>239</sup> Arguments were heard on December 5, 2005, in the Wake County Superior Court. Four days later, Judge Donald Smith agreed that there was no justiciable controversy and dismissed the case.<sup>240</sup>

The ACLU appealed, and on January 16, 2007, the North Carolina Court of Appeals reversed, finding that there was no impediment to litigation, and indeed the litigation was inevitable.<sup>241</sup> The case went back to the Wake County Superior Court. In the meantime, the North Carolina legislature considered a statute which would allow "the party to be sworn to place the party's hand upon the Bible or any text sacred to the party's religious faith" and delete the words, "So help me God" if appropriate to the person's faith.<sup>242</sup> However, on May 24, 2007, Superior Court Judge Paul Ridgeway held "as a matter of common law of North Carolina and under the authority of clear precedent of the North Carolina Supreme Court, oaths are to be administered in a form, and upon such sacred texts, including texts other than the Holy Bible, that a witness or juror holds to be 'most sacred and obligatory upon their conscience.'" <sup>243</sup> The State had thirty days to appeal the decision, but took no action, effectively ending the controversy.

---

<sup>239</sup> ACLU of N.C. v. North Carolina, 639 S.E.2d 136, 137-38 (N.C. App. 2007) (stating that on November 29, 2005, the ACLU of North Carolina filed an amended complaint adding Syidah Matteen as a plaintiff).

<sup>240</sup> *Id.* at 138. Blau, *supra* note 216, at 226 & n.19 (citing Wake County Superior Court Order and Judgment, ACLU of N.C. v. North Carolina, No. 05 CVS 9872 (filed Dec. 2005)).

<sup>241</sup> *ACLU of N.C.*, 639 S.E.2d at 139-40 ("Although it cannot be predicted exactly when or how much time will pass until a member of the ACLU-NC who would prefer to swear on a holy text other than the Christian Bible is required to take an oath in court, there is sufficient practical certainty that such a situation will occur." The appellate court noted that "by its refusal to permit witnesses to swear on any text other than the Christian Bible," the State had clearly demonstrated "its intent to continue the course of action," and concluded that future litigation was not speculative. Furthermore, the court found there was no impediment to litigation between the ACLU of North Carolina and the State because the former had submitted "affidavits from eight of its members from Guilford County, eligible for jury duty, who are Jewish and would prefer to swear on the Old Testament rather than the Christian Bible. ACLU-NC further alleged that it has approximately 8,000 members throughout the state, many of whom are of Islamic or Jewish religious faith." The court agreed that the ACLU of North Carolina had sufficiently indicated its members' intent to avail themselves of their rights against a State policy that was not speculative, so that future litigation of the issue was not a matter of "if" but rather of "when.").

<sup>242</sup> Milhizer, *supra* note 46, at 12 n.4. The legislation, however, was never passed perhaps because the resolution of the case rendered the issue moot.

<sup>243</sup> Declaratory Judgment at 17, ACLU of N.C. v. North Carolina, No. 2005 CVS 9872 (Super. Ct. Div. May 24, 2007), available at [www.aclu.org/files/images/asset\\_upload\\_file287\\_2987v3.pdf](http://www.aclu.org/files/images/asset_upload_file287_2987v3.pdf).



Judge Ridgeway declined to interpret "Holy Scriptures" as anything other than the Holy Bible.<sup>244</sup> However, Ridgeway quoted James Iredell's comments in the 1788 debate of the North Carolina ratifying convention,<sup>245</sup> in which Iredell indicated the holding of *Omychund*, that if the witness believed in a Supreme Being and a future state of rewards and punishments, "*the oath is to be administered according to that form which it is supposed will bind his conscience most.*"<sup>246</sup> Even more significant was the court's dependence on North Carolina case law, *Shaw v. Moore*,<sup>247</sup> an opinion of the state's Supreme Court dating from 1856.

The *Shaw* case concerned an objection to a witness who believed in "the obligation of an oath on the Bible; in God and Jesus Christ,"<sup>248</sup> but thought "that God would punish in this world all violators of his law . . . but there would be no punishment after death."<sup>249</sup> After surveying Coke's prohibition on non-Christian testimony, Lord Chief Justice Hale's exception for Jews, and the *Omychund* case, the *Shaw* court concluded that the rule of common law was that a non-Christian was a competent witness provided he believed in a Supreme Being who punishes the sinner.<sup>250</sup> There was no requirement the witness needed to believe that punishment would occur in the next life.<sup>251</sup> If such was the common law rule of a non-Christian, the court reasoned, then certainly "the fact that this Christian believes the divine punishment will be inflicted in this world, and not in the world to come is immaterial."<sup>252</sup> The *Shaw* court then stated the legal question before it, which was whether this rule of common law was "changed by our statutory provisions prescribing the form of oaths, ch. 76 Rev. Code."<sup>253</sup> In the *Mateen* case, Judge Ridgeway noted that "ch. 76 Rev. Code" was none

---

<sup>244</sup> *Id.* at 4 ("There is no authority known to this court that suggests that under a plain meaning, historical or contextual analysis, the term 'Holy Scriptures,' particularly when capitalized as in N.C. Gen. Stat. § 11-2, means anything other than the Holy Bible.").

<sup>245</sup> See *supra* notes 189-203 and accompanying text.

<sup>246</sup> Declaratory Judgment at 5, *ACLU of N.C.*, No. 2005 CVS 9872 (quoting 4 THE DEBATES IN THE SEVERAL STATES), *supra* note 163, at 197 (emphasis added by Judge Ridgeway).

<sup>247</sup> 49 N.C. (4 Jones) 25 (1856).

<sup>248</sup> *Id.* at 26.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 29-31.

<sup>251</sup> *Id.* at 29 ("The great case of *Omychund v. Barker*, . . . establishes the rule to be, that an infidel is a competent witness, provided he believes in the existence of a Supreme Being, who punishes the wicked, without reference to the *time* of punishment. The substance of the thing is, every *oath must have a religious sanction.*").

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

other than the statute currently codified as N.C. Gen. Stat. § 11-1 et seq., and found that this was the very question before him, "[W]as the common law rule that witnesses are to be sworn in a form most sacred and obligatory upon their own religious senses abrogated by the enactment of N.C. Gen. Stat. § 11-2?"<sup>254</sup>

Regarding the statute, the *Shaw* court stated, "we think it manifest, by a perusal of the Statute, that it was not intended to alter any rule of law," but rather "to prescribe forms, adapted to the religious belief of the general mass of the citizens, for the sake of convenience and uniformity."<sup>255</sup> After reviewing the three alternatives for swearing or affirming under North Carolina law,<sup>256</sup> the *Shaw* court made the following statement of moral outrage at the notion of prohibiting a person from taking an oath because of his religious belief:

[T]he argument that [the statute] was also intended to change the law by prohibiting any one from being sworn . . . would exclude both Jews, and infidels who believe in God. *We think it indecent to suppose that the Legislature intended in an indirect and covert manner to alter a well-settled and unquestioned rule of law*, and, in despite of the progress of the age, to throw the country back upon the illiberal and intolerant rule which was supposed to be the law in the time of bigotry; for, *it was every day's practice to swear Jews upon the Old Testament, and Omychund v. Barker had settled the rule that infidels are to be sworn according to the form which they hold to be most sacred and obligatory on their conscience.*<sup>257</sup>

In his opinion for the *Mateen* case, Judge Ridgeway quoted this statement in full, as well as the following, in which the *Shaw* court indicated that if indeed it found that the effect of the statute was to override the

---

<sup>254</sup> Declaratory Judgment at 7-8, *ACLU of N.C. v. North Carolina*, No. 2005 CVS 9872 (Super. Ct. Div. May 24, 2007).

<sup>255</sup> *Shaw*, 49 N.C. (4 Jones) at 29.

<sup>256</sup> The *Shaw* court addressed all three alternatives for making an oath or affirmation under North Carolina law. The first was "suited to such as hold the ordinary tenets of the Christian religion; that is, an oath, laying the hand upon 'the Holy Evangelists, etc.'" The second choice, "makes an exception in favor of those Christians who have conscientious scruples against taking an oath on the Holy Evangelists, and the form of the oath is framed in reference to their belief." The third section makes an exception in favor of those Christians who are Quakers, etc., and the form is framed in reference to their peculiar belief, 'swear not.'" *Id.*

<sup>257</sup> Declaratory Judgment at 8, *ACLU of N.C.*, No. 2005 CVS 9872 (quoting *Shaw*, 49 N.C. (4 Jones) at 30) (emphasis added by Judge Ridgeway).

common law established by *Omychund*, the statute would then violate the North Carolina Constitution in regard to religious freedom.

If . . . the Legislature had the purpose of altering the common law, so as to exclude Jews and infidels, who believe in a God, and Christians, who do not believe in future rewards and punishments, from the privilege of taking the oaths which are required to enable them to testify as witnesses, or to take any office or place of trust or profit, in other words, to degrade and persecute them for "opinion's sake," *then it is clear, that the statute, so far as this purpose is involved is void and of no effect because it is in direct contravention of the 19 sec. of the Declaration of Rights*: "That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences."<sup>258</sup>

The *Shaw* court went on to express its distaste for discriminating against non-Christian believers in God in regard to the oath, stating that if *Omychund* had not, "relieved the common law from the reproach of holding Jews and infidels who believe in a God, unfit to take an oath, . . . the effect of this section of our declaration of rights, would be, to extirpate the error and tear it up by the roots."<sup>259</sup>

Finally, the *Shaw* case contemplated the effect of this discrimination on the oaths for public office, for to enjoin the oath of a non-Christian would not only prevent the person from providing testimony, but:

[N]ay, more, he cannot take the oath of office as a constable, sheriff, justice of the peace, judge, legislator or governor; in short, it would be the institution of a "test oath," towards which our revolutionary fathers had so just an abhorrence, and which is wholly repugnant to the tolerant and enlightened spirit of our institutions and of the age in which we live.<sup>260</sup>

It is a remarkable irony that in the state whose history included Iredell's eloquent arguments of 1789, citing *Omychund*, decided in 1744, and in the state whose legal precedent included *Shaw v. Moore*, decided in

---

<sup>258</sup> *Id.* (quoting *Shaw*, 49 N.C. (4 Jones) at 30) (emphasis added by Judge Ridgeway). Section 19 of the North Carolina Declaration of Human Rights is now codified as Article I, section 13, of the North Carolina Constitution. See *supra* note 238.

<sup>259</sup> *Shaw*, 49 N.C. (4 Jones) at 31.

<sup>260</sup> *Id.*

1856, that judges of that very same state should think that only the Bible could be used to swear an oath at the dawn of the twenty-first century.<sup>261</sup>

## ii. Keith Ellison

You know, it's like Jackie Robinson, did he worry about being the first black baseball player? No. He worried about getting a hit, he worried about getting on base.<sup>262</sup>

It was January 4, 2007, moments after the entire 110th Congress, according to congressional custom, was sworn in en masse on the floor of the House of Representatives.<sup>263</sup> Democrat Keith Ellison, an African-

<sup>261</sup> Perhaps it could be argued that *Shaw* was distinguishable from *ACLU of North Carolina* because the former concerned a Christian and the latter a Muslim, or that a great deal of *Shaw's* rhetoric was dicta. However, in a long footnote, Judge Ridgeway demonstrated that under North Carolina law, the *Shaw* case was not at all eccentric in finding that the form of the oath is of little consequence as long as the oath-taker or affirmation-maker understands the duty to tell the truth. In 1914, the North Carolina Supreme Court stated "[N.C. Gen Stat. § 11-2], as to the manner of swearing is . . . merely a form 'adapted to the religious belief of the general mass of citizens for the sake of convenience and uniformity.'" *State v. Pitt*, 80 S.E. 1060, 1062 (N.C. 1914). In 1922, the North Carolina Supreme Court held that as long as the trial judge was satisfied that witnesses understood the obligation to tell the truth, the "way in which they expressed their conception of such obligation was of secondary importance." *Lanier v. Bryan*, 114 S.E. 6, 7 (N.C. 1922) *See also* *State v. Boyles*, 196 S.E. 850, 860 (N.C. 1938) ("[T]he decision (*Shaw v. Moore*, 49 N.C. 25) approves the doctrine that the witness should have the appreciation of a moral duty to tell the truth, and conforms to the general rule that the judgment of the trial judge on the question of competency of a person who is offered as a witness is a matter of discretion and will not be disturbed on appeal."). Finally, in *U.S. v. Looper*, a case from the Western District of North Carolina, the Fourth Circuit Court of Appeals stated, "The common law . . . requires neither an appeal to God nor the raising of a hand as a prerequisite to a valid oath. All that the common law requires is a form or statement which impresses upon the mind and conscience of a witness the necessity for telling the truth." *U.S. v. Looper*, 419 F.2d 1405, 1407 (4th Cir. 1969). The *Looper* court made it clear that no witness should be denied for not accepting a form of oath or affirmation designated by common law. *Id.* Rather, "All the district judge need do is to make inquiry as to what form of oath or affirmation would not offend defendant's religious beliefs but would give rise to a duty to speak the truth." *Id.* "The district judge could qualify defendant to testify in any form which stated or symbolized that defendant would tell the truth and which, under defendant's religious beliefs, purported to impress on him the necessity for so doing." *Id.*

<sup>262</sup> *Good Morning America: New Congress, Big Changes Coming?* (ABC television broadcast Jan. 4, 2007), available at 2007 WLNR 172044 (Representative Keith Ellison, commenting on being the first Muslim elected to the U.S. House of Representatives and the first representative to take his oath of office on the Qur'an).

<sup>263</sup> Kevin Diaz & Brady Averill, *A Jubilant Day of Firsts in Congress*, STAR TRIB., Jan. 5, 2007, available at 2007 WLNR 229345. Brady Averill & Steven Thomma, *CONGRESS: Holy Books Optional for Congressional Swearing-In*, MIAMI HERALD, Dec. 2, 2006, § A, available at 2006 WLNR 20805868 ("The House speaker administers the oath to members en masse on the floor

American newly elected to the House from Minnesota's Fifth District, proceeded to take the oath again in a private, unofficial ceremony, as do many members of Congress wishing to have a photo-op for the event.<sup>264</sup> Ellison's ceremonial swearing in, however, was not typical. It marked the first time a Muslim was to become a member of Congress.<sup>265</sup> Another first that attracted media attention and controversy was his decision to take the oath of office on the Qur'an.<sup>266</sup> For the occasion he had requested the Library of Congress to provide the Qur'an that had been the property of Thomas Jefferson.<sup>267</sup>

Ellison had made no secret of his religion or his plans to take the oath of office on the Qur'an during his campaign for the solidly democratic seat, which encompasses Minneapolis and is currently home to a high concentration of Muslims, including a Somali immigrant community.<sup>268</sup> He had rather easily weathered attacks from his Republican op-

---

of the House of Representatives. It's up to individual members if they want to hold religious texts, said Fred Beuttler, the House deputy historian. After the official swearing-in, members often have photos taken at a staged swearing-in ceremony in the speaker's office or their own offices, where they can place their left hands on sacred texts or hold them and have their families or religious leaders present, Beuttler said.").

<sup>264</sup> Averill & Thomma, *supra* note 263; Rochelle Olson, *Fifth District Ellison's Win a First in Several Areas*, STAR TRIB., Nov. 8, 2006, available at 2006 WLNR 19480703.

<sup>265</sup> Neil MacFarquhar, *Democrat Poised to Become First Muslim in Congress*, N.Y. TIMES, Oct. 8, 2006, § 1, available at 2006 WLNR 17420816.

<sup>266</sup> *Id.*

<sup>267</sup> Brady Averill, *Ellison to Borrow Qur'an Once Owned by Jefferson*, STAR TRIB., January 4, 2007, available at 2007 WLNR 2203561. Nancy Pelosi, the female Speaker of the House (yet another first) administered the oath. Diaz & Averill, *supra* note 263. During Jefferson's Presidency, the United States fought a war with four North African Muslim States, known collectively as the Barbary Pirates. See FRANK LAMBERT, *THE BARBARY WARS: AMERICAN INDEPENDENCE IN THE ATLANTIC WORLD 137-70* (2005). It has been suggested that Jefferson owned a copy of the Qur'an in order to know his enemy. See, e.g., David Barton, *An Historical Perspective on a Muslim Being Sworn into Congress on the Koran*, <http://www.wallbuilders.com/resources/misc/ellison.pdf> ("Why did Jefferson own a Koran? A simple answer is: To learn the beliefs of the enemies he was fighting.") Jefferson, however, bought the George Sale translation of the Qur'an from the *Virginia Gazette* in 1765, while he was still a student at the College of William and Mary. Kevin J. Hayes, *How Jefferson Read the Qur'an*, 39 EARLY AMERICAN LITERATURE 247, 247 (2004); Library of Congress, Thomas Jefferson's Library, <http://myloc.gov/Exhibitions/jeffersonslibrary/Reason/ExhibitObjects/JeffersonsCopyoftheKoran.aspx>. This was long before the first instance in which the Barbary Pirates captured an American vessel in 1784. LAMBERT, at 17-18. It appears that Jefferson's interest in the Qur'an had little to do with a desire to know Muslims as enemies.

<sup>268</sup> MacFarquhar, *supra* note 264 (quoting an Ellison supporter as stating, "If he wins, he will take the oath of office on a Koran," and adding, "The Fifth Congressional District is a Democratic citadel. The last Republican to represent it lost re-election in 1962. . . . There are far larger communities of Muslims in the United States . . . . But few other Congressional districts

ponent, who repeatedly accused him of being a supporter of the Nation of Islam leader, Louis Farrakhan.<sup>269</sup> Indeed, while a law student at the University of Minnesota, Ellison had written several articles under the pen name, Keith E. Hakim, one of which defended Farrakhan.<sup>270</sup> Ellison, now an orthodox Sunni Muslim, reached out to the local Jewish community, repudiating Farrakhan as anti-Semitic, and explaining his affiliation with the Nation of Islam as a limited one spanning an eighteen month period during which he helped to organize the Minnesota delegation to the Million Man March in 1995.<sup>271</sup>

It was an editorial posted on the *Townhall* website by the conservative radio talk-show host, Dennis Prager, soon after the election that sparked a much larger controversy.<sup>272</sup> The article contained several provocative pronouncements, not the least of which was its title, *America, Not Keith Ellison, Decides What Book a Congressman Takes His Oath On*.<sup>273</sup> Prager went on to say that Ellison "should not be allowed to [take his oath of office on the Qur'an], not because of any American hostility to the Koran, but because the act undermines American civilization."<sup>274</sup> He proclaimed, "America should not give a hoot what Keith Ellison's favorite book is . . . America is interested in only one book, the Bible. If you are incapable of taking an oath on that book, don't serve

---

have such a high concentration. . . . Somalis started arriving here in in 1993 as refugees fleeing the civil war in their country. Their number has grown to 120,000, with one fourth in the Fifth District."). For a map of Minnesota's Fifth District, see *5th District*, KEITH ELLISON: REPRESENTING MINNESOTA'S 5TH DISTRICT, <http://ellison.house.gov/about/our-district> (last visited March 8, 2014).

<sup>269</sup> MacFarquhar, *supra* note 265 ("Mr. Ellison's Republican opponent, Alan Fine, . . . made a concerted effort to discredit him for previous ties to the Nation of Islam, the radical group founded by Louis Farrakhan, but experts do not expect Mr. Fine to pose a serious challenge."). Ellison defeated his opponents, Alan Fine and Tammy Lee, by ratios of almost three to one. Rochelle Olson, *Fifth District Ellison's Win a First in Several Areas*, STAR TRIB., Nov. 8 2006, available at 2006 WLNR 19480703.

<sup>270</sup> MacFarquhar, *supra* note 265 (Ellison had converted from Catholicism to Islam while he was a student at Wayne State University).

<sup>271</sup> *Id.*; Rochelle Olson, *First Muslim Congressman Seen As More Than a Lawmaker*, HOUSTON CHRON., Nov. 17, 2006, § A, 2006 WLNR 20002333 ("He's a Sunni Muslim, the largest denomination of Islam. Ellison doesn't drink alcohol or eat pork.").

<sup>272</sup> See generally THE DENNIS PRAGER SHOW, <http://www.dennisprager.com/> (last visited March 8, 2014) (background on Mr. Prager).

<sup>273</sup> TOWNHALL MAG. (Nov. 28, 2006), [http://townhall.com/columnists/dennisprager/2006/11/28/america\\_not\\_keith\\_ellison\\_decides\\_what\\_book\\_a\\_congressman\\_takes\\_his\\_oath\\_on/page/full/](http://townhall.com/columnists/dennisprager/2006/11/28/america_not_keith_ellison_decides_what_book_a_congressman_takes_his_oath_on/page/full/).

<sup>274</sup> *Id.*

in Congress.”<sup>275</sup> Perhaps the most inflammatory passage of the piece was a rhetorical question which implied an invidious comparison between the Qur’an and another book for which universal opprobrium is generally reserved: “Would they allow him to choose Hitler’s ‘Mein Kampf,’ the Nazis’ bible, for his oath?”<sup>276</sup> Prager suggested that the substitution of the Qur’an for the Bible was a kind of moral terrorism, “doing more damage to the unity of America and to the value system that has formed this country than the terrorists of 9-11.”<sup>277</sup>

Besides some rather tepid support from conservative quarters, a torrent of criticism from many quarters rained down on Prager’s head.<sup>278</sup> The Council on American-Islamic Relations called upon the Holocaust Council, which oversees the United States Holocaust Memorial Museum in Washington, to remove Prager from its board: “[N]o one who holds such bigoted, intolerant and divisive views should be in a

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* Mr. Prager continued, “And if not, why not? On what grounds will those defending Ellison’s right to choose his favorite book deny that same right to a racist who is elected to public office?” *Id.* Mr. Prager later denied that he was comparing the Qur’an with *Mein Kampf*. *Hannity & Colmes: Interview with Dennis Prager, Roy Sekoff, Sean Hannity, and Bob Beckel* (Fox News television broadcast Jan. 4, 2007), available at 2007 WLNR 186098.

<sup>277</sup> Prager, *supra* note 273 (“[I]t is an act of hubris that perfectly exemplifies multicultural activism – my culture trumps America’s culture. . . . What Ellison and his Muslim and leftist supporters are saying is that it is of no consequence what America holds as its holiest book, all that matters is what any individual holds to be his holiest book.”).

<sup>278</sup> Not many public figures followed Prager’s lead. But among them was Virgil Goode, the Congressman who ironically represented the congressional district that includes Monticello, Jefferson’s home, and the University of Virginia, which Jefferson founded. *Rep. Goode’s Attack on Muslims in Government an Affront to Legacy of Thomas Jefferson Values, Traditions of Virginia*, U.S. FED. NEWS (Dec. 28, 2006), available at 2006 WLNR 22704377. To constituents who complained about Ellison’s choice of book to swear by, Congressman Goode wrote, “When I raise my hand to take the oath on Swearing In Day, I will have the Bible in my other hand. I do not subscribe to using the Koran in any way.” Rex Bowman, *Goode Stands By Comments About Muslims*, RICHMOND TIMES DISPATCH (Dec. 21, 2006), available at 2006 WLNR 22428428. “[I]f American citizens don’t wake up and adopt the Virgil Goode position on immigration there will likely be many more Muslims elected to office and demanding the use of the Koran.” *Id.* Goode believes that a limitation on Muslim immigration is needed for American security. Noting that he kept the Ten Commandments and motto, “In God We Trust,” on his office wall, Goode provided the following response to a Muslim student who asked him why he did not also have something about the Koran: “As long as I have the honor of representing the citizens of the 5th District of Virginia in the United States House of Representatives, the Koran is not going to be on the wall of my office.” *Id.* The American Family Association issued an “Action Alert” asking members to urge their congressmen to pass a constitutionally suspect law making “the Bible the book used in the swearing in ceremony of Representatives and Senators.” Omar Sacirbey, *Religion’s Role in the American Political System Questioned in Debate over Oaths of Office*, SUN HERALD (Biloxi, MS), Dec. 8, 2006, § B, available at 2006 WLNR 21192665.

policymaking position at a taxpayer-funded institution that seeks to educate Americans about the destructive impact hatred has had, and continues to have, on every society."<sup>279</sup> New York City's former Mayor, the late Ed Koch, agreed, calling Prager a "bigot" and a "schmuck,"<sup>280</sup> adding, "Dennis Prager is not qualified to serve on the board of the U.S. Holocaust Council."<sup>281</sup> The Anti-Defamation League called Prager's remarks, "intolerant, misinformed and downright un-American."<sup>282</sup> The Religious Action Center of Reform Judaism stated that Prager's criticism was "irreconcilable with American law and ideals as well as Jewish values and interests."<sup>283</sup>

Prager's appearance on various talk shows did little to quiet this criticism. At a joint interview on CNN, UCLA Professor of Law, Eugene Volokh, explained to Prager the legal untenability of his position:

[T]he Constitution specifically says that you may refuse to use any book. . . . You may refuse even to give an oath. You may affirm. . . . The purpose of an oath is not [to] affirm the correctness of the book that you use. The purpose of using a book is to invoke God as your witness and as a means of firming up your resolve to abide by the truth. . . .<sup>284</sup>

Here, as elsewhere, Volokh pointed out that requiring a person to take an oath of office on a particular religious text, as Prager demanded, "would impose an unconstitutional religious test."<sup>285</sup>

---

<sup>279</sup> Frederic J. Frommer, *Columnist Targeted in Quran Flap*, PITTSBURGH POST-GAZETTE, Dec. 5 2006, available at 2006 WLNR 20975193.

<sup>280</sup> Kathleen Parker, Commentary, *U.S. Will Survive One Hand on Koran*, CHI. TRIB., Dec. 13, 2006, available at 2006 WLNR 21486089. See also Jennifer Siegel, *Koch Calls for Prager's Ouster from Shoah Council*, THE JEWISH DAILEY FORWARD, Dec. 8, 2006, available at <http://forward.com/articles/9621/koch-calls-for-pundits-ouster-from-shoah-council/#>.

<sup>281</sup> Ed Koch, Opinion, *Keith Ellison, the Koran and Tolerance*, JERUSALEM POST, Dec. 14, 2006, available at 2006 WL 22080944.

<sup>282</sup> *Anti-Defamation League Comments on Dennis Prager's Attack on Muslim Congressman for Taking Oath of Office on Koran*, U.S. FED. NEWS, (Dec. 1, 2006), available at 2006 WLNR 20809894.

<sup>283</sup> *Reform Jewish Leader Supports First Muslim Member of Congress' Right to Take Oath of Office Using Koran*, U.S. FED. NEWS (Dec. 4, 2006), available at 2006 WLNR 21546918.

<sup>284</sup> *Paula Zahn Now: Interview with Dennis Prager, Eugene Volokh* (CNN television broadcast Nov. 30, 2006), available at 2006 WLNR 20719461.

<sup>285</sup> Eugene Volokh, *Oh Say, Can You Swear on a Koran?*, NAT'L REV. ONLINE (Nov. 29, 2006), <http://www.nationalreview.com/articles/219360/oh-say-can-you-swear-koran/eugene-volokh>.



Several pundits expressed their bemusement with Prager's position. Tucker Carlson quipped, "Here we have a Jew pushing a Muslim to use the Christian Bible. . . . That's America."<sup>286</sup> Bill Maher opined, "In this country, we put our hand on the Bible (or the Koran) and swear to uphold the Constitution, not the other way around."<sup>287</sup> But perhaps Kevin J. "Seamus" Hasson, the President of the Becket Fund for Religious Liberty, most effectively captured the paradox of Prager's tirade: "It makes no sense at all to . . . violate the Constitution in order to [have someone] affirm his duty to uphold the Constitution."<sup>288</sup> Not surprisingly, Prager modified his views in his subsequent suggestion that Ellison could have taken his oath on both the Qur'an and the Bible,<sup>289</sup> and finally in expressing regret for some of what he had written.<sup>290</sup> The admission of regret does him credit.

#### IV. RELIGIOUS EXPRESSION IN THE AGE OF DIVERSITY

##### A. *Religious Expression in Testamentary and Other Courtroom Oaths*

Despite his ringing endorsement of Mateen's right to make her testamentary oath on the Qur'an, Judge Ridgeway still had to deal with an issue whose significance he may have underestimated. In its argument against the freedom of witnesses to choose whatever text they want to swear upon, the State pointed out that a witness "may wish to be sworn on noxious texts, such as Hitler's *Mein Kampf*, under some

---

<sup>286</sup> World Sources Online, *Tucker: Interview with Dennis Prager* (MSNBC television broadcast Dec. 4, 2006), available at 2006 WLNR 20999389.

<sup>287</sup> John Yewell, *Ironic Twist on Religious Freedom*, MONTEREY COUNTY HERALD (Dec. 1, 2006), § 2, available at 2006 WLNR 20780106.

<sup>288</sup> Jane Lampman, *At Swearing In, Congressman Wants to Carry Koran. Outrage Ensues*, CHRISTIAN SCI. MONITOR, Dec. 7, 2006, available at 2006 WLNR 21089102.

<sup>289</sup> Dennis Prager, *A Response to My Many Critics, and a Solution*, TOWNHALL MAG. (Dec. 5, 2006), [http://townhall.com/columnists/dennisprager/2006/12/05/a\\_response\\_to\\_my\\_many\\_critics\\_-\\_and\\_a\\_solution/page/full/](http://townhall.com/columnists/dennisprager/2006/12/05/a_response_to_my_many_critics_-_and_a_solution/page/full/) ("Why wouldn't Ellison bring a Bible along with the Koran? That he chose not to is the narcissism of multiculturalism that I referred to: The individual's culture trumps the national culture.").

<sup>290</sup> Dennis Prager, *Worried About the Bible's Place in U.S.*, N.Y. JEWISH WEEK: MANHATTAN EDITION (Jan. 5, 2007), available at 2007 WLNR 1562186 ("There were sentences in that column that I regret writing and that deserved criticism. I was wrong in writing them. The most widely cited example is that Ellison 'should not be allowed to take his oath on the Koran.' I made clear in my next column and on my radio show the next day that I fully understand that any elected official has the legal right to take his oath of office on any or no book. What I implied was clearly unconstitutional.").

strained claim of religious preference."<sup>291</sup> One is reminded of Guilford County Judge Albright's concern that acceptance of the Qur'an as an instrument for courtroom oaths could eventually lead to the acceptance of such texts as the Book of Wiccan for this purpose.<sup>292</sup> In regard to Ellison's oath, the State's argument is also reminiscent of Prager's fear of the possibility that an elected official may choose *Mein Kampf* for the oath of office.<sup>293</sup> Judge Ridgeway thought that through its inherent judicial authority a court could decide to exclude a religious text when "the individual's preference regarding their oath interferes with the administration of justice by delaying or distracting the court or jury."<sup>294</sup>

Judge Ridgeway's facile solution to this problem, however, brings the entire question of religious freedom in regard to a testamentary oath back to square one. The argument could be made that the choice of the Qur'an will distract a jury, particularly after any significant terrorist attack in which the terrorists claim to be motivated by Islamic beliefs. Could a judge prohibit the use of the Qur'an for a testamentary oath if the judge determined that, under the circumstances of a particular proceeding, the Qur'an would be a distraction? What about a peculiar religious text claimed by a small, unpopular, religious minority, as opposed to the scripture of a major religion like Islam? After all, the initial hostility of the English judiciary to Quakers did not seem so unreasonable when the Society of Friends was still a persecuted sect whose refusal to swear oaths on grounds of conscience undercut what was believed to be a necessary means of eliciting truthful testimony.<sup>295</sup>

When the freedom to choose from a great variety of texts, sacred or profane, replaces the expectation of one standard religious text, or even a short list of texts, upon which witnesses are expected to swear testamentary oaths, problems arise regarding court decorum, coercion, and juror

---

<sup>291</sup> Declaratory Judgment at 16, *ACLU of N.C. v. North Carolina*, No. 2005 CVS 9872 (Super. Ct. Div. May 24, 2007).

<sup>292</sup> See *supra* note 215 and accompanying text.

<sup>293</sup> See *supra* note 276 and accompanying text.

<sup>294</sup> Declaratory Judgment at 16-17, *ACLU of N.C.*, No. 2005 CVS 9872.

<sup>295</sup> Ryan C. MacPherson, *Quakers in America: From Persecution to Toleration to Domination*, RYANMACPHERSON.COM, <http://www.ryanmacpherson.com/publications/26-research-papers/74-quakers-in-america-from-persecution-through-toleration-to-domination.html> ("[Quakers] faced imprisonment for the first refusal to take a [loyalty] oath; subsequent infractions could result in praemunire, or forfeiture of their property, both real and personal, to the king, whose prisoner the violator would remain. For their refusal to testify in court under oath, Quakers were generally convicted—not necessarily of the original charge brought against them, but rather of refusal to testify under oath. This, too, was cause for imprisonment.").

bias. Dean Milhizer posits this dilemma as the core reason for his conclusion that courts should not permit the use of religious artifacts in courtroom oaths.<sup>296</sup> He argues that acceptance of such objects presents the court with the contradictory burdens of acceding "to an oath taker's request to use any artifact which he considers symbolic of his religious beliefs," and "restrict[ing] the use of the artifacts only to those that are deemed acceptable."<sup>297</sup> If the court accedes to all such requests, there will inevitably be cases where an oath taker will insist upon using an artifact that will distract and offend most jurors. But if the court restricts the use of such artifacts to what the court deems acceptable, the court would be exhibiting an apparent preference for religious beliefs over secular beliefs, or vice versa, or for some religious beliefs over others, both likely violations of the Establishment Clause.<sup>298</sup>

Let us suppose the court should decide that only religious artifacts are acceptable. The court will find it difficult, if not impossible, to find standards that, without stirring controversy, can effectively distinguish between religious objects and secular objects.<sup>299</sup> If the court fails to find such criteria or declines to apply them, then witnesses may choose any secular objects they idiosyncratically believe would guarantee to the jury the truth of their testimony, ranging from philosophical texts to comic books.<sup>300</sup> Even if the court were confident in its ability to decide whether a particular artifact is religious in nature, the court will not be able to prohibit minority religious artifacts that many would find offensive and objectionable for an oath, such as objects representing New Age spirituality, Satanism, or witchcraft.<sup>301</sup> Milhizer's logic is inexorable.

If some artifacts are allowed while others are excluded, this would necessitate the recognition and application of criteria for drawing such

---

<sup>296</sup> Milhizer, *supra* note 46, at 65-70.

<sup>297</sup> *Id.* at 65.

<sup>298</sup> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Bd. of Educ. of Ewing Twp.*, 33 U.S. 1, 15 (1947). *But see*, *Van Orden v. Perry*, 545 U.S. 677, 684, n.3 (2005) (citing *Cutter v. Wilkinson*, 533 U.S. 709 (2005)) ("[W]e have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion."); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Walz v. Tax Comm'n of New York*, 397 U.S. 664 (1970)).

<sup>299</sup> Milhizer, *supra* note 46, at 66.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 67.

distinctions. These criteria necessarily would involve a substantive and normative evaluation about the legitimacy, or at a minimum, the acceptability, of various religions and their artifacts. This implicates judgments about the genuineness and worthiness of faith traditions and their beliefs. Such decisions would involve imponderables and could be highly offensive.<sup>302</sup>

Even if there were a moral consensus about such decisions, the constitutionality of acting upon it would be a never-ending source of difficulty and litigation.<sup>303</sup>

In a Note addressing the *Matteen* case, Daniel Blau focused on the coercive pressures at play when a non-Christian or non-religious juror or witness is confronted with the choice of oath or affirmation.<sup>304</sup> He relates the story of John Sidoti, a long-time North Carolina resident who, as a defendant in small claims court, chose to affirm rather than swear an oath.<sup>305</sup> The plaintiff in that case continuously badgered Sidoti for not putting his hand on the Bible and swearing, and claimed that Sidoti would lie.<sup>306</sup> Sidoti had to ask the Magistrate to reprimand the plaintiff for returning to this issue after the court had accepted his affirmation.<sup>307</sup> Later on, Mr. Sidoti appeared as a plaintiff in a civil case and again asked to affirm.<sup>308</sup> When he said he preferred not to raise his right hand because he thought the gesture expressed recognition of God, the judge "cocked her head to the side and stared at [him] as if to say [he] was weird."<sup>309</sup> He thought he lost the case because of the judge's reaction.<sup>310</sup> The next time he appeared in court, he swore an oath because he feared the impression he would make if he again asked to affirm.<sup>311</sup> He immediately regretted the decision to swear "to a god that [he] did not believe in."<sup>312</sup> When later called as a juror, he asked to affirm rather than swear by the Bible.<sup>313</sup> The clerk administering the juror oaths

---

<sup>302</sup> *Id.* at 69.

<sup>303</sup> *Id.*

<sup>304</sup> Blau, *supra* note 216, at 252-60.

<sup>305</sup> *Id.* at 252-54.

<sup>306</sup> *Id.* at 252.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 252-53.

<sup>310</sup> *Id.* at 253.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* (Sidoti continued, "[A]nd ironically and paradoxically, [I] was swearing that I wouldn't tell a lie!").

<sup>313</sup> *Id.*

shouted, "We have one who wants to affirm," provoking a discussion with the judge about what to do with Mr. Sidoti.<sup>314</sup> This made Sidoti feel self-conscious and wonder whether he had credibility with the other jurors.<sup>315</sup>

Eventually Blau questions the constitutionality of permitting the religious oath in the courtroom.<sup>316</sup> He acknowledges that the Supreme Court's leading decision that found religious expression unconstitutional due to its coercive tendency, *Lee v. Weisman*, relied on the presence of school children,<sup>317</sup> whereas in *Marsh v. Chambers*, the Supreme Court allowed prayer in the predominantly adult environment of a legislative session.<sup>318</sup> In these cases, the blanket assumption was that children are very impressionable, but adults, not so much, because they have the maturity to resist religious indoctrination. Blau, however, points out that, unlike the legislative setting of *Marsh v. Chambers*, the solemnity and litigious stakes of courtroom proceedings present particularly coercive forces likely to affect the decisions of adults, as in the case of Mr. Sidoti.<sup>319</sup> It is, nevertheless, a difficult proposition to argue the unconstitutionality of the courtroom oath when the Constitution itself

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 253-54 ("On my drive home I was very depressed and embarrassed that I had [been singled out], and that the court had not explained to anyone that affirming, rather than swearing, was an option. In fact, from all appearances, the way the Bibles were methodically laid out as if by rote, [suggested that] this was the only way to become a juror. At least if affirmation were stated by the court as an option, that would have given my act some credibility, and [would not have made] me feel like the only outsider to be on the jury."). Cf. Epstein, *supra* note 153, at 2146-47 (Epstein makes much the same point about the coercive powers of the courtroom: "A witness or juror who does not believe in the Christian Bible, in swearing to God, or in the God envisioned in the oath, must publicly declare her disbelief in front of (and with the likely perception of disapproval of) a judge and her fellow citizens. If the government is forbidden from coercing a statement of belief, it should be equally forbidden from coercing a confession of nonbelief.").

<sup>316</sup> Blau, *supra* note 216, at 244-65.

<sup>317</sup> *Lee v. Weisman*, 505 U.S. 577, 593 (1992). See also Blau, *supra* note 216, at 258 ("Skeptics of the coercion argument argue that the types of coercive pressures present in *Lee* are absent in [oath] ceremonies. In *Lee*, the Court found that indirect coercive pressures were at work because of the setting in which the religious exercise took place: a high school graduation ceremony. The court noted that teenagers, especially sensitive to peer pressure in social situations, were more likely to be coerced into conformity and participation in the religious exercise.").

<sup>318</sup> *Marsh v. Chambers*, 463 U.S. 783 (1983). See also Blau, *supra* note 216, at 258 (citing *Marsh*, 463 U.S. at 792) ("In contrast, in *Marsh v. Chambers*, the Court found that adults are 'presumably not readily susceptible to "religious indoctrination" . . . or peer pressure.'").

<sup>319</sup> Blau, *supra* note 216, at 259 ("While an adult juror or witness may be less susceptible to religious indoctrination, the pressure to conform is greatly increased when it takes place in a courtroom. For a witness who commands the attention of the judge, court officials, parties to

provides for the choice of oath or affirmation, not only for the oath of office of the president and other public officials, but also for a quasi-judicial legislative proceeding like the impeachment of the president.<sup>320</sup>

The most cogent reason to prohibit religious artifacts in the testamentary oath is the effect, which differences in choice of religious artifact would have on the jurors who assess the credibility of a witness's testimony. Milhizer briefly notes this effect: "Unusual or elaborate forms of oaths, and controversial and offensive artifacts . . . could unduly detract from the credibility of a witness based on an expression of his religious beliefs when taking his oath."<sup>321</sup> And in his contentions about coercion, Blau indirectly implicates the effect the religious expression of an oath may have on a jury as a factor which may coerce a witness deciding whether to swear or affirm:

[A] witness feels compelled to swear on the Bible so that the jury will believe and give proper weight to his or her testimony. This coercion is especially problematic when a defendant testifies on his or her own behalf, for his or her own fate is at stake when the bailiff approaches with a Bible. . . . In the post-September 11 world, . . . an Islamic defendant will be acutely aware of the fact that he or she may greatly damage his or her testimony by exercising the right to swear an oath to Allah on the Qur'an.<sup>322</sup>

Even if it is assumed that adult witnesses will not be coerced into using or not using religious artifacts in their testamentary oaths (and, of

---

the litigation, and most importantly, a jury of his or her peers, the social pressure to swear a religious oath may be overwhelming.”).

<sup>320</sup> The phrase “oath or affirmation” occurs three times in the Constitution: U.S. CONST. art. I, § 3, cl. 6 (for impeachments: “The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation.”); U.S. CONST. art. II, § 1, cl. 9 (for the president’s oath of office: “Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: - ‘I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’”); U.S. CONST. art. VI (for the oath of office of federal and state officials: “The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”). The first instance, regarding impeachment, is the quasi-judicial situation referred to in the text. However, it is acknowledged that this choice is for a type of juror oath or affirmation as opposed to a witness oath or affirmation.

<sup>321</sup> Milhizer, *supra* note 46, at 67-68.

<sup>322</sup> Blau, *supra* note 216, at 256-57.

course, some will), juror influence is still a problem. The unscrupulous witness, to whom the choice of oath or affirmation makes no difference, will choose the form of oath or affirmation she believes will have the greatest effect in persuading the jury she is telling the truth. On the other hand, the sincere witness will choose the form of oath or affirmation dictated by her conscience, and will fortuitously receive the advantage or disadvantage of the jury's preference. It is true that juries are routinely told and expected to disregard information obtained outside the trial, or testimony for which an objection has been sustained. But if a courtroom oath, dressed up in religious symbols and expression, in and of itself is a source of bias, prejudice, and a lack of objectivity, the court achieves greater impartiality by keeping the religiously laden oath out of court proceedings entirely, especially if the oath is not necessary.

Much of the coercive effect that Blau recounts is due to or magnified by the presence of religious artifacts in the courtroom, which Milhizer would remove. But Milhizer, if not Blau, is cognizant of the advantages custom and tradition have found in the oath, advantages that would largely be lost should a rule prohibiting religious artifacts in the courtroom be adopted.<sup>323</sup> He observes that "[religious artifacts] can enhance an oath's substantive effectiveness, . . . [by] bind[ing] the taker's conscience and emphasiz[ing] his duty to tell the truth."<sup>324</sup> Not only does the religious dimension of the oath influence the religious conscience of certain witnesses to be truthful, but "[f]or fact-finders and the broader public, witness oaths . . . can remedy a defect, namely, some man's lack of belief in another man. An invocation of 'God' as part of an oath helps satisfy others that the oath taker's conscience has at least presumptively been awakened to the duty to tell the truth."<sup>325</sup> As Nadin Farid, another commentator on the Mateen case states, "The protection offered the witness in the taking of the oath serves to comfort the jury as well; it is the hallmark of the witness's earnestness."<sup>326</sup>

But inherent in the very advantage of creating jury confidence based on the religious dimension of the oath is the disadvantage about which Milhizer and Blau complain. The jury's belief that the religious expression of an oath renders testimony more credible is prejudicial, for the belief that the religious expression of the oath indicates the truthfulness

---

<sup>323</sup> Milhizer, *supra* note 46, at 64-65.

<sup>324</sup> *Id.* at 64.

<sup>325</sup> *Id.* at 59.

<sup>326</sup> Farid, *supra* note 216, at 560.

ness of the witness is most likely to be held by jurors who share religious belief with the witness. For the believer in God who has no objection to taking an oath, its religious dimension does not present a problem. But for the witness who does not believe or merely objects to the oath, the availability of the oath is unfair. Such a witness would have to take the oath insincerely or under duress in order to gain the same credibility as other witnesses who, sincerely or not, take the oath. And for the witness who, as a matter of conscience, will not take the oath, it is then an instrument that is unavailable to convince the jury of truthfulness, though such a person may be as truthful as the most sincere oath-taker.

Milhizer proposes a solution: "An Invocation of God Without the Use of Artifacts."<sup>327</sup> This solution entails the prohibition of religious artifacts so that witnesses do not have a choice of any articles on which to swear, but are only allowed to invoke "a public, generic reference to the divine."<sup>328</sup> This solution would diminish the seriousness of the problems that Milhizer discusses, but does not eliminate them altogether. There would remain those who will not be comfortable invoking God at all, as the term is generally understood in a predominantly western, Christian country such as the United States.<sup>329</sup> If there is a valid concern that members of certain minority religions and nonbelievers will want to use religious artifacts that the majority may find objectionable, it is then also a valid concern that some witnesses will not want to use the term, "God," and as a result be limited to choosing only between that particular religious expression or an affirmation, which is

---

<sup>327</sup> Milhizer, *supra* note 46, at 70.

<sup>328</sup> *Id.*

<sup>329</sup> The conscientious objector case, *United States v. Seeger*, 380 U.S. 163 (1963), has a discussion about the meaning of "Supreme Being." Here, conscientious objectors claimed exemption from military combatant training on the basis of "religious training and belief" defined as "belief in a relation to a Supreme Being" in § 6(j) of the Universal Military Training and Service Act, 50 U.S.C. app. § 456(j) (1958). *Seeger*, 380 U.S. at 164. However, the conscientious objectors could not claim that they believed in a Supreme Being. *Id.* at 164-69. After reviewing the writings of various theologians and clerics on the nature of God, Justice Clark wrote in the majority opinion, "[t]hese are but a few of the views that comprise the broad spectrum of religious beliefs found among us. But they demonstrate very clearly the diverse manners in which beliefs, equally paramount in the lives of their possessors, may be articulated." *Id.* at 183. In a concurring opinion, Justice Douglas reviewed the beliefs of Hindus and Buddhists about God, finding these to be distinct from that of an "orthodox religionist." *Id.* at 193 (Douglas, J., concurring). He opined that subjecting the religious beliefs of some but not others to penalties would be would be discrimination that violated the free Exercise Clause, equal protection, and Due Process. *Id.* at 188.



the Mateen problem all over again.<sup>330</sup> Should witnesses be allowed to replace the term, "God," with some other term or religious formulation, then the problem presented by distracting or offensive religious artifacts has not been solved at all.

For the purposes of optimizing juror impartiality, it may be best to eliminate any reference to the deity and provide only an affirmation, which a person makes under the worldly penalties of perjury. Thus the bailiff in administering the oath will not mention God. What if the juror, on his own, adds "So help me God," or some other religious or secular formulation in repeating the affirmation? Only under these narrow circumstances may the court exercise its inherent power to maintain proper decorum under the circumstances and decide whether the addition to the affirmation is too obtrusive or distracting to be permitted.

Though the Constitution might not require the court to impose upon itself or upon witnesses these limitations, the practical concerns of a religiously diverse society suggest that a universal affirmation is the most practical way to achieve impartiality among the jurors. In an age where witnesses are entitled to choose whatever artifacts or expression they think will best demonstrate their truthfulness and candor, any advantage the religious oath may afford for extracting the truth from the witness and creating jury confidence in testimony is likely to be outweighed by the advantage of avoiding as much as possible bias regarding the witnesses' choice. Regarding conscientious witnesses, religious or not, truthfulness will still have the advantage of the general admonitions of most religions, and of most secular systems of morality, not to mention modern investigative devices and the penalties for perjury, that a person be truthful in bearing witness.<sup>331</sup>

### B. *Religious Expression in the Oath of Office*

In his article on ceremonial deism, Epstein lumps the oath of office with the testamentary oath as forms of ceremonial deism likely to offend the Establishment Clause, arguing that both are violative of the Establishment Clause.<sup>332</sup> In applying Establishment Clause jurisprudence to

---

<sup>330</sup> See *supra* notes 215-234 and accompanying text.

<sup>331</sup> See *supra* notes 166-167 and accompanying text, discussing Madison's view that an oath is itself a private test of one's truthfulness.

<sup>332</sup> Epstein, *supra* note 153, at, 2144-47 (Epstein sets up his analysis with an examination of the Supreme Court's Establishment Clause jurisprudence).

several instances of what he identifies as "Core Ceremonial Deism,"<sup>333</sup> Epstein treats the "Oaths of Public Officers, Court Witnesses and Jurors."<sup>334</sup> Regarding the oath of office, he writes:

When the Chief Justice of the Supreme Court asks the President-elect to place his left hand on the Christian Bible . . . and to swear the words "so help me God," nonadherents cannot help but feel left out. In this one act, the highest officials of two branches of the federal government, in an official ceremony like none other in this country, through word and act, embrace the Christian Bible and the God envisioned therein. It is difficult to understand why *Torcaso v. Watkins* does not compel the conclusion that this practice violates the Establishment Clause.<sup>335</sup>

In 2008, Michael Newdow brought at least part of Epstein's contention to court when he filed a complaint in federal court alleging that it was unconstitutional for Chief Justice Roberts to prompt President-elect Obama with the words "So help me God" in the presidential oath of office.<sup>336</sup> The Constitution provides that the president may take an oath or affirmation and provides the words for the ceremony, but it does not include any mention of "So help me God," or of swearing upon any religious book.<sup>337</sup> Though Newdow did not challenge the president-elect's choice to include the words, he objected to the Chief Justice's prompt.<sup>338</sup> Newdow argued that in administering the presidential oath,

---

<sup>333</sup> *Id.* at 2137-54.

<sup>334</sup> *Id.* at 2144-47.

<sup>335</sup> *Id.* at 2145.

<sup>336</sup> Complaint, *Newdow v. Roberts*, No. 1:08-CV-02248-RBW (D.D.C. Dec. 30, 2008) (Newdow lost the case).

<sup>337</sup> U.S. CONST. art. II, § 1, cl. 9. *See also* Complaint at 24, 26, *Newdow*, No. 1:08-CV-02248-RBW.

101. The oath of office for the President of the United States is specified in the Constitution's Article II, Section 1. . . .

102. It is to be noted that the words, "so help me God" are not included in this oath. . . .

110. Absent constitutional amendment, there is no authority to alter the text of the Constitution, the provisions of which are "fixed and exclusive." *United States Term Limits v. Thornton*, 514 U.S. 779, 790 (1995) . . . .

<sup>338</sup> *Id.* at 21 ("The President, like all other individuals, has Free Exercise rights, which might permit such an alteration.").

the Chief Justice speaks for the United States government.<sup>339</sup> Therefore, his utterance of “So help me God” amounted to a government approval of religious belief forbidden by the Establishment Clause.<sup>340</sup> Indeed, though George Washington is commonly said to have uttered these words at the first presidential inauguration, there is no contemporary account or evidence indicating he did so, and no one made such a claim until the 1850’s.<sup>341</sup> Aside from Washington, there is no convincing evidence that any President used the words at subsequent inaugurations until Chester A. Arthur did so in 1884, after which the practice eventually became customary.<sup>342</sup>

To some extent, the use of religious artifacts and expression in oaths for public office raise the same problems of coercion, offense, and bias that the use of such artifacts and expression present in court. Some politicians may feel compelled to use religious artifacts and verbiage in which they have no particular belief because to do otherwise would alienate constituencies the majority of whom are believers. Other politicians may manipulate the support of their constituencies with religious

---

<sup>339</sup> *Id.* at 24 (arguing that when “So help me God” is recited “by the Chief Justice of the United States as part of the inauguration of the President, it wields enormous power in reinforcing the false notion that the United States is a nation where Monotheism is officially preferred, thus stigmatizing Plaintiffs and others who hold contrary religious views.”).

<sup>340</sup> *Id.* at 29 (“[The] addition of ‘so help me God’ to the constitutionally prescribed presidential oath of office violates every Establishment Clause test enunciated by the Supreme Court . . .”).

<sup>341</sup> *Id.* at 20 (“There is no contemporaneous account supporting this claim, which was first made in 1854, apparently on the basis of a recollection of Washington Irving. Irving was six years old in 1789, when the first inaugural was held. A historical claim based upon nothing but the alleged recollection of a six year old, first made more than six decades later, is of highly questionable validity. Combined with the fact that Irving’s report of where he was standing during the inauguration would have made it impossible for him to have heard the oath at all, that validity falls to zero.”). For discussions of the historical evidence for “So help me God” in the presidential oath, see *So Help Me God in Presidential Oaths*, NONBELIEVER ANTIDISCRIMINATION PROJECT, [http://www.nonbeliever.org/commentary/inaugural\\_shmG.html](http://www.nonbeliever.org/commentary/inaugural_shmG.html); and Frederick B. Jonassen, *Kiss the Book . . . You’re President . . . “So Help Me God” and Kissing the Book in the Presidential Oath of Office*, 20 WM. & MARY BILL RTS. J. 853 (2012) (pointing out that though Washington may not have uttered, “So help me God,” there is contemporary historical evidence that he kissed a Bible, which was a gesture traditionally associated with the religious expression of an oath).

<sup>342</sup> Peter R. Henriques, *A George Washington Myth That Should Be Discarded*, GEORGE MASON HIST. NEWS NETWORK (Jan. 11, 2009), <http://www.hnn.us/articles/59548.html> (“The first clearly documented case of a President adding the words, ‘So Help Me God,’ was recorded – when Chester A. Arthur took the oath in 1881.”).

See also, *So Help Me God in Presidential Oaths*, *supra* note 341; Jonassen, *supra* note 341, at 893-94.

symbols.<sup>343</sup> There may also be politicians who adhere to a minority religion, and will therefore refrain from taking an oath reflecting their faith in order to avoid offense. Would it not be preferable to regard any government complicity in the administration of a God-referencing oath as an Establishment Clause violation, and therefore ban religious artifacts and religious expression, such as the phrase, "So help me God," from any official oath ceremony?

Though there is a degree of influence that the religious preferences of constituencies may impose upon public officials, eliminating religious artifacts or expression from oath of office ceremonies would have less effect in reducing this influence than such a ban would have in the courtroom. Jurors do not usually know the religious beliefs of witnesses who testify before them. However, the public generally knows the religious affiliations of candidates for office, whether the candidates make a point of advertising their religion or not. The acceptability of a candidate's religious beliefs is likely to have already been decided by the electorate long before administration of the oath of office. The decision of a public official, then, to incorporate any religious expression in the oath is not coerced to the same degree that such a decision might be for a witness in the courtroom.

In an effort to minimize bias and maximize impartiality, a trial court typically exercises strict control over what the jury sees and hears. The court therefore focuses the jury on what the court considers material evidence and pertinent law so that the jury may reach the fairest verdict possible. There are no such limitations on information in the hurly burly of the competition for public office. In that context, a politician is not providing testimony that affects the interests of others, let alone a court's interest in fairness. Instead, the politician is selling himself and his ideas, and both are subject to freewheeling public criticism however biased or prejudiced that criticism may be. No court oversees

---

<sup>343</sup> See Martin Jay Medhurst, "God Bless the President": The Rhetoric of Inaugural Prayer 62 (Aug. 1980) (unpublished Ph. D. dissertation, The Pennsylvania State University) (on file with author) (presenting several examples of presidential prayers, which exploited religious expression for political points. For example, Medhurst relates that Jack Valenti, who served as an aide to President Johnson, requested the clergymen who were to provide prayers at Johnson's 1965 inauguration submit drafts of the prayers beforehand. In the case of Dr. George R. Davis, who was a minister of the National City Christian Church in Washington, D.C., Medhurst presents evidence that Dr. Davis offered four drafts from which Valenti chose a version and suggested revisions. "[T]he actual effect of the prior submission and oversight may never be known, but the very fact that submissions were required, suggestions made, and revisions scrutinized testifies to the ease with which inaugural prayer could be turned to partisan political ends.").

what public officials say, or advises the public about how to reach a decision on the vote. Public officials have greater discretion about what they say and take responsibility for any resultant success or failure with their constituents. Under such circumstances, freedom of expression, including religious expression, outweighs the concern for coercion, or offense, or bias. This being the case, the only concern is that of drawing a line between the public official's freedom to express personal beliefs and the constitutional prohibition that the government remain neutral on matters of religion.

As indicated above, the Constitution implies its acceptance or "imprimatur" for testamentary oaths on the basis of the choice between oath and affirmation, which the founding document repeatedly permits even for quasi-judicial legislative proceedings.<sup>344</sup> However, the Constitution quite explicitly permits the oath in providing this choice for the presidential oath of office and for the oath of loyalty to the federal government that the Constitution requires federal and state officials to take.<sup>345</sup> In order for this choice to have any meaning, the oath must include religious expression; and the affirmation, no religious expression. If this were not the case, the choice would be meaningless. Furthermore, at the North Carolina ratifying convention, Iredell defined the oath as "a solemn appeal to the Supreme Being . . . by a person who believes in the existence of a Supreme Being and in a future state of rewards and punishments."<sup>346</sup> The understanding of an oath, then, that was contemporary to the composition and ratification of the Constitution, and applicable to the founding document itself, was religious in nature.<sup>347</sup>

Seth Barrett Tillman has pointed out that because the oath is a promise predicated on religion, the presence of the choice of taking an oath in the Constitution is an acknowledgement of religious belief.<sup>348</sup>

---

<sup>344</sup> See U.S. CONST. art I, § 3, cl. 6.

<sup>345</sup> U.S. CONST. art. II, § 1, cl. 9 & art. VI.

<sup>346</sup> 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS *supra* note 163, at 196.

<sup>347</sup> See also, WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY, 112-1309 (Liberty Fund 2002) (1785) ("It is the calling upon God to witness, *i.e.* to take notice of, what we say, and it is invoking his vengeance, or renouncing his favour, if what we say be false, or what we promise be not performed.").

<sup>348</sup> Seth Barrett Tillman, *Blushing Our Way Past Historical Fact and Fiction: A Response to Professor Geoffrey R. Stone's Melville B. Nimmer Memorial Lecture and Essay*, 114 PENN. ST. L. REV. 391, 395-96 (2009) ("What is the difference between an oath and affirmation? The consensus view—and as far as I know the universal view—is that the former is taken in God's name, but the latter is not. The purpose of the clause—according to the standard narrative—

Though this may be an indirect acknowledgement, it has the effect of securing a place for religious expression at the inauguration of any public official in the United States. In thus accommodating religious expression in the oath of office, the Constitution permits the government to likewise accommodate officials who wish to take the oath on a religious artifact with religious expression.

Perhaps this application of what an oath meant at the time when the Constitution was ratified in combination with the argument of what the choice between oath and affirmation means is nothing more than a rather rigid example of originalist reading which should give way to interpreting the Constitution as a living document. As Epstein observes:

The Supreme Court has recognized . . . that the Constitution is not a static document frozen in time and constricted by the predilections of those who framed it. Were it otherwise, African-Americans would still be subjected to Jim Crow laws, segregated schools, and miscegenation statutes; women would not be entitled to the protections of the Equal Protection Clause.<sup>349</sup>

However, in this particular instance, a decision to remove the choice of an oath provided in the Constitution is not simply an expansion of rights to a racial minority or to women. It is the removal of a freedom, which the Constitution gives to the oath-taker to incorporate a religious element in accepting the responsibility of office. In collapsing oath and affirmation to what in effect is affirmation only, the government would be making the choice of oath or affirmation for the office holder, and in so doing the government would be supporting a nonreligious personal commitment to keep a promise as opposed to a religious personal commitment to do so. This would be a preference for no religion as opposed to religion. To achieve neutrality, the government would do better to accommodate oath or affirmation as long as the choice remains with the public official who is taking the oath of office.

In spite of its reliance on the Establishment Clause, *Torcaso v. Watkins* does not compel the conclusion that the president's religious oath violates the Establishment Clause because a choice cannot be a test. In

---

was to permit Quakers and others having a religious or other conscientious objections to oath-taking to also hold public office. The purpose is one of inclusiveness and tolerance, but it is also a textual reference to God in our public charter—albeit an indirect one.”). See also Seth Barrett Tillman, *Blushing Our Way Past History*, 2009 CARDOZO L. REV. DE NOVO 46, 48 (2009).

<sup>349</sup> Epstein, *supra* note 153, at 2155-56.

regard to public office, the Constitution does not make the choice of oath or affirmation for the public official. It leaves the choice to the public official. In doing so, the Constitution also leaves it up to the electorate to decide what kind of promises the electorate finds acceptable. It does not choose for them. Indeed, it is regrettable that the public might favor an oath that is made on a particular book of scripture. But the gradual acceptance of diverse religious oaths and nonreligious affirmations suggests that the Founding Fathers may eventually be proven wise in giving the public this choice, rather than making the choice for the public. Perhaps in the future an oath taken on the Bible will be a rarity, and the affirmation will predominate. As long as there is a choice, and no test, officials will be able to choose, and no law will impose any particular test of religious belief or nonbelief. So, Josh was right: under the Constitution, a president may choose to swear upon *Sports Illustrated*. And it is up to the people to decide if the elected official's choice makes any difference to them.<sup>350</sup>

### CONCLUSION

This Article began with an episode from a television series about what Bible the President would use to swear his oath on. For all the fussing over finding a Bible that would suitably convey the solemnity of the historical tradition, the President ended up with a Bible that was probably pilfered from Donnie's hotel. In the end, the particular copy of the book was not as important as the character of the man who would decide whether there would be war or peace and the quality of his word. The oath of office is both a highly personal statement relevant to the individual's commitment to the promise made, and also a public statement, relevant to the governmental office to be assumed.<sup>351</sup> Personally, the expression of the promise, in religious or non-religious terms, with or without a particular religious text, may matter a great deal to the

---

<sup>350</sup> In the state conventions that ratified the Constitution, several speakers, while skeptical that a non-Protestant or non-Christian could become president, nevertheless admitted the remote possibility, but relegated this decision to the electorate. See *supra* note 196.

<sup>351</sup> Steve Sheppard, *What Oaths Meant to the Framers' Generation: A Preliminary Sketch*, 2009 CARDOZO L. REV. DE NOVO 273, 276 (2009) ("The oath, by definition, is created by a public institution, indeed drafted by officials of those institutions, but it must be taken personally by the individual, who is required to perform the office with particular care and (sometimes impliedly and sometimes explicitly) for the benefit of the public. This duality in [sic] inherent in the 'subscription' by which a person takes an oath, and the 'office' that requires the oath itself."). See also STEVE SHEPPARD, I DO SO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS 105-09 (2009).

individual taking the oath. It is a promise of the Constitution, which is gradually but fortunately coming to pass that oath-takers may freely choose the personal expression and form of their commitments. In regard to the good of the public, what is really important is something that these choices of oath or affirmation only vaguely and uncertainly reflect: the person taking the oath. "It is not the oath that makes us trust the person, but the person who makes us trust the oath."<sup>352</sup>

---

<sup>352</sup> 2 AESCHYLUS, *TRAGEDIES AND FRAGMENTS*, No. 276, at 188 (Edward Hayes Plumptre trans., 1901). See also JOHN BARTLETT, *BARTLETT'S FAMILIAR QUOTATIONS*, No. 8464 (10th ed. 1919).