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THE LINGERING BIGOTRY OF STATE CONSTITUTION RELIGIOUS TESTS

Allan W. Vestal*

INTRODUCTION

In her *Town of Greece* dissent Justice Elena Kagan describes the position of a citizen who does not conform to state-sponsored religious practice:

. . . she becomes a different kind of citizen, one who will not join in the religious practice that the Town Board has chosen as reflecting its own and the community's most cherished beliefs. And she thus stands at a remove, based solely on religion, from her fellow citizens and her elected representatives.¹

In Justice Kagan's example, a Muslim citizen wishes to appear before the town board. Before she appears "a minister deputized by the Town asks her to pray 'in the name of God's only son Jesus Christ.'"² Given the evident connection between Christian worship and the board,³ she faces a choice:

. . . to pray alongside the majority as one of that group or somehow to register her deeply felt difference. She is a strong person, but that is no easy call—especially given that the room is small and her every action (or inaction) will be noticed. She does not wish to be rude to her neighbors, nor does she wish to aggravate the Board members whom she will soon be trying to persuade. And yet she does not want to acknowledge

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* Professor of Law, Drake University Law School.

¹ *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1850 (2013) (Kagan, J., dissenting).

² *Id.*

³ *Id.* ("She must think—it is hardly paranoia, but only the truth—that Christian worship has become entwined with local governance.").

Christ's divinity, any more than many of her neighbors would want to deny that tenet.⁴

If she chooses an option consistent with her religious beliefs – declining to participate in the Christian prayer or standing up and leaving the room – the citizen of Muslim faith is forced to stand at a remove from her fellow citizens.

Over the course of our national history citizens have often been forced to stand at a remove based on religious belief. One mechanism has been through our most basic laws; from the Revolution to the present day, citizens have been set apart based on their religious beliefs by virtue of provisions in our state constitutions.

One way in which state constitutions have placed Catholics, Jews and non-believers apart at various times in our national history has been through religious tests for public office. Typically these tests were straightforward. For example, the Mississippi constitution of 1890 provided: “No person who denies the existence of a Supreme Being shall hold any office in this state.”⁵ Eight states retain these provisions in their current constitutions.⁶

A second way in which state constitutions have placed groups disfavored on grounds of religious belief at a remove has been through religious tests for testimonial competency. Less common in state constitutions than religious tests for public office, these provisions were equally straightforward. For example, the Arkansas constitution of 1874 provided: “No person who denies the being of a God shall . . .

⁴ *Id.*

⁵ *See infra* app. A.5.e. In contrast, eight states had constitutional provisions barring all clergymen from office, none of which survived the 19th Century. *See* DEL. CONST. of 1776, art. XXIX; DEL. CONST. of 1792, art. I, § 9; FLA. CONST. of 1838, art. VI, § 10; GA. CONST. of 1777, art. LXII; GA. CONST. of 1789, art. I, § 18; KY. CONST. of 1800, art. II, § 26; MD. CONST. of 1851, art. III, § 11; MISS. CONST. of 1817, art. VI, § 7; N.Y. CONST. of 1777, art. XXIX; N.Y. CONST. of 1821, art. VII, § 4; S.C. CONST. of 1790, art. I, § 23. The clauses were removed in these eight states with adoptions of subsequent constitutions. *See* DEL. CONST. of 1831; FLA. CONST. of 1865; GA. CONST. of 1798; KY. CONST. of 1850; MD. CONST. of 1864; MISS. CONST. of 1832; N.Y. CONST. of 1846; S.C. CONST. of 1895.

⁶ *See infra* apps. A.1.d, 3.c, 5.e, 7.e, 8.e, 9.a, 10.c, 11.a.

be competent to testify as a witness in any court.”⁷ Two states retain these provisions in their current constitutions.⁸

The following discussion turns first to religious tests for public office,⁹ then to religious tests for testimonial competence,¹⁰ looking at both in terms of their history and contemporary status. Following we discuss some public policy reasons these state constitutional religious tests should be of concern.¹¹ The conclusion proposes a course of action.¹²

As we shall see, the importance of these state constitutional provisions has always been in their symbolism, not in their day-to-day impact on who served in public positions or who testified in court. But their symbolic importance has been significant. Through such provisions certain of our state constitutions affirmed that, based solely on religious belief, some citizens were unworthy to serve in public capacities and undeserving to be believed in judicial proceedings. These state constitutional provisions unfairly placed some of our fellow citizens at a substantial remove from the rest of society.

⁷ ARK. CONST. of 1874, art. XIX, § 1.

⁸ *See infra* apps. C.1.c & 2.c.

⁹ *See infra* Part I.

¹⁰ *See infra* Part II.

¹¹ *See infra* Part III.

¹² *See infra* Part IV.

I. RELIGIOUS TESTS FOR PUBLIC OFFICE

If you're an atheist and don't believe in God and still want to hold office, I have a problem with that. And the constitution of North Carolina has a problem with that.

H.K. Edgerton¹³

In the fall of 2009, H.K. Edgerton had a cause.¹⁴ Cecil Bothwell was running for the Asheville, North Carolina city council. Edgerton opposed Bothwell, and thought him ineligible to serve. For Cecil Bothwell did not “believe in supernatural beings of any stripe,”¹⁵ and the North Carolina constitution barred from office “any person who shall deny the being of Almighty God.”¹⁶

Bothwell won the election and was sworn in as a member of

¹³ David Zucchini, *Councilman Under Fire for Atheism*, L.A. TIMES (Dec. 20, 2009), <http://articles.latimes.com/2009/dec/20/nation/la-na-hometown-asheville20-2009dec20>.

¹⁴ H.K. Edgerton does not give up on lost causes. An African-American, he is known as a “Southern heritage activist.” Stephanie McNeal, *Unenforceable Ban on Atheists Holding Public Office Still on the Books in 8 States*, FOX NEWS (July 16, 2014), <http://www.foxnews.com/politics/2014/07/16/states-atheists-banned-public-office/>. He describes himself as being:

[A] black Confederate activist who works tirelessly to bring the real truth of our heritage to people of all races. [He] has walked thousands of miles carrying his large Confederate Battle Flag through cities and towns and down country roads. He speaks at venues all over the South exposing the many myths of Yankee history and setting the record straight regarding [the] black role in the history of the South.

Southern Heritage 411, SOUTHERNHERITAGE411.COM, <http://www.southernheritage411.com/index.shtml> (last visited Apr. 15, 2015).

¹⁵ Rob Boston, *North Carolina Politicians Seek to Unseat Councilman Because He's an Atheist*, ALTERNET (Feb. 1, 2010), http://www.alternet.org/story/145501/north_carolina_politicians_seek_to_unseat_councilman_because_he's_an_atheist (quoting CECIL BOTHWELL, *THE PRINCE OF WAR: BILLY GRAHAM'S CRUSADE FOR A WHOLLY CHRISTIAN EMPIRE* (1st ed. 2007)). He is variously described by others as an “atheist,” a “post-theist,” “Satan’s helper,” a “radical extremist,” and is a member of the Unitarian Universalist Church. Zucchini, *supra* note 13.

¹⁶ N.C. CONST. of 1971, art. VI, § 8.

the Asheville city council. Edgerton threatened litigation but did not follow through. What if the issue had been joined? Would Bothwell have been barred from service? The answer is found in the earlier experiences of Roy Torcaso, a bookkeeper from Maryland, and Herb Silverman, a math professor from South Carolina.

Roy Torcaso was in most respects an unexceptional man. Born in 1910 into a farm family in Washington state, he served in the Army in both World War II and Korea. A bookkeeper by training, he worked a series of mundane jobs and died in 2007.¹⁷ The exceptional chapter of Roy Torcaso's life began in 1959. Employed by a Maryland construction company, at his employer's suggestion Roy applied to become a notary public. His application was denied because he refused to swear to a state mandated oath that affirmed the existence of God. For Roy, the son of a Catholic father and a Protestant mother, was an atheist and in 1959 Maryland had a constitutional provision that imposed a religious test for state office holders: "That no 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 . . .*"¹⁸

Over thirty years later Herb Silverman applied to be a notary public in South Carolina. His application was rejected because he struck through the portion of the required oath that read "So help me God."¹⁹ For Herb was an atheist²⁰ and in 1992 South Carolina had a constitutional provision that imposed a religious test for state office

¹⁷ Adam Bernstein, *Roy Torcaso, 96; Defeated Md. In 1961 Religious Freedom Case*, WASH. POST (June 21, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/20/AR2007062002276.html>.

¹⁸ See *infra* app. A.3.c (*emphasis added*). The provision remains in the Maryland constitution to this day. See MD. CONST. art. XXXVII.

¹⁹ *Silverman v. Campbell*, 486 S.E.2d 1, 1 (S.C. 1997).

²⁰ A self-described "mild-mannered mathematics professor and liberal, Jewish, Yankee atheist," Silverman ran for Governor of South Carolina in 1990 and in his book, *Candidate Without a Prayer*, Silverman described his experiences. *Herb Silverman The Unflappable Atheist*, HERB SILVERMAN, <http://www.herbsilverman.com/> (last visited Mar. 8, 2015). The Fourth Circuit affirmed the district court's grant of a motion to dismiss Silverman's lawsuit, brought on behalf of those who wish to run for state office and who deny the existence of a supreme being, based on ripeness. *Silverman v. Ellisor*, No. 91-1022, 1991 U.S. App. LEXIS 18506, at *1 (4th Cir. Aug. 14, 1991).

holders: “No person who denies the existence of a Supreme Being shall hold any office under this Constitution.”²¹

The situation in which Cecil Bothwell, Roy Torcaso and Herb Silverman found themselves was not unusual. Twelve states have had religious tests for office in their state constitutions: Arkansas, Delaware, Maryland, Massachusetts, Mississippi, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Vermont.²²

There was variation in the formulation of the state constitution religious tests. The narrowest, adopted by three states, permitted only Protestant Christians to hold office, excluding Catholics, Jews, and non-believers.²³ Thus there was a time when – based solely on their respective religious beliefs – no current member of the Supreme Court could have been an elected official in New Jersey, North Carolina, or Vermont.²⁴

A number of broader formulations moved Catholics into favored status by permitting Christians to hold office. These broader formulations included the four states which required an affirmation of the divine inspiration of the Old and New Testaments,²⁵ the three states which required a declaration of belief in the “Christian religion,”²⁶ and the state that required a profession of “faith in God the

²¹ Actually, the provision appeared *twice* in the South Carolina constitution. S.C. CONST. of 1895, art. VI, § 2 (“No person who denies the existence of a Supreme Being shall hold any office under this Constitution.”); S.C. CONST. of 1895, art. XVII, § 4 (“No person who denies the existence of a Supreme Being shall hold any office under this Constitution.”). The provisions remain in the South Carolina constitution to this day. *See* S.C. CONST. art. VI, § 2; S.C. CONST. art. XVII, § 4.

²² *See infra* app. A.

²³ New Jersey, North Carolina, and Vermont required a declaration of faith in the protestant religion. *See infra* apps. A.6.a, 7.a, 12.a, 12.b.

²⁴ *See infra* apps. A.6.a, 7.a, 12.a. Chief Justice Roberts and Justices Alito, Kennedy, Scalia, Sotomayor, and Thomas are Catholic; Justices Breyer, Ginsburg, and Kagan are Jewish.

²⁵ Delaware, North Carolina, Pennsylvania, and Vermont required an affirmation of the divine inspiration of the Old and New Testaments. *See infra* apps. A.2.a, 7.a, 7.b, 7.c, 8.a, 12.a, 12.b.

²⁶ Maryland, Massachusetts and Vermont required a declaration of faith in the Christian religion. *See infra* apps. A.3.a, 3.b, 4.a, 7.b.

Father, and in Jesus Christ His only Son, and in the Holy Ghost, One God, blessed for evermore.”²⁷

A broader formulation moved Jews into favored status:²⁸ four states required an affirmation of belief in a “future state of rewards and punishments.”²⁹ The broadest set of formulations, which excluded only non-believers,³⁰ was adopted by ten states.³¹ These included a requirement that the office holder declare a belief in God³² or a supreme being,³³ or in the alternative an exclusion of those who denied the existence of God³⁴ or a supreme being.³⁵

Although not uncommon, state constitution religious tests for office have not dominated the national landscape. Thirty-two states have had prohibitions on religious tests in their state constitutions.³⁶

²⁷ Delaware had this formulation. *See infra* app. A.2.a.

²⁸ The Maryland Constitution of 1851 having first required “a declaration of belief in the Christian religion,” it subsequently provided that “if the party shall profess to be a Jew, the declaration shall be of his belief in a future state of rewards and punishments.” *See infra* app. A.3.a.

²⁹ Maryland, Mississippi, Pennsylvania and Tennessee required an affirmation of belief in a future state of rewards and punishments. *See infra* apps. A.3.b, 5.a, 5.b, 5.d, 5.e, 8.b, 8.c, 8.d, 8.e, 10.a, 10.c.

³⁰ This discussion uses the term non-believer, not atheist or agnostic, because the typical religious tests are cast in terms of belief in a God or a Supreme Being. Such a formulation includes atheists and agnostics, but it also includes believers in faith traditions that do not have a God or Supreme Being. *Schowgurow v. State*, 213 A.2d 475, 478 (Md. 1965) (“[T]he Buddhist religion . . . does not teach a belief in the existence of God or a Supreme Being.”); *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (“Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.”).

³¹ Ten states – Arkansas, Delaware, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Vermont – adopted one or more of these formulations. *See infra* notes 32–35.

³² *See infra* apps. A.2.a, 3.b, 8.a, 8.b, 8.c, 8.d, 8.e, 12.a, 12.b.

³³ *See infra* app. A.11.a.

³⁴ *See infra* apps. A.1.a, 1.b, 1.d, 5.a, 5.b, 7.a, 7.b, 7.c, 7.d, 7.e, 10.a, and 10.c. In addition, North Carolina excluded from office individuals “who shall hold religious principles incompatible with the freedom and safety of the State” *See infra* apps. A.7.a, 7.b, 7.c.

³⁵ *See infra* apps. A.5.d, 5.e, 9.a.

³⁶ They are Alabama, Arizona, Arkansas, California, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana,

There is a clear historical trend away from state constitutional religious tests for office. While a handful of states had religious tests for office in their state constitutions from the revolution, the first state constitution prohibition of such tests did not appear until 1792.³⁷ The number of states with such tests exceeded the number with prohibitions until 1820, when the count stood at six with tests and six with prohibitions. But the next year, 1821, the number of state constitution prohibitions exceeded the number of state constitution tests, and that relationship has grown substantially over the following one-hundred and ninety-three years.³⁸ Indeed, while sixteen states adopted constitutional prohibitions on religious tests prior to 1850, only two states adopted constitutional religious tests in the 20th Century.³⁹

Today, eight states retain religious tests for public office in their constitutions: Arkansas, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee, and Texas.⁴⁰ In form, these contemporary state constitution religious tests for office are

Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See infra* app. B.

³⁷ Delaware wins the prize for being the first adopter both of a religious test, in 1776, and a prohibition on religious tests, in 1792. *See infra* apps. A.2.a & B.5.a

³⁸ The delta between the number of states with constitutional prohibitions and the number with religious tests for office has grown steadily, especially if one corrects for the 1860s oddities in state constitutions of states engaged in the rebellion. Even without correcting for the rebellion, grouping the years into decades produces the following average deltas:

1820s	1.8	1860s	14.0	1900s	13.0	1940s	14.0	1980s	16.4
1830s	4.1	1870s	11.9	1910s	17.7	1950s	14.0	1990s	17.0
1840s	7.4	1880s	10.4	1920s	14.0	1960s	14.0	2000s	17.0
1850s	9.7	1890s	13.4	1930s	14.0	1970s	15.6	2010s	17.0

³⁹ The sixteen states which adopted constitutional prohibitions on religious tests prior to 1850 were Delaware (1792), Ohio (1802), Indiana (1816), Illinois (1818), Alabama (1819), Maine (1820), Missouri (1820), New York (1821), Virginia (1830), Michigan (1835), Tennessee (1835), New Jersey (1844), Texas (1845), Iowa (1846), Wisconsin (1848), and California (1849). *See infra* apps. B.1.a, 4.a, 5.a, 7.a, 8.a, 9.a, 12.a, 13.a, 15.a, 18.a, 19.a, 21.a, 25.a, 26.a, 28.a, 31.a. The two states which adopted constitutional religious tests in the 20th Century were Pennsylvania (1968) and North Carolina (1971). *See infra* apps. A. 7.e & 8.e.

⁴⁰ *See infra* apps. A.1.d, 3.c, 5.e, 7.e, 8.e, 9.a, 10.c, 11.a.

straightforward. Arkansas, Maryland, North Carolina, Pennsylvania, and Tennessee require a belief in God;⁴¹ Mississippi, South Carolina, and Texas require a belief in a Supreme Being.⁴² Pennsylvania and Tennessee add language relating to belief in a future state of rewards and punishments.⁴³ On the other side, twenty-six states retain prohibitions on religious tests in their current constitutions.⁴⁴

Both Roy Torcaso and Herb Silverman litigated the state constitution religious tests that kept them from becoming notary publics. Torcaso challenged the Maryland provision before the Maryland Court of Appeals on First Amendment grounds.⁴⁵ The Maryland Court of Appeals rejected Torcaso's challenge, predicting that the United States Supreme Court would not invalidate the religious test for office:

In the absence of any direct authority on the point, we find it difficult to believe that the Supreme Court will hold that a declaration of belief in the existence of God, required by Article 37 of our Declaration of Rights as a qualification for State office, is discriminatory and invalid. As Mr. Justice Douglas, speaking for a majority of the Court in *Zorach v. Clauson*, 343 U.S.

⁴¹ See *infra* apps. A.1.d, 3.c, 7.e, 8.e, 10.c.

⁴² See *infra* apps. A.5.e, 9.a, 11.a.

⁴³ See *infra* apps. A.8.e & 10.c.

⁴⁴ They are Alabama, Arizona, California, Delaware, Georgia, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See *infra* apps. B.1.e, 2.a, 4.b, 5.c, 6.g, 8.b, 9.b, 10.a, 12.a, 13.d, 14.a, 15.d, 16.a, 17.a, 18.b, 20.a, 21.b, 22.a, 23.a, 24.a, 27.a, 28.b, 29.a, 30.c, 31.a, 32.a.

⁴⁵ *Torcaso v. Watkins*, 162 A.2d 438, 442 (Md. 1960) (“The appellant contends, in effect, that the State Constitutional qualification deprives him of his ‘liberty’ to disbelieve in God, and discriminates against him as a nonbeliever.”). Torcaso did not seek to invalidate the Maryland provision on the basis of the direct application of the Federal Constitution’s Article VI prohibition on religious tests for office. See *id.* (“The appellant does not contend that clause three of Art. VI of the Federal Constitution is applicable to the states. That clause, providing that ‘no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States,’ is plainly inapplicable.”). Nor did he claim the Article VI prohibition was applicable through the Fourteenth Amendment. See *id.* (“Nor is it contended that this clause could be imported into the Fourteenth Amendment.”).

306, 313, said: “We are a religious people whose institutions presuppose a Supreme Being.”⁴⁶

The Maryland court based its prediction, in part, on the existence of a related type of discrimination against non-believers: the exclusion of their testimony as incompetent.

The problem here is more basic than in any of the cases cited. An oath, predicated upon a belief in God, is a regular incident of judicial proceedings. There can be no doubt that at common law an atheist was incompetent as a witness. There has been no constitutional or statutory abrogation of the common law rule in this State.⁴⁷

The Maryland court ultimately found itself essentially arguing that the bigotry written into its constitution was justified:

To the members of the Convention, as to the voters who adopted our Constitution, belief in God was equated with a belief in moral accountability and the sanctity of an oath. We may assume that there may be permissible differences in the individual's conception of God. But it 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.⁴⁸

Of course, equating disbelief in a supreme being with the denial of any moral accountability is a stunningly ignorant position. The court was reduced to arguing that “we cannot say that the distinction between believers and non-believers is so patently inappropriate as a security for good conduct, as to make it invidious under the Fourteenth Amendment.”⁴⁹

⁴⁶ *Id.* at 443.

⁴⁷ *Id.* (citations omitted).

⁴⁸ *Id.*

⁴⁹ *Id.* at 444.

The Maryland Court of Appeals could not have been more wrong in its prediction of how the United States Supreme Court would rule. Writing for the Court, Justice Black found that the Maryland constitutional provision “sets up a religious test which was designed to and, if valid, does bar every person who refuses to declare a belief in God from holding a public ‘office of profit or trust’ in Maryland.”⁵⁰ Justice Black noted “that there is much historical precedent for such laws.”⁵¹

Indeed, it was largely to escape religious test oaths and declarations that a great many of the early colonists left Europe and came here hoping to worship in their own way. It soon developed, however, that many of those who had fled to escape religious test oaths turned out to be perfectly willing, when they had the power to do so, to force dissenters from their faith to take test oaths in conformity with that faith. This brought on a host of laws in the new Colonies imposing burdens and disabilities of various kinds upon varied beliefs depending largely upon what group happened to be politically strong enough to legislate in favor of its own beliefs. The effect of all this was the formal or practical “establishment” of particular religious faiths in most of the Colonies, with consequent burdens imposed on the free exercise of the faiths of nonfavored believers.⁵²

Having noted an earlier pronouncement by the Court that “the test oath is abhorrent to our tradition,”⁵³ Justice Black quoted at length from *Everson v. Board of Education*:

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

⁵⁰ *Torcaso*, 367 U.S. at 489–90.

⁵¹ *Id.* at 490.

⁵² *Id.*

⁵³ *Id.* at 491 (citing *Girouard v. United States*, 328 U.S. 61, 69 (1946)).

pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”⁵⁴

Finally, Justice Black rejected the argument that the Supreme Court’s decision in *Zorach* required a different result: “Nothing decided or written in *Zorach* lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept.”⁵⁵

The *Torcaso* Court’s conclusion was clear:

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person “to profess a belief or disbelief in any religion.” Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions

⁵⁴ *Id.* at 492–93 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–6 (1947)). Justice Black also quotes Justice Frankfurter’s concurrence in *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 213 (1948) joined in by the other dissenters in *Everson*: “We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an ‘established church’ We renew our conviction that ‘we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.’” *Torcaso*, 367 U.S. at 493–94.

⁵⁵ *Id.* at 494.

founded on different beliefs.⁵⁶

Thirty years after *Torcaso*, Herb Silverman challenged the state constitution religious test that kept him from becoming a notary public.⁵⁷ The trial court found two provisions of the South Carolina constitution to violate both the First Amendment and the Religious Test Clause of the Federal Constitution.⁵⁸ The South Carolina Supreme Court affirmed the trial court holding.⁵⁹

Other state constitutional religious tests for office have been challenged. The Texas constitutional provision was challenged in Federal court in the early 1980s.⁶⁰ The Fifth Circuit allowed some of the claims to go forward and, although it did not decide on the merits, indicated that “it is difficult to distinguish this case from *Torcaso v. Watkins* . . .” and quoted from the *Torcaso* opinion:

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person “to profess a belief or disbelief in any religion.” Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a

⁵⁶ *Id.* at 495. *Torcaso* was decided on the basis of the First Amendment; the Court did not reach the claim that the Maryland oath violated the ban on religious tests under Article VI. *Id.* at 489 n.1. (“Appellant also claimed that the State’s test oath requirement violates the provision of Art. VI of the Federal Constitution that ‘no religious test shall ever be required as a Qualification to any Office or public Trust under the United States.’ Because we are reversing the judgment on other grounds, we find it unnecessary to consider appellant’s contention that this provision applies to state as well as federal offices.”).

⁵⁷ *Silverman v. Campbell*, 486 S.E.2d 1, 2 (S.C. 1997).

⁵⁸ *Id.*

⁵⁹ *Id.* The *Silverman* court cites *Torcaso* for the proposition that the “Maryland Constitution’s Supreme Being Clause violates First Amendment and Religious Test Clause.” *Id.* (citing *Torcaso*, 367 U.S. 488 (1961)). This is in error, as the *Torcaso* opinion did not reach the question of whether the Maryland provision violated the Article VI religious test provision. *Torcaso*, 367 U.S. at 489 n.1.

⁶⁰ *O’Hair v. Hill*, 641 F.2d 307, 309–313 (5th Cir. 1981), *reh’g granted* *O’Hair v. White*, 675 F.2d 680 (5th Cir., 1982) (dismissing the case without expressing an opinion as to the constitutionality of the Texas religious test provision),

belief in the existence of God as against those religions rounded on different beliefs.⁶¹

The Mississippi constitutional provision⁶² was challenged in Federal court in the mid-1980s.⁶³ As to standing and the substantive analysis, the Mississippi district court noted the Fifth Circuit analysis in *O'Hare v. White*. The district court also noted the *Torcaso v. Watkins* decision: "it is clear that under the analysis of the Supreme Court in *Torcaso v. Watkins* . . . that this provision of the Mississippi State Constitution is constitutionally infirm."⁶⁴

The Arkansas constitutional provision⁶⁵ was challenged in Federal court in the early 1980s upon the theory that the provision was a bill of attainder and violated the establishment clause of the First Amendment.⁶⁶ The district court dismissed the claim on standing based on the lack of an actual or threatened injury. The Eighth Circuit affirmed, but stated in a footnote: "Although we do not reach the merits of appellants' constitutional claim given the procedural posture of this case, we note that the challenged section would appear to be inconsistent with *Torcaso v. Watkins*"⁶⁷ Ten years later the Attorney General of Arkansas, relying on the Eighth Circuit's footnote in *Flora v. White* and the Supreme Court holding in *Torcaso*, issued an opinion "that if a plaintiff with proper standing brings a claim that is ripe for adjudication, art. 19, §1 will most likely be declared unconstitutional."⁶⁸ The Arkansas constitutional provision has also been the subject of commentary in the *Arkansas Law Review*.⁶⁹

⁶¹ *White*, 675 F.2d at 696 n.34 (5th Cir. 1982) (quoting *Torcaso*, 367 U.S. at 495).

⁶² MISS. CONST. of 1890, art. XIV, § 265 ("No person who denies the existence of a Supreme Being shall hold any office in this state.").

⁶³ See *Tirmenstein v. Allain*, 607 F.Supp. 1145 (S.D. Miss. 1985).

⁶⁴ *Id.* at 1146 (citations omitted).

⁶⁵ See *infra* app. A.1.d ("No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any court.").

⁶⁶ *Flora v. White*, 692 F.2d 53, 54 (8th Cir. 1982).

⁶⁷ *Id.* at 54 n.2.

⁶⁸ Letter from Winston Bryant, Attorney Gen., Opinion No. 92-164 (June 30, 1992). Attorney General Bryant referred in his opinion letter to both the religious test language of Article 6 and the First Amendment to the Federal Constitution. See *id.*

⁶⁹ Seth R. Jewell, *Disqualification of Atheists: Punishment for Nonbelievers in Arkansas*, 64 ARK. L. REV. 409, 409 (2011).

Noting potential Constitutional challenges based on the First Amendment,⁷⁰ the religious test clause of Article 6,⁷¹ the due process clause,⁷² the equal protection clause of the Fourteenth Amendment,⁷³ and the confrontation clause of the Sixth Amendment,⁷⁴ the author concluded that “[i]f article XIX, section 1 was subject to a valid constitutional challenge, the provision would undoubtedly be held unconstitutional, and Arkansas would face severe embarrassment and damaging ridicule.”⁷⁵

And what of the North Carolina constitutional religious test for office, under which H.K. Edgerton sought to prevent Cecil Bothwell from serving on the Asheville city council? Although apparently neither Edgerton nor Bothwell knew it, almost forty years before Bothwell’s election the office of the North Carolina Attorney General had opined that the religious test for public office in the North Carolina constitution is unenforceable.⁷⁶ Citing and quoting from *Torcaso*, the opinion concluded:

In the light of the decisions of the United States Supreme Court, the portion of Article VI, Section 8, of the North Carolina Constitution, which disqualifies for office any person who shall deny the being of Almighty

⁷⁰ *Id.* at 418–422.

⁷¹ *Id.* at 422–24. While the author acknowledges that the *Torcaso* court “did not explicitly address Article VI, Section 3” he asserts that “it effectively upheld its purpose” and suggests that as Article XIX, §1 of the Arkansas constitution “violates these specific purposes” it is unconstitutional. *Id.* at 423. The author does not address the language of the religious test clause of Article VI being limited to “any Office or public Trust under the United States.” *See id.*

⁷² *Id.* at 424–25.

⁷³ *Id.* at 426.

⁷⁴ *Id.* at 427. The Confrontation Clause argument is perhaps not the strongest. If the excluded non-believer is an adverse witness it is true the defendant will be denied the right to confront. But the exclusion of the atheist witness means her adverse testimony will be excluded. The defendant is thus advantaged by the unconstitutional exclusion. If the excluded non-believer is favorable, the defendant is indeed disadvantaged. But the disadvantage is less appropriately cast as a confrontation problem – one doesn’t confront favorable witnesses – than as a due process problem.

⁷⁵ *Id.* at 416.

⁷⁶ Robert Morgan & James F. Bullock, *North Carolina Attorney General Reports*, 41 N.C.A.G. 708, 730 (1972).

God, violates the First Amendment of the United States Constitution and cannot be used to disqualify a person from office who is otherwise qualified.⁷⁷

The opinion of the North Carolina attorney general was confirmed seven years later, thirty years before Edgerton sought recourse to the North Carolina provision, in Federal court. The outcome was not surprising; in 1979 a declaratory judgment was entered pursuant to a consent decree. North Carolina agreed to not enforce its religious test.⁷⁸ As it turns out, H.K. Edgerton had backed another lost cause. Cecil Bothwell still sits on the Asheville city council.⁷⁹

II. RELIGIOUS TESTS FOR TESTIMONIAL COMPETENCY

I am certain that there is an obligation on my part to tell the truth when sworn; I am not certain that there is a Supreme Being who rewards and punishes men; I am not satisfied that it is so, and I am not certain that it is not so; I have no belief one way or the other.

Ira Aldrich⁸⁰

In April of 1855, Ira Aldrich witnessed a train strike and grievously injure an ox owned by one Rockafellow.⁸¹ The ox died and Rockafellow sued the railroad. The railroad called Aldrich but the

⁷⁷ Morgan & Bullock, *supra* note 76, at 730.

⁷⁸ O’Hair v. White, 675 F.2d 680, 683 n.1 (5th Cir. 1982) (“The Society [of Separationists, Inc.] filed a similar suit in the United States District Court for the Western District of North Carolina in 1979. In that case a declaratory judgment was entered on the basis of a consent decree in which the state agreed not to enforce a similar constitutional provision.” (citing *Society of Separationists, Inc. v. Hunt*, No. CC 78-0351 (W.D.N.C. April 4, 1979))).

⁷⁹ *Meet City Council*, ASHEVILLE, N.C., <http://www.ashevilenc.gov/CityCouncil/MeetCityCouncil.aspx> (last visited Mar. 3, 2015).

⁸⁰ *Cent. Military Tract R.R. Co. v. Rockafellow*, 17 Ill. 541, 544 (1856).

⁸¹ The basis for the *Rockafellow* holding is the common law, Illinois having neither a constitutional nor a statutory provision on point. The case serves to illustrate the theory common to the various states, whether they followed the common law or had a constitutional or statutory provision. *Id.* at 552.

“plaintiff objected to his being sworn on account of his want of religious belief”⁸² The trial court allowed an examination of Aldrich as to his religious beliefs.

I don’t believe in the existence of a God, particularly; can’t say whether I believe it or not . . . I don’t believe there is a God who punishes for perjury, either in this world or any other; I don’t believe anything about it; it may be and it may not; I have no opinion about it. . . . I believe I should be responsible to the civil law if I should testify falsely; and, further, that I should be punished by losing the esteem of my fellow men⁸³

On the basis of Aldrich’s testimony, the trial court refused to permit him to be sworn or to testify. Without the benefit of Aldrich’s testimony the railroad was assessed \$50 for Rockafellow’s ox.⁸⁴

Two contemporary state constitutions include religious tests for testimonial competency.⁸⁵ Is it possible that, today, a witness like Ira Aldrich would be excluded from testifying based solely on religious belief?

The exclusion of some witnesses as incompetent based on their religious beliefs was the common law rule. In 1215, Pope Innocent III and the Fourth Lateran Council issued a reform decree withdrawing the Church’s support for trial by ordeal.⁸⁶ Seeking a replacement system that would continue the fundamental characteristic of being able to “wrap the system’s judgments in the word of God” seeing “a substitute that would reassure the public of God’s continuing role in meting out human justice,” led, it is asserted by Professor George Fisher in his innovative study, to a justice system that “by staking its

⁸² *Id.* at 544.

⁸³ *Id.*

⁸⁴ *Id.* at 542.

⁸⁵ See *infra* apps. C.1.c & C.2.c.

⁸⁶ LATERAN IV c.18 (“Neither shall anyone in judicial tests or ordeals by hot or cold water or hot iron bestow any blessing”); Roger D. Groot, *The Early-Thirteenth-Century Criminal Jury*, in *TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200–1800* 3, 3 (J.S. Cockburn & Thomas A. Green eds., 1988); George Fisher, *The Jury’s Rise as Lie Detector*, 107 *YALE L.J.* 575, 585, 586 (1997).

verdicts on the oaths of witnesses . . . could claim that the threat of divine vengeance assured truthful outcomes.”⁸⁷

But a system that depended for “divine sanction for the verdicts of its very human juries” on “the witness’s oath, enforced (as it was thought to be) by the threat of divine vengeance” was substantially challenged by testimony under oath that conflicted.⁸⁸ Thus, “a broad series of witness competency rules that barred whole categories of witnesses – those thought most likely to lie – from testifying,” Professor Fisher argues, can be seen as “guarding against the embarrassment of conflicting oaths” and protecting “the old presumption that all sworn evidence was true.”⁸⁹ The groups thought “unlikely to tell the truth” included “slaves, women (in certain circumstances), those below the age of fourteen, the insane, the infamous, paupers, infidels, criminals, parties to the cause, children of parties, parents of parties, servants of parties, and enemies of parties.”⁹⁰ The Fourth Lateran Council of 1215 issued a reformatory decree prohibiting “heretics” from giving testimony in court.⁹¹

⁸⁷ Fisher, *supra* note 86, at 587, 583; Paul W. Kaufman, *Disbelieving Nonbelievers: Atheism, Competence, and Credibility in the Turn of the Century American Courtroom*, 15 YALE J.L. & HUMAN. 395, 402 (2003) (“[T]he oath’s ‘solemn invocation of the vengeance of the Deity upon the witness, if he do not declare the whole truth’ served to dissuade potential perjurers with the threat of eternal damnation.” (quoting THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE, AND DIGEST OF PROOFS, IN CIVIL AND CRIMINAL PROCEEDINGS 22 (2nd ed. 1833))).

⁸⁸ Fisher, *supra* note 86, at 589.

⁸⁹ *Id.* at 583–84.

⁹⁰ *Id.* at 590 (quoting Charles Donahue, Jr., *Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law*, in ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN THE HONOR OF SAMUEL E. THORNE 127, 130–131 (Morris S. Arnold et al. eds., 1981)).

⁹¹ LATERAN IV c.3:

We decree that those who give credence to the teachings of the heretics, as well as those who receive, defend, and patronize them, are excommunicated; and we firmly declare that after any one of them has been branded with excommunication, if he has deliberately failed to make satisfaction within a year, let him incur *ipso jure* the stigma of infamy and let him not be admitted to public offices or deliberations, and let him not take part in the election of others to such offices or use his right to give testimony in a court of law. . . .

The reliance of the judicial system on the oaths of witnesses disadvantaged religious minorities and atheists.⁹² “During medieval times and the early Enlightenment, it was thought that only those who believed in a future state of rewards and punishments, governed by the Christian deity, could be trusted.”⁹³

Over time there was an evolution on the exclusion of witnesses on grounds of religious belief. While Lord Coke had asserted that only Christians could testify upon oath, by the turn of the 19th Century testimony upon oath was allowed non-Christians who nevertheless believed in some type of “divine retribution for falsehoods told under oath.”⁹⁴ Thus there developed procedures by which non-Christians could be sworn, including Jews (“on the Pentateuch with covered heads”), “Mahometans” (upon the Koran), “Gentoo” (“touching the foot of a Brahmin (or priest)”), Chinese (“by the ceremony of killing a cock, or breaking a saucer, the witness declaring that, if he speaks falsely, his soul will be similarly dealt with”), “a Scotch covenanter and a member of the Scottish Kirk” (“by holding up the hand, without kissing the book”), and a “Hindoo” (“by the uplifting of the hand”).⁹⁵ “Quakers and others, who profess to entertain conscientious scruples against taking an oath in the usual form, are allowed an affirmation, i.e., a solemn religious asseveration that their testimony shall be true.”⁹⁶

But not non-believers, who remained excluded because of the oath.⁹⁷

⁹² Kaufman, *supra* note 87, at 403 (“Reliance on the oath . . . significantly affected religious minorities and atheists.”).

⁹³ *Id.*

⁹⁴ Fisher, *supra* note 86, at 657 & n.379 (“[N]othing but the belief of a God and that he will reward and punish us according to our deserts is necessary to qualify a man to take the oath.” (quoting *Omichund v. Barker*, Y.B. 18 Geo. 2, Hil. 1, at 545 (Ch. 1744))); Kaufman, *supra* note 87, at 403.

⁹⁵ 5 JAMES M. HENDERSON, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES § 2090, at 3914–15, 3914 n.19 (2nd ed. 1926) (referring to “Hindoo”).

⁹⁶ *Id.* at 3915.

⁹⁷ Kaufman, *supra* note 87, at 403 (“After *Omichund*, the common view was that ‘not only Jews, but infidels of any country, believing in a God who enjoins truth and punishes falsehood, ought to be received as witnesses.’ . . . While this treatment of religious persons was surprisingly progressive, it did little for atheists.”).

The law is wise in requiring the highest attainable sanction for the truth of testimony given; and is consistent in rejecting all witnesses incapable of feeling this sanction, or of receiving this test; whether this incapacity arises from the imbecility of their understanding, or from its perversity. It does not impute guilt or blame to either. . . . The atheist is also rejected because he, too, is incapable of realizing the obligation of an oath, in consequence of his unbelief. The law looks only to the fact of incapacity, not to the cause, or the manner of avowal. Whether it be calmly insinuated, with the elegance of Gibbon, or roared forth in the disgusting blasphemies of Paine, still it is atheism; and to require the mere formality of an oath, from one, who avowedly despises, or is incapable of feeling its peculiar sanction, would be but a mockery of justice.⁹⁸

Even if at least one English judge was not quite sure that they existed:

. . . I am clearly of [the] opinion that such infidels (if any such there be) who [either] do not believe 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 in any case or under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them.⁹⁹

It has been suggested that the inclusion of members of non-Christian religions – but not non-believers – “may have been a symptom more of religious tolerance than of any diminished regard for the value of the oath.”¹⁰⁰ But nevertheless, in “progress toward modernity,” as one commentator observed, “this cardhouse of

⁹⁸ SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 368, at 412 n.2 (1842) (quoting 1 Law Reporter 346, 347).

⁹⁹ 5 HENDERSON, *supra* note 95, § 2090, at 3914 (quoting Lord Hale, 2d vol. 279).

¹⁰⁰ Fisher, *supra* note 86, at 657.

competency rules collapsed” in the middle of the 19th Century in both England and the United States. The theoretical underpinnings of the general collapse of competency rules included the arguments of Jeremy Bentham that temporal penalties for perjury were sufficient to guarantee truthfulness, making divine retribution on the basis of an oath unnecessary.¹⁰¹

While the card house of competency rules collapsed, the exclusion of atheists lasted longer than the other exclusions. In England, Quakers and Moravians got relief from Parliament in 1828, conscientious objectors got some relief in 1838, and religious objectors got further relief in 1854.¹⁰² Having failed in 1861 and 1863, proponents secured an end to the exclusion of atheist testimony in England only in 1869.¹⁰³

In the United States ending the exclusion of atheist testimony was a matter of state decision and the states moved quite unevenly. With adoption of its constitution of 1846, Iowa became the first state to ban religious tests for witness competency as a matter of constitutional law.¹⁰⁴ New York quickly followed.¹⁰⁵

Iowa and New York provided a model for other states to allow testimony without regard to religious belief as a matter of constitutional law. In all, twenty-two states have had constitutional

¹⁰¹ Kaufman, *supra* note 87, at 403–04.

¹⁰² *Id.* at 404–05.

¹⁰³ Fisher, *supra* note 86, at 659 (citing An Act for the Further Amendment of the Law of Evidence, 32 & 33 Vict., ch. 68 § 4 (1869)); Kaufman, *supra* note 87, at 405.

¹⁰⁴ IOWA CONST. art. I, § 4 (stating that “no person shall be . . . rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion”). An identical provision had been included in Iowa’s 1844 constitution, which was not adopted because of a dispute with Congress over the boundaries of the new state. *See* IOWA CONST. art. I, §4 (1844).

¹⁰⁵ N.Y. CONST. art. I, § 3. The Iowa and New York efforts were essentially contemporaneous. The Iowa convention met for fifteen days in May of 1846; the Iowa Constitution of 1846 was adopted by popular vote on August 3, 1846. The New York convention met from June 1 to October 9, 1846; the New York Constitution of 1846 was adopted by popular vote in November. The New York Constitution of 1846 provides “. . . no person shall be rendered incompetent to be a witness on account of his opinion on matters of religious belief . . .” *Id.*

prohibitions on religious tests for testimonial competency.¹⁰⁶ They are, in chronological order: Iowa (1846), New York (1846), Wisconsin (1848), California (1849), Indiana (1851), Ohio (1851), Minnesota (1857), Kansas (1859), Oregon (1859), Nevada (1864), Missouri (1865), Florida (1868), Illinois (1870), Nebraska (1875), Texas (1876), North Dakota (1889), Washington (1889), Wyoming (1889), Utah (1895), Michigan (1908), Arizona (1912), and Alabama (1931).¹⁰⁷ All but Florida retain their constitutional provisions today. Eleven states have had statutory provisions that rejected religious tests for testimonial competency.¹⁰⁸ An additional eight states rejected religious tests for testimonial competency as a matter of common law.¹⁰⁹

¹⁰⁶ Two additional states, Virginia and West Virginia, have constitutional provisions that are somewhat ambiguous. VA CONST. art. I, § 16 (stating that “the General Assembly shall not prescribe any religious test whatever . . .”); W. VA. CONST. art. III, §11 (stating that “[n]o religious or political test oath shall be required as a prerequisite or qualification to vote, serve as a juror, sue, plead, appeal, or pursue any profession or employment”).

¹⁰⁷ See *infra* apps. D.1.a, 2.a, 3.a, 4.a, 5.a, 6.a, 7.a, 8.a, 9.a, 10.a, 11.a, 12.a, 13.a, 14.a, 15.a, 16.a, 17.a, 18.a, 19.a, 20.a [AL & IA missing from abstract].

¹⁰⁸ Kaufman, *supra* note 87, at 410 n.88 (Colorado); *Id.* at 419 & n.154 (1886 Conn. Pub. Acts 588) (Connecticut). Kaufman dates the Connecticut change to 1875, apparently in error since he cites CONN. GEN. STAT. tit. 19, ch. 11, § 35 (1875) as having “carried forward [an *Omychund* rule that a belief in a future state of rewards and punishments was necessary to qualify a witness] . . .” *Id.*; *Id.* at 417 n.138 (Delaware); *Id.* at 413–14 (IDAHO TERRITORY COMP. & REV. LAWS § 617 (1875)) (Idaho); *Id.* at 414 & n.117 (MASS. GEN. LAWS ch. 131, § 12 (1830), confirmed in *Allan v. Guarante*, 148 N.E. 461 (Mass., 1925)) (Massachusetts); *Id.* at 412–13 & n.106 (MISS. REV. CODE ch. 58, 1604 (1880) (“No person shall be incompetent as a witness because of defect of religious belief.”)) (Mississippi); *Id.* at 419 n.155 (LAWS OF MONT. TERRITORY, Civ. P. Act, § 444 (1872)) (Montana); *Id.* at 409–10 (Penn. P.L. 140 (1909)) (Pennsylvania); *Id.* at 420 (*State v. Riddel*, 96 A. 531 (R.I., 1916) cites R.I. GEN. LAWS ch. 32, § 10 (1909) for the word “oath” to include “affirmation,” and thus the competency of atheist testimony. As the rule traces back to at least 1822, this is taken to suggest that atheists could have testified in Rhode Island as of that date. *Id.* at 420 n.161) (Rhode Island); *Id.* at 414 (TENN. ACTS ch. 10, § 1 (1895)) (Tennessee); and *Id.* at 410 n.87 (VT. GEN. ASSEMBLY, Res. No. 12 (1851) (“No person shall be deemed to be incompetent as a witness in any court, matter, or proceeding, on account of his opinions on matters of religious belief . . .”)) (Vermont).

¹⁰⁹ Kaufman, *supra* note 87, at 414–15 (Georgia); *Id.* at 410–11 (Kentucky); *Id.* at 411 (Maine); *Id.* at 417 n.139 (New Hampshire); *Id.* at 417 n.140 (New Jersey); *Id.* at 415 n.123 (Oklahoma); *Id.* at 412 (Virginia); *Id.* at 412 (West Virginia).

By 1864, reference could be made to the almost universal rejection among the states of witness competence bars based on religion, this in the context of legislation which would have guaranteed the right of blacks to testify in Federal courts:

The general practice and the tendency of opinion now is to take away all disqualification of witnesses upon any ground, and to leave their testimony to go to the jury and the court for them to weigh it and do justice. In many of our States now, even the parties to an action are competent witnesses; and no objection in point of law exists in nearly all the States on account of a man's religious sentiments. All those disqualifications have been swept away, and we think it time to do it here in relation to colored people, and to make them competent witnesses in the United States courts. The courts and the juries of course will judge of their credibility.¹¹⁰

In contrast, only two states, Arkansas¹¹¹ and Maryland,¹¹² have had constitutional prohibitions on atheist testimony. Both states retain their discriminatory provisions today.¹¹³

Arkansas has been governed by four constitutions – 1836, 1864, 1868, and 1874.¹¹⁴ The constitutions of 1836,¹¹⁵ 1864,¹¹⁶ and 1874¹¹⁷ contained religious tests for testimonial competency. The constitution of 1868, which was adopted as part of the effort to get Arkansas readmitted to the Union after its participation in the rebellion, did not contain a religious test for testimonial competency.

¹¹⁰ Fisher, *supra* note 86, at 680.

¹¹¹ See *infra* apps. C.1.a, C.1.b, C.1.c.

¹¹² See *infra* apps. C.2.a, C.2.b, C.2.c.

¹¹³ See *infra* apps. C.2.a, C.2.b, C.2.c.

¹¹⁴ Some historians speak of an Arkansas constitution of 1861. This document, which in the main followed the 1836 constitution but changed references to “the United States of America” to “the Confederate States of America.” This “constitution” was not submitted to the people of Arkansas for ratification.

¹¹⁵ See *infra* app. C.1.a.

¹¹⁶ See *infra* app. C.1.b.

¹¹⁷ See *infra* app. C.1.c.

But the effect of the religious tests for testimonial competency in the Arkansas constitutions was not clear because each of the four Arkansas constitutions also contained provisions guaranteeing that the rights and capacities of citizens would not be diminished on account of religious belief.¹¹⁸

One Arkansas academic addressed the interplay between the religious test for testimonial competency in Article XIX, §1 and the bar on religious tests for competency in Article II, §26.¹¹⁹ Dean Ralph Barnhart noted the wide range of reasons a witness might have been deemed incompetent under the common law, and acknowledged the unusual record of Arkansas:

Most of these incompetencies have been abolished in almost all jurisdictions today. Remnants of them remain, however, and Arkansas seems to have retained more than most of her sister jurisdictions.¹²⁰

He acknowledged the exclusion of non-believers under the common law and turned to the two Arkansas constitutional provisions on point.¹²¹ Citing and quoting Article II, §26, Dean Barnhart sought to place Arkansas in the mainstream of American jurisdictions:

The Arkansas constitution has somewhat contradictory provisions with respect to religious belief as affecting competency of witnesses. Along with the other states of the United States, Arkansas has abolished religious

¹¹⁸ The constitutions of 1836 and 1864 provided “[t]hat the civil rights, privileges or capacities of any citizen shall in no wise be diminished or enlarged on account of his religion.” ARK. CONST. of 1836, art. II, § 4; ARK. CONST. of 1864, art. II, § 4. The constitutions of 1868 and 1874 contained specific language on religious belief and testimonial competency. The constitution of 1868 provided “. . . nor shall any person be rendered incompetent to give evidence in any court of law or equity in consequence of his opinion upon the subject of religion” ARK. CONST. of 1868, art. I, § 21. The constitution of 1874, which remains in place, provides: “. . . nor shall any person be rendered incompetent to be a witness on account of his religious belief” ARK. CONST. of 1874, art. II, § 26.

¹¹⁹ Ralph C. Barnhart, *Theory of Testimonial Competency and Privilege*, 4 ARK. L. REV. 377, 381 (1950).

¹²⁰ *Id.* at 380.

¹²¹ *Id.* at 380–81.

tests as a prerequisite to competency. . . . Such provisions are found in constitutions or statutes of all the states in one form or another.¹²²

He then acknowledged the language of Article XIX, §1, and observed “[t]he cases which have arisen under this last provision of the constitution seem to be few, and those which have been reported are those in which the competency of a challenged witness was upheld.”¹²³ Dean Barnhart concluded his discussion by suggesting that the religious test for testimonial competency was unusual and subject to criticism:

Wigmore lists Arkansas as one of three remaining states which expressly require a theological belief in order to be a witness. This requirement of a specific theological belief as a prerequisite of competency is out of line with the law elsewhere and has been the subject of searching criticism.¹²⁴

The Arkansas religious test for testimonial competency under Article XIX, §1 has been considered by the Arkansas courts three times.¹²⁵ The 1914 case of *Farrell v. State* involved the murder

¹²² *Id.* at 381.

¹²³ *Id.* (citing *Mueller v. Coffman*, 200 S.W. 136 (Ark. 1918); *Farrell v. State*, 163 S.W. 768 (Ark. 1914)).

¹²⁴ *Id.* at 381.

¹²⁵ It has also been ignored by the Supreme Court of Arkansas on one occasion, involving an appeal by a convicted murderer who was denied the opportunity to *voir dire* prospective jurors on their religious beliefs and activities. *Bader v. State*, 40 S.W.3d 738, 741–42 (Ark. 2001) (“The purpose of the proposed *voir dire* was . . . to use peremptory strikes to remove venire-persons that appellant considered to be too religious.”). In finding “the questions regarding religious preferences that appellant was seeking to ask were not so plainly appropriate that we should say the trial court’s discretion was abused,” the court noted “[t]he principle that there is a prohibition against discrimination based on religious beliefs . . .” *Id.* at 741, 742. The examples the court used to illustrate the principle display a rare sense of whimsy:

We note that there are prohibitions against using religious tests as a qualification for holding office, voting, or exercising the rights of a citizen to participate fully in the instrumentalities of government. The principles of religious freedom and the prohibition against religious discrimination are well-grounded in this country. The

prosecution of J.D. Farrell.¹²⁶ The allegation was that Farrell supplied morphine used by three individuals who attempted suicide, two of them successfully.¹²⁷ Turner, the unsuccessful suicide, was called by the prosecution to testify.¹²⁸ Defense counsel challenged Turner's competency, claiming that he was an atheist.¹²⁹ The trial court found, and the appellate court upheld, that Turner was competent to testify because he wasn't an atheist: "A written pamphlet of Mr. Turner introduced before the court showed that he did believe in the existence of a God . . ." The Arkansas Supreme Court quoted and applied without analysis the religious test for testimonial competence.¹³⁰

The 1918 case of *Mueller v. Coffman* involved a commercial dispute in which the testimony of Coffman was essential to establish an agreement between the parties.¹³¹ It was argued that Coffman was incompetent to testify "because of his atheistic belief."¹³² The proof that Coffman was an atheist consisted of some published verse and his testimony in court:

Coffman admitted the authorship of some verse, of more or less ambiguous meaning but of atheistic trend, which was published in the local paper, and his

United States Constitution states that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." This principle is similarly articulated in Article II, Section 26, of the Arkansas Constitution, which provides that "[n]o religious test shall ever be required of any person as a qualification to vote or hold office, nor shall any person be rendered incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths or affirmations." *Id.* at 742.

The principles of religious freedom and the prohibition against religious discrimination may be well-grounded in this nation, but they are not ubiquitous. The *Bader* court ignored the Arkansas constitution provision: "No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any Court." ARK. CONST. of 1874, Art. XIX., §1.

¹²⁶ 163 S.W. 768, 768 (Ark. 1914).

¹²⁷ *Id.* at 769.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 770.

¹³¹ 200 S.W. 136, 136 (Ark. 1918).

¹³² *Id.*

examination by opposing counsel indicated the absence of a belief in “the being of a God”¹³³

Counsel having been unsuccessful when following the language of the constitutional provision,¹³⁴ the trial judge tried a different formulation:

The Court: Let me ask the witness a question, Mr. Taylor. Do you believe in an omnipotent Supreme Being, who rewards one or punishes him according to his sins committed while here?

A. Yes, sir; in a Power; I believe we are punished according to our acts.

Q. And that that power and disposition to punish comes from an omnipotent Supreme Being?

A. Yes, sir.

The Court: I think, Mr. Taylor, under this showing that the witness is competent. Let the objection to his competency be overruled.¹³⁵

The Arkansas Supreme Court upheld the competency ruling:

. . . [T]he witness expressed the belief that we are punished according to our acts, and that the power and disposition to punish comes from an omnipotent Supreme Being. One possessing this belief is not incompetent under section 1 of article 19 of the Constitution of the State¹³⁶

In the 1982 case of *Flora v. White*, the Eighth Circuit Court of Appeals upheld the dismissal on standing grounds of a challenge to the Arkansas religious test for testimonial competency and the religious test for public office under Article XIX, §1 of its constitution.¹³⁷ Although it did not reach the merits, the court indicated its answer to

¹³³ *Id.*

¹³⁴ *See infra* app. C.1.c.

¹³⁵ *Mueller*, 200 S.W. at 136–37.

¹³⁶ *Id.* at 137.

¹³⁷ 692 F.2d 53, 54 (8th Cir. 1982).

the ultimate question: “. . . we note that the challenged section would appear to be inconsistent with *Torcaso v. Watkins*”¹³⁸

It seems highly unlikely any Arkansas court would attempt to give effect to the religious test for testimonial competency under Article XIX, Section 1. First, the language of Article II, Section 26 seems clear. Second, as the Eighth Circuit observed, the religious test for testimonial competency under Article XIX Section 1 is contradicted by the Supreme Court’s pronouncements in *Torcaso*. Third, Arkansas has adopted Federal Rules of Evidence 610, which provides: “Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired [impaired] or enhanced.”¹³⁹

There is one way in which the two Arkansas constitutional provisions might be harmonized. One might read Article XIX, Section 1 as a threshold inquiry, excluding non-believers as incompetent. Those potential witnesses who survived the Article XIX, Section 1 threshold inquiry – by definition believers – could not thereafter be rendered incompetent based on religious belief because of Article II, Section 26. Thus non-believers would be excluded under Article XIX, Section 1, but believers could not be excluded as incompetent because of other difference in belief. Thus the state could not exclude Catholics as incompetent but include Baptists as competent solely over theological differences over transubstantiation. This construction would deny non-believers the protection of Article II, section 26, because they have no “religious belief.” This tortured construction requires one to classify the question “do you believe in God” as not a test of religious belief.

As to Maryland, the courts did enforce the religious test for witnesses.¹⁴⁰ That ended in 1965 with the cases of *Schowgurow v.*

¹³⁸ *Id.* at 54 n.2.

¹³⁹ ARK. CT. R. 610.

¹⁴⁰ *See* *Arnd v. Amling*, 53 Md. 192, 196 (Md. 1880). In an action for damages the plaintiffs sought to call a witness who the defendants challenged “for want of religious faith.” *Id.* The defendants offered testimony of others that the proffered witness had said he “did not believe in God.” *Id.* Without hearing the witnesses, the court swore the witness “and inquired of him whether or not he believed in God, and that, under His dispensation, he, the said witness, would be held morally accountable

*State*¹⁴¹ and *State v. Madison*.¹⁴² *Schowgurow* involved a Buddhist who had been convicted of murder by a jury that, pursuant to the Maryland constitutional religious test, included jurors without respect to religious belief “provided, he believes in the existence of God.”¹⁴³ The *Schowgurow* court noted the Maryland decision in *Torcaso*,¹⁴⁴ and the Supreme Court reversal.¹⁴⁵

In Maryland the exclusion of certain individuals on the basis of their religious beliefs was a practical reality, not a theoretical possibility:

. . . [T]his Court takes judicial notice of the fact that it is and for many years has been a widespread practice in this State, not only for grand and petit jurors to be questioned as to their belief in God as part of their oath, but also for prospective jurors to be so questioned, orally or in written interrogations, before their names are placed on the jury lists, and that any person who does not state his belief in God is excluded.¹⁴⁶

The court used the Supreme Court’s holding in *Torcaso* to decide the issue of religious tests for jurors:

The State does not deny that the Supreme Court’s decision in *Torcaso* renders unconstitutional the long established law of this State that expression of a belief in the existence of God is a condition precedent to

for his acts, and punished or rewarded therefor, either in this world or in the world to come” *Id.* The witness answered in the affirmative. *Id.* The judge then offered the defendants an opportunity to present their testimony attacking the witness’s statement of faith. *Id.* The defendants declined. *Id.* The appellate court cited commentators for “the general proposition that defect of religious belief is never presumed, and the burden of proof is on the objecting party” *Id.* at 198. The court of appeals did not in any way question the constitutionality of the exclusion.

¹⁴¹ 213 A.2d 475 (Md. 1965).

¹⁴² 213 A.2d 880 (Md. 1965).

¹⁴³ *Schowgurow*, 213 A.2d at 477.

¹⁴⁴ *Torcaso*, 162 A.2d at 444.

¹⁴⁵ *Torcaso*, 367 U.S. at 496.

¹⁴⁶ *Schowgurow*, 213 A.2d at 479. *But see* *Loker v. State*, 233 A.2d 342, 347 (Md. 1967) (noting that the jury list was made without regard to religious beliefs of potential jury members).

holding public office. If, as was held by the Supreme Court in *Torcaso*, a notary public cannot constitutionally be required to demonstrate his belief in God as a condition to taking office, it follows inevitably that the requirement is invalid as to grand and petit jurors, whose responsibilities to the public and to the persons with whom they deal are far greater.¹⁴⁷

Madison extended *Schowgurow* to instances where the defendant was not of a religious belief excluded by the constitution.¹⁴⁸

The reasoning of the *Schowgurow* court is consistent with the thoughts of other courts which have referred to the Maryland constitutional religious tests.¹⁴⁹ Presumably, the Maryland court would extend the analogy to witnesses, holding inevitably that the requirement is invalid as to witnesses, whose responsibilities to the public and to the persons with whom they deal are far greater than a notary public.¹⁵⁰

It should be noted that discrimination against witnesses based on their religious beliefs is not ended by barring religious tests for testimonial competency. Once witnesses are deemed competent without respect to religious belief, the question shifts to whether evidence of religious belief can be introduced to attack credibility. Three states – Arizona, Oregon, Washington – answered this question by adopting constitutional prohibitions on inquiries into religious

¹⁴⁷ *Schowgurow*, 213 A.2d at 479.

¹⁴⁸ *Madison*, 213 A.2d at 885.

¹⁴⁹ *Murray v. Burns*, 405 P.2d 309, 322 (Haw. 1965) (“While the religious test stricken down by the Supreme Court in *Torcaso v. Watkins* pertained to qualifications under Article 37 of the Declaration of Rights for public office in Maryland, it is obvious that the reasoning underlying the opinion and the explicit language contained in it apply equally as well to nullify the proviso of Article 36 disqualifying atheists from jury service.”); *Levitsky v. Levitsky*, 190 A.2d 621, 625 (Md. 1963) (“ . . . [T]he opening clause of Art. 36 appears to be no longer tenable under *Torcaso v. Watkins* . . . ”).

¹⁵⁰ *But see* *Jackson v. Garrity*, 250 F.Supp. 1 (D. Md. 1965). In *Jackson* a pro se defendant challenged his conviction on the grounds “that the witnesses at petitioner’s trial were required to state their belief in God before testifying.” *Id.* at 2. The court’s analysis dealt with the form of the oath, not the Maryland constitutional religious test for witnesses. MD. CONST., DECL. OF RTS. art. XXXVI.

belief to challenge credibility, not merely competence.¹⁵¹ This is the modern rule; the Federal Rules of Evidence provide that “[e]vidence of a witness’s religious beliefs or opinions is not admissible to attack or support the witness’s credibility.”¹⁵² This rule has been adopted in forty-five states, and the remaining states reach the same result by alternative means.¹⁵³

¹⁵¹ See *infra* app. D.2.a, 15.a, 18.a.

¹⁵² FED. R. EVID. 610.

¹⁵³ Forty-five states (all but Connecticut, Kansas, Missouri, New York, and Virginia) have adopted versions of FED. R. EVID. 610. See ALA. R. EVID. 610; ALASKA R. EVID. 610; ARIZ. R. EVID. 610. Arizona has also adopted a constitutional provision on point. See *infra* app. D.2.a. See also ARK. R. EVID. 610; CAL. EVID. CODE §789; COLO. R. EVID. 610; DEL. R. EVID. 610; FL. STAT. ANN. § 90.611 (2012); GA. CODE ANN. § 24-6-610 (2013); HAW. R. EVID. 610; IDAHO R. EVID. 610; ILL. EVID. R. 610; IND. R. EVID. 610; IOWA R. EVID. 5.610; KY. R. EVID. 610 Rule 610; LA. CODE EVID. ANN. art. 610 (1989); ME. R. EVID. 610; MD. R. 5-610; MASS. R. EVID. 610; MICH. R. EVID. 610; MINN. R. EVID. 610; MISS. R. EVID. 610; MONT. R. EVID. 610; NEB. REV. STAT. § 27-610 (2014); NEV. REV. STAT. § 50.105 (1971); N.H. R. EVID. 610; N.J. R. EVID. 610; N.M. R. EVID. 11-610; N.C. GEN. STAT. § 8C-610; N.D. R. EVID. 610; OHIO R. EVID. 610; OKL. ST. ANN. tit. 12, § 2610 (2002); OR. REV. STAT. § 40.365 (1981). Oregon has also adopted a constitutional provision on point. See *infra* app. D.15.a. See PA. R. EVID. 610; R.I. R. EVID. 610; S.C. R. EVID. 610; S.D. CODIFIED LAWS § 19-14-17 (2014); TENN. R. EVID. 610; TEX. R. EVID. 610; UTAH R. EVID. 610; Vt. R. Evid. 610; WASH. R. EVID. 610. Washington has also adopted a constitutional provision on point. See *infra* app. D.18.a; W.V. R. EVID. 610; Wis. Stat. Ann. § 906.10 (2013); WYO. R. EVID. 610.

Kansas uses non-uniform language to achieve the same end. KAN. STAT. ANN. § 60-430 (1963) (“Every person has a privilege to refuse to disclose his or her theological opinion or religious belief unless his or her adherence or nonadherence to such an opinion or belief is material to an issue in the action other than that of his or her credibility as a witness.”).

Connecticut provides by statute that no person can be disqualified as a witness based on his or her disbelief in a supreme being. CONN. GEN. STAT. ANN. § 52-145 (1982) (“[No person is] disqualified as witness because of his . . . disbelief in existence of a supreme being . . .”). Although Connecticut case law recognizes “a general prohibition against cross-examination on one’s religious beliefs . . . Absent a state constitutional provision specifically proscribing such an inquiry, questions concerning religion are treated as evidentiary issues when the defendant seeks to strengthen his credibility through the use of religion.” *State v. Rogers*, 674 A.2d 1364, 1367 (Conn. App. Ct. 1996).

Missouri does not have an evidence code or codified rules of evidence. Missouri case law is that it is improper to inquire into religious belief to establish or attack credibility. *McClellan v. Owens*, 74 S.W.2d 570, 577 (Mo. 1934) (“Clearly the great weight of authority is that under constitutional provisions such as ours, the question of a witness’s personal belief, even as to there being a God or Supreme

The underlying theory as to why evidence of religious belief ought not be admissible to establish or attack credibility was nicely put by Justice Edgar M. Cullen of the New York Supreme Court in a concurrence in a 1903 commercial law case, *Brink v. Stratton*.¹⁵⁴ In *Brink* the witness was asked “whether the witness . . . believed in the existence of a Supreme Being who will punish false swearing . . .”¹⁵⁵ After the objection was overruled, the witness answered:

I do not know anything about it, I am sure. I will reply that I am an agnostic. I have no belief on that subject at all. I do not know anything about it.¹⁵⁶

Justice Cullen noted the provision of the New York Constitution of 1846 that “. . . no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief,” and stated that there was not dispute about “the competency of an infidel or an atheist as a witness.”¹⁵⁷ He then identified the two approaches to credibility, the *Stanbro* rule which allowed evidence of religious belief to go to credibility, and the Virginia and Kentucky rule “that a witness cannot be interrogated as to his belief in the existence

Being, cannot be inquired into, especially of the witness himself, for the purpose of affecting his credibility.”)

New York does not have a rule of evidence on point, but “any attempt to discredit or otherwise penalize a witness because of his [or her] religious beliefs . . . is improper, because those factors are irrelevant to the issue of credibility.” *People v. Caba*, 66 A.D.3d 1121, 1123 (N.Y. App. Div. 2009) (quoting *People v. Wood*, 66 N.Y.2d 374, 378, 488 (1985)).

Virginia’s 2012 rules of evidence provide “the credibility of a witness may be impeached by any party other than the one calling the witness, with any proof that is relevant to the witness’s credibility.” VA. R. EVID. 2:607(a). The impeachment rule specifies eight non-exclusive ways in which a witness can be impeached, none of which relate to the witness’s religious beliefs. VA. R. EVID. 2:607(a)(i)-(viii). Evidence going to credibility, otherwise relevant, might still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice and the likelihood of confusing or misleading the trier of fact. VA. R. EVID. 2:403. Presumably the Virginia courts would find that evidence of religious belief is not relevant to the credibility of a witness, or, in the alternative, would find that the unfair prejudice of such evidence substantially outweigh its probative value.

¹⁵⁴ 68 N.E. 148, 148 (N.Y. 1903).

¹⁵⁵ *Id.* at 150.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 151.

of a Deity or a future state for the purpose of affecting his credibility.”¹⁵⁸

In electing between the two approaches, Justice Cullen identified the analogy used by the *Stanbro* court:

The learned court in the *Stanbro* Case said with entire truth that, though a witness may be competent, his credibility may be impaired. It then argued that in analogy to the case of a party to an action who is now a competent witness, but whose interest in the cause goes to his credibility, so the religious belief of a witness, while not rendering him incompetent, might be considered on the question of the credit to be accorded him.¹⁵⁹

He then challenged the *Stanbro* analogy:

I think the learned court was misled by a false analogy. Interest in the subject-matter and relationship to the parties are temporal and mundane influences which common experience teaches us tend to bias consciously or unconsciously the testimony of witnesses. But such is not naturally the result of abstract religious belief.¹⁶⁰

Having addressed the *Stanbro* analogy, Justice Cullen turned to a question rarely raised in these discussions: whether religious belief is a reliable predictor of behavior. He made reference to another New York case in which the question was whether evidence of a deceased’s atheist beliefs was relevant to the question of whether he committed suicide. The trial court excluded the evidence, and was upheld by the appellate court “on the ground that a man’s probable course of action could not be predicated from his religious belief.”¹⁶¹

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 151.

¹⁶¹ *Id.*

Justice Cullen quoted with approval the analysis of Judge Hunt:

In what way, and how far, do these statements of belief operate upon the conduct of man? Is it certain that he who believes in the eternal punishment of the impenitent in a future world is a better observer of the laws of his country, and more free from actual crime, than he who denies that doctrine? Or is it certain that he who believes in the final salvation of all men would refrain from an offense which he would have committed had he believed that there was no future state? No man can answer with certainty.¹⁶²

Indeed, Justice Cullen asserted that the analysis of Judge Hunt applied with even greater force to the facts in *Brink* than in *Gibson* because religions differ in their treatment of suicide “[b]ut I know of no system of religion or code of ethics at any time generally prevalent in the world that has failed to condemn falsehood, or to hold truth as a virtue.”¹⁶³

Having discussed the predictive power of the inquiry into religious belief, Justice Cullen turned to the public policy aspects of the question:

If, despite the constitutional enactment that no such test of competency shall longer prevail, inquiry on the subject is still to be made with reference to the witness’ credibility, I think we may be led into great embarrassments.¹⁶⁴

He made the argument that the use of evidence of religious belief to attack credibility “necessarily fell” as part of the exclusion of religious belief evidence to determine admissibility and qualification for office:

¹⁶² *Id.*

¹⁶³ *Id.* at 152.

¹⁶⁴ *Id.*

I think that the learned court in the *Stanbro* Case failed to appreciate that when the Constitution abrogated all disqualifications from office or civil rights the consideration of a witness' religious belief on the question of his credibility necessarily fell at the same time. On the trial of a cause, as is pointed out by the Supreme Court of Virginia, the judge may be a skeptic or an infidel and the juror an agnostic or an atheist. Neither can be excluded for that reason from sitting in judgment. Is it possible that we would uphold the submission to a jury of a witness' belief in Christianity as impairing his credibility?¹⁶⁵

Finally, Justice Cullen confronted the rationale of one of the *Stanbro* judges for allowing religious belief evidence; the other judge having stated:

I have no fears that this rule will encourage parties to scandalize truly religious witnesses by imputations that they profess the worst of creeds. For, so long as no religious test shall be required for judges and jurors, parties will be loath to cross-examine witness as to their opinions on matters of religious belief, unless they are well assured the opinions of the witnesses are very obnoxious to the sentiments of citizens¹⁶⁶

Justice Cullen argued that this is not a safeguard against abuse, it is the danger of the practice:

That which the learned judge considered a safeguard against the abuse of the practice, to me constitutes its danger. Doubtless, no wise advocate will interrogate a witness as to his religious faith unless it is obnoxious and unpopular in the community. But that is the very case in which the exposure of a witness' religious belief would probably lead to injustice. . . . [T]he principle involved here is in itself important, and the rule

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

declared by the court, in my judgment, wrong. Unfortunately, religious animosities are easily aroused, and we should not give sanction to a principle that may hereafter work great injustice.¹⁶⁷

What of the Illinois ox case where the trial court had refused to hear the testimony of Ira Aldrich because he stated: “I don’t believe that there is a Supreme Being who will reward and punish men . . .”?¹⁶⁸ The railroad appealed the exclusion of Aldrich on the basis of his religious beliefs.

The Illinois Supreme Court began its analysis by referring to but not quoting the religious liberty provision of the Illinois constitution: “The constitution (Art. 13, Sec. 3) has declared complete toleration of all religions, and a freedom of conscience to every man to worship as he may be enlightened and feel inclined”¹⁶⁹ But, the court continued, the constitution:

. . . has no provision that modifies the rules of the common law in relation to requiring evidence in courts being given upon oath. Nor has it changed the rules for ascertaining those competent to give it.¹⁷⁰

The Illinois constitution in effect at the time, the constitution of 1848, did contain two provisions arguably related to the exclusion of Aldrich’s testimony on the basis of his religious beliefs. The Bill of Rights provision cited by the court includes language “that no preference shall ever be given by law to any religious establishments or modes of worship.”¹⁷¹ And the following section of the Bill of Rights provides: “That no religious test shall ever be required as a qualification to any Office or public trust under this state.”¹⁷² The court also noted that there was not an Illinois statutory provision on

¹⁶⁷ *Id.* at 153.

¹⁶⁸ Cent. Military Tract R.R. Co. v. Rockafellow, 17 Ill. 541, 544 (1856).

¹⁶⁹ *Id.* at 552.

¹⁷⁰ *Id.*

¹⁷¹ ILL. CONST. of 1848, art. XIII, § 3.

¹⁷² See *infra* app. B.7.b.

point.¹⁷³

Having said that there were no applicable constitutional or statutory provisions, the court moved to the common law rule. The analysis began by noting the formulation of Lord Coke, which excluded from testifying all non-Christians, describing it as “a rule as narrow, bigoted and inhuman as the spirit of fanatical intolerance and persecution which disgraced his age and country.”¹⁷⁴

The court noted with approval Lord Hale’s formulation as:

. . . that all are competent who believe that there is a God, the Creator and Preserver of all things, and that He will punish them if they swear falsely, in this world or in the next; and a want of such belief will render them incompetent to take an oath, without which no one can testify in a court of justice.¹⁷⁵

The court did not explain why the Lord Hale formulation is not as “narrow, bigoted and inhuman” as that of Lord Coke.

The court did claim that “there is great uniformity and unanimity in the adoption and application of the rule, unchanged by any constitution save that of Virginia, which secures religious toleration and declares that men’s religion ‘shall in no wise affect, diminish, or enlarge their *civil capacities*.’”¹⁷⁶ This statement is, of course, factually incorrect. By 1856, when the Illinois opinion was published, six states – including three of the five states contiguous to Illinois – had constitutional provisions barring religious tests for testimonial competency: Iowa (1846), New York (1846), Wisconsin (1848), California (1849), Indiana (1851), and Ohio (1851).¹⁷⁷

The Illinois court was of the opinion that the civil punishment for perjury was insufficient: “A liability to civil punishment for

¹⁷³ *Rockafellow*, 17 Ill. at 552.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 553.

¹⁷⁷ See *infra* apps. D.2.a., 4.a., 5.a., 12.a., 14.a., and 19.a.

perjury, and the fear of it, will not substitute that moral, conscientious obligation under which witnesses are required to state facts as testimony, and which is supposed to be imposed and exist by an oath taken by one entertaining such belief.”¹⁷⁸ Being ineligible to take the oath, non-believers could not give testimony:

. . . one having no religion, believing in no God, and not accountable to any punishment for falsehood, here or hereafter, except his own notions of honor, veracity and amenability to criminal justice, cannot be sworn, as no legal, moral, conscientious obligation or responsibility, in the view of the law, can be imposed by an oath, and he may not testify without.¹⁷⁹

The court sought to reassure that the exclusion of non-believers from testifying was not an abridgement of their rights:

And this is no infringement of freedom of conscience, or violation of constitutional tolerance. He may take official oaths, and make ex parte affidavits, for no one but a party interested can object to competency, and that only to giving testimony against him; or, it may be, to sit as a juror . . . and such acts as affect the rights of others.¹⁸⁰

On the basis of his religious beliefs, the Illinois Supreme Court found Ira Aldrich incompetent to testify.¹⁸¹

¹⁷⁸ *Rockafellow*, 17 Ill. at 552.

¹⁷⁹ *Id.* at 553–54.

¹⁸⁰ *Id.* at 554.

¹⁸¹ *Id.*

III. WHY OUGHT WE CARE?

*. . . that we are, each of us, finite and imperfect people, contending against others who are equally finite and imperfect.*¹⁸²

Given the holding in *Torcaso*, it has been clear for fifty years that religious tests for office will not be enforced at either the Federal or state level. It must be equally clear that religious tests for testimonial competence have no place under the First Amendment. Why, then, should we be concerned about the eight state constitutions that retain religious tests for public office, and the two of those eight that also have religious tests for testimonial competency?

As to religious tests for both public office and testimonial competency, it is hard to gauge the effects of the constitutional provisions. One can look for cases in which the provisions were used to attempt to exclude non-believers from public office or the courtroom. As to the tests for public office, even pre-*Torcaso* there is literally no record of any cases being brought to enforce these provisions other than the test cases brought to challenge them. As to tests for testimonial competency, there are only a very few reported cases.

But perhaps the impact of the provisions was felt without litigation; perhaps knowing of the provisions non-believers did not seek public office and did not attempt to testify. The small number of public non-believers into the mid-19th Century suggests that the number of people who avoided public positions, or declined to testify, because of the religious tests was exceedingly small.¹⁸³ Nor is it clear

¹⁸² Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations*, 15 WM. & MARY BILL RTS. J. 75, 143 (2006). This is a Reinhold Niebuhr quotation, "finite and sinful men, contending against others who are equally finite and equally sinful," paraphrased to be more inclusive. Reinhold Niebuhr, *Zeal Without Knowledge*, in BEYOND TRAGEDY: ESSAYS ON THE CHRISTIAN INTERPRETATION OF HISTORY 246–47 (1937).

¹⁸³ JAMES TURNER, *WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA* 44 (Johns Hopkins Univ. Press, 1986). With the caveat that the author is referring to non-believers who publicly acknowledged their lack of belief, Notre

that there would have been support among religious citizens to exclude non-believers from office or from testifying.

Finally, it would have been relatively easy for many non-believers to avoid the operation of the provisions. Surely there have always been what might be termed “professing non-believers,” individuals who maintain the forms of outward rite of the dominant religion even while acknowledging – at least to themselves – that they do not believe. It can be assumed that many such professing non-believers would not have been deterred by the religious tests for public office or for testimonial competency. They would have avoided the religious tests by keeping their non-belief private.

Opposition to religious tests for public office and for witness competency has always been grounded in the symbolic implications of such provisions. The first concern is that the presence of such religious tests, even if unenforceable, sends the message that the government is prejudiced against a group of citizens based on religious belief. By declaring non-believers unfit for public office or to testify, the religious tests relegate them to second-class status. The prejudice is heightened in situations, as in North Carolina, where the provision reinforces the discriminatory message: the North Carolina language groups “person[s] who deny the being of God” with “person[s] who ha[ve] been adjudged guilty of treason or any other felony” and “person[s] who ha[ve] been adjudged guilty of corruption or malpractice in any office”¹⁸⁴

A second concern is that the religious tests coarsen our national

Dame Professor James Turner observes that “. . . America does not seem to have harbored a single individual before the nineteenth century who disbelieved in God.” *Id.* (“If one disregards the expatriate [radical poet Joel] Barlow just before 1800”). *Id.* After the Civil War the situation changed:

Within twenty years after the Civil War, agnosticism emerged as a self-sustaining phenomenon. Disbelief in God was, for the first time, plausible enough to grow beyond a rare eccentricity and to stake out a sizable permanent niche in American culture. *Id.* at 171.

Thereafter non-believe matured into a practical option: “By the 1880s, unbelief had assumed its present status as a fully available option in American culture . . . it was true that many Americans no longer believed in God. . . .” *Id.* at 262.

¹⁸⁴ N.C. CONST. of 1971, art. VI, § 8.

discussion of religion by acting as catalysts for religious bigotry. Take, for example, the discussion surrounding Cecil Bothwell's election to the Asheville city council. It was perhaps not surprising that arguments against Bothwell taking office started with the North Carolina constitutional religious test for office, but the underlying hostility of Bothwell's critics toward non-believers was quite clear. H.K. Edgerton cited the constitutional provision: "I'm not saying that Cecil Bothwell is not a good man, but if he's an atheist, he's not eligible to service in public office, according to the state constitution."¹⁸⁵ But then he acknowledged his antipathy towards non-believers:

My father was a Baptist minister. I'm a Christian man. I have problems with people who don't believe in God.¹⁸⁶

Rather than an establishment or free exercise question, Bothwell's opponents attempted to cast the controversy as "a matter of honoring the state constitution."¹⁸⁷ But here, too, the issue wound back to Bothwell's religious beliefs:

If you don't like it, amend it and take out that clause. But don't just pick and choose what parts you're going to obey. This is serious business. I mean, the belief in God is not exactly a quirk.¹⁸⁸

Even at the Federal level, where the Constitution has always contained a prohibition of religious tests for office, the suggestion of such a test is the gateway for advocacy of discrimination based on religious preference.

In August of 2014, the Air Force refused to allow a Technical

¹⁸⁵ Boston, *supra* note 15.

¹⁸⁶ *Id.*

¹⁸⁷ Zucchini, *supra* note 13 (quoting David Morgan, editor of the conservative weekly Asheville Tribune).

¹⁸⁸ *Id.*

Sergeant John Smith¹⁸⁹ to reenlist solely because he struck the words “so help me God” from a reenlistment form. A non-believer, Airman Smith felt he could not truthfully sign the form with the included oath. “The airman was told his only options were to sign the religious oath section of the contract without adjustment and recite an oath concluding with ‘so help me God,’ or leave the Air Force”¹⁹⁰

An academic commentator was appropriately critical of the Air Force’s position:

It is not only a violation of his constitutional rights under the First Amendment but an offense to the many atheists who have served and continue to serve our country. . . . The refusal to accommodate the religious beliefs of this service member is deeply disturbing and contravenes core American values. He should challenge the rule . . . in federal court. He will then doubly serve his country in standing against not just enemies from without but those within our country who refuse to respect the religious or non-religious views of all citizens.¹⁹¹

Airman Smith challenged the rule.¹⁹² His argument, based on two provisions of the United States Constitution, was both straightforward and compelling. Article VI provides: “no religious Test shall ever be required as a Qualification to any Office or public

¹⁸⁹ Not his real name, which was never publicly disclosed. The only disclosures were that he is a man and a technical sergeant serving at Creech Air Force Base in Nevada.

¹⁹⁰ Stephen Losey, *Group: Airman Denied Reenlistment for Refusing to Say ‘So Help Me God,’* AIR FORCE TIMES (Sept. 4, 2014, 6:00 AM), <http://archive.airforcetimes.com/article/20140904/NEWS05/309040066/Group-Airman-denied-reenlistment-refusing-say-help-me-God->.

¹⁹¹ Jonathan Turley, *Air Force Bars Atheist From Reenlisting Unless He Signs and Orally Repeats an Oath to God* (Sept. 10, 2014), <http://jonathanturley.org/2014/09/10/air-force-bars-atheist-from-reenlisting-unless-he-signs-and-orally-repeats-an-oath-to-god/>.

¹⁹² E-mail from Monica Miller, Esq., Appignani Humanist Legal Ctr., to Office of Inspector Gen., Air Force et al. (Sept. 2, 2014) (On file with Appignani Humanist Legal Ctr.).

Trust under the United States.”¹⁹³ The First Amendment contains the free exercise clause: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”¹⁹⁴ As the Supreme Court stated in *Torcaso*, the Federal government cannot “constitutionally force a person ‘to profess a belief or disbelief in any religion.’”¹⁹⁵

The Air Force quickly backed down.¹⁹⁶ Air Force Secretary Deborah Lee James affirmed “[w]e take any instance in which Airmen report concerns regarding religious freedom seriously,” announced the Air Force was “making the appropriate adjustments to ensure our Airmen’s rights are protected,” and confirmed airmen would be allowed to reenlist without having to include the affirmation “so help me God” in the process.¹⁹⁷

Although the substantive issue was quickly decided in Airman Smith’s favor, the suggestion of a religious test gave a patina of legitimacy to the intolerance of differing religious views. For example, one commenter thought Airman Smith’s refusal to swear a religious oath made him unfit to serve.¹⁹⁸ Another commenter

¹⁹³ U.S. CONST. art. VI, § 3.

¹⁹⁴ U.S. CONST. amend. I.

¹⁹⁵ *Torcaso*, 367 U.S. at 495.

¹⁹⁶ The Air Force policy had been the subject of a number of critical opinion pieces. See, e.g., Allan Vestal, *How Can Air Forces So Misread Constitution?*, DES MOINES REGISTER (Sept. 17, 2014, 11:10 PM), <http://www.desmoinesregister.com/story/opinion/columnists/2014/09/17/can-air-force-misread-constitution/15754039/>.

¹⁹⁷ *Air Force Nixes ‘So Help Me God’ Requirement in Oaths*, AIR FORCE TIMES (Sept. 17, 2014, 6:06 PM), <http://www.usatoday.com/story/news/nation/2014/09/17/air-force-nixes-so-help-me-god-requirement-in-oaths/15802309/>. In allowing members to omit “so help me God,” the Air Force aligned its policy with those of the Army, Navy, and Marine Corps. Rachael Lee, *‘So Help Me God’ Made Optional in Air Force Enlistment Oath*, CHRISTIANITY DAILY (Sept. 18, 2014, 7:19 PM),

http://www.al.com/news/index.ssf/2014/09/air_force_dumps_so_help_me_god.html.

¹⁹⁸ Comment by wball, in *US. Air Force Allows Scrubbing of ‘So Help Me God’ From Enlistment Oath*, TOWNHALL.COM (Sept. 19, 2014 5:28 PM), <http://townhall.com/tipsheet/katiepavlich/2014/09/19/us-air-force-scrubs-so-help-me-god-from-enlistment-oath-n1893214> (“What good is an oath if you haven’t sworn to someone or something. If the recruit feels he is unable to take the oath properly, he is unfit to serve.”).

grouped Airman Smith with “jihadists and unwanted/immoral people,”¹⁹⁹ yet another thought him an easy convert to Islamic extremism:

I fear Atheists can be easy [to] convince to kill Christians and even join ISIS, I do not trust Atheists, they seems [*sic*] like they could kill and have no remorse. They seems [*sic*] cold and not know [*sic*] real deep love for others.²⁰⁰

Another thought Airman Smith would be dangerous to have in the military:

I don't want to be around anybody that won't say Those words, I have on the battle field enough years to know it ain't all about skill and superior fire power, sometimes things just happen, I have found the ones that don't believe in GOD to be dangerous and just a [*sic*] overall SH- Head. I'm not the most religious but I do rely on GOD for a lot of Help from time to time especially when bullets are trying to find me. More times than I care to Count I've [*sic*] seen men blown apart still able to speak I can't even begin to get a grip on that, It has to be Devine Intervention, So why won't the bastards say So Help Me GOD WTF!!!²⁰¹

¹⁹⁹ Comment by Sourcecode-v14, in *U.S. Air Force to Atheists: Declare God in Your Enlistment Oath, or You Cannot Join the Air Force*, SHOEBAT.COM (Sept. 10, 2014), <http://shoebat.com/2014/09/10/us-air-force-atheists-declare-god-enlistment-oath-join-airforce/> (“One Nation Under G-D’ weather you like it or not. Doing things like an Oath keeps jihadists and unwanted/immoral people from our armed services.”).

²⁰⁰ Comment by DustyFae, in *U.S. Air Force to Atheists: Declare God in Your Enlistment Oath, or You Cannot Join the Air Force*, SHOEBAT.COM (Sept. 10, 2014), <http://shoebat.com/2014/09/10/us-air-force-atheists-declare-god-enlistment-oath-join-airforce/>.

²⁰¹ Comment by M24, in Oliver Darcy, *The Four Words the Air Force Will Now Allow Airmen to Omit From Their Enlistment Oaths*, THE BLAZE, (Sept. 18, 2014, 7:38 AM), <http://www.theblaze.com/stories/2014/09/18/the-four-words-the-air-force-will-now-allow-airmen-to-omit-from-their-enlistment-oaths/>.

Another commenter opined that non-believers cannot be trusted:

I'm not going to get into a long diatribe here, but at least in this country still exists some of the fundamentals of our founding fathers in our military. When we speak of God, Country, and Family that still means something to many of us. Whether your God is Jesus, Allah or your Big Book everyone of substance should have one. When the atheists speak out they have no foundation, and their lies are innumerable [*sic*]. They would have all denouncing our creator and be damned. So yes I absolutely support my US Airforce [*sic*] on this decision because Atheists simply cannot be trusted and we all know there are no Atheist in the foxholes.²⁰²

The director of issues analysis for the American Family Association agreed with the Air Force's initial, discriminatory position:

The Air Force is doing exactly the right thing here. There is no place in the United States military for those who do not believe in the Creator who is the source of every single one of our fundamental human and civil rights. Serving in the military is a privilege, not a constitutional right. And it should be reserved for those who have America's values engraved on their hearts This is an absolutely foundational, non-negotiable, bed-rock American principle: there is a Creator . . . and he and he alone is the source of the very rights the military exists to protect and defend. An individual who does not understand and believe this has no right to serve in the U.S. military. Military service should rightly be reserved for those who believe in and are willing to die for what America stands for – and what America stands for is a belief in God as the source of

²⁰² Comment by Michael Scott, in Stephen Losey, *Atheist Must Swear To God – Or Leave US Air Force*, THE LIBERTY CRIER (Sept. 10, 2014), <http://libertycrier.com/atheist-must-swear-god-leave-us-air-force/>.

our rights Military service should be reserved for genuine Americans – and genuine Americans, like the Founders, believe in God.²⁰³

Televangelist Pat Robertson characterized the Air Force decision to make the “so help me God” language optional as “crazy,” and managed to inject what some would see as anti-Semitism into the discussion:

There’s a left-wing radical named Mickey Weinstein, who has got a group of people against religion or whatever he calls it, and he has just terrorized the armed forces. You think you’re supposed to be tough, you’re supposed to defend us, and you got one little Jewish radical who is scaring the pants off of you. You want these guys flying the airplanes to defend us when you got one little guy terrorizing them? That’s what it amounts to. You know, we swear oaths, in the so help me God. What does it mean? It means that with God’s help. And you don’t have to say you believe in God, you just say I want some help beside myself with the oath I’m taking. It’s just crazy. What is wrong with the Air Force? How can they fly the bombers to defend us if they caved to one little guy?²⁰⁴

Perhaps the most inappropriate statement in the public discussion over Airman Smith’s re-enlistment came from a commenter who prayed for the death of those responsible for the policies of the Army, Air Force, and Marine Corps making the “so help me God” oath optional to accommodate differences in religious belief among recruits:

²⁰³ Bryan Fischer, *No Atheist Should Be Permitted to Serve in the U.S. Military*, ONE NEWS NOW (Sept. 10, 2014) http://www.onenewsnow.com/perspectives/bryan-fischer/2014/09/10/no-atheist-should-be-permitted-to-serve-in-the-us-military#.VEbGMovF_5E.

²⁰⁴ Dominique Mosbergen, *Pat Robertson Learns Air Force Is Making ‘So Help Me God’ Optional, Totally Freaks Out*, HUFFINGTON POST (Sept. 19, 2014, 4:59 PM), http://www.huffingtonpost.com/2014/09/19/pat-robertson-air-force-so-help-me-god_n_5851228.html.

I have lost all respect for the Army, Air Force and Marines. They have gone out of their way to accommodate evil and alienate the very God they need for protection in battle. To whom shall they turn now. I pray the officers who worked this evil meet a deadly fate on the battle field.²⁰⁵

Such statements, in some sense endorsed by state constitutional religious tests for office, coarsen our national discussion at a time we should be seeking reconciliation on matters of religion in our public life.

Removing unenforceable state constitution religious tests because of their symbolic effect is consistent with the effort to elevate our national discussion involving matters of religion. In an article on the Federal religious test clause, in which he argues – correctly, I think – for a narrow reading of the third clause of Article VI in the context of Federal judicial nominations, Professor Paul Horwitz calls for an “etiquette of pluralism” in our use of religion in our public discourse.²⁰⁶ Two of the guidelines he suggests, genuine respect and humility, have application in the context of state constitutional religious tests for office.

Professor Horwitz speaks of genuine respect in terms of respect for religion:

One of the reasons that religion should not be excluded from public discussion, or from the public square more broadly, is that to do so fails to show genuine respect for the vital role of religion in people’s lives, and for all that it contributes to our public dialogue. Such policies of exclusion are disrespectful to the religious

²⁰⁵ Comment by Publius, in Oliver Darcy, *The Four Words The Air Force Will Now Allow Airmen to Omit From Their Enlistment Oaths*, THE BLAZE (Sept. 18, 2014, 9:08 PM), <http://www.theblaze.com/stories/2014/09/18/the-four-words-the-air-force-will-now-allow-airmen-to-omit-from-their-enlistment-oaths/>. Evidently the author was unaware that the Navy has the same policy in this regard as the Army, Air Force and Marine Corps; presumably the author’s prayer would also extend to the leadership of the Navy.

²⁰⁶ Horwitz, *supra* note 182, at 133–44.

individuals who make up a substantial part of the polity, and who wish to participate equally in our political dialogue without being constrained to remain silent about those values and motivations that drive them the most deeply. To ask them to do so is more than disrespectful; it is a form of violence.²⁰⁷

Surely Professor Horwitz would extend the call for respect to encompass respect for non-believers. To include non-believers would show genuine respect for the vital role of non-belief in some people's lives, and for all that non-religious critiques contribute to our public dialogue. To exclude such points of view is disrespectful to the non-believing citizens who wish to participate equally in our political dialogue without being constrained to remain silent about those values and motivations that drive them the most deeply. To exclude such non-believing voices is more than disrespectful; it is a form of violence.

After all, Professor Horwitz acknowledges the prospect that the presence of religion in our public dialogue will also bring about the presence of criticism: "If religion is to enter into public dialogue, it is appropriate to understand and expect that some criticism – hopefully thoughtful, but quite possibly stringent nonetheless – will be mixed in with the praise."²⁰⁸

Which brings us to the other of Professor Horwitz's guidelines that applies: humility. As he observes, ". . . in our 'world of multi-lingual discourse,' in which both religious and non-religious individuals engage each other in the public square, we ought always to be conscious of our own limits, and strive to make our arguments with 'humility and tolerance.'"²⁰⁹ It is a virtue that he would call upon both the religious and the non-believer to exhibit.

. . . [I]n thinking about how each of us can engage in religious talk in the public square, or how those of us

²⁰⁷ *Id.* at 141 (citations omitted).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 144 (quoting Daniel O. Conkle, *Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America*, 12 J. L. & RELIGION 337, 368 (1995–96)).

who are non-religious can engage *with* religious ideas in the public square, we might keep in mind a virtue that one might hope always characterizes our efforts to enter public dialogue: that of humility. Humility does not counsel us to refrain from any religious or secular judgments at all, or to disengage from the public square altogether. But it reminds us that we are, each of us, “finite and sinful men, contending against others who are equally finite and equally sinful.”²¹⁰

With the obvious caveat about inclusiveness, Professor Horwitz is surely correct about the need for humility.

It would elevate our national discourse on matters of belief to demonstrate genuine respect and humility by removing religious tests for office and for testimonial competency from the state constitutions of Arkansas, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee, and Texas. There is some support for a campaign to remove religious tests for office and testimonial competency.²¹¹ What are the prospects for such a positive development, and what would be the effect of attempts to remove the religious tests failed?

Consider Arkansas, which has state constitution religious tests for both public office and testimonial competency. What are the prospects for removing the religious tests from the state constitution? To start, the Arkansas constitution is relatively easy to amend; the current 1874 constitution has been amended over eighty times.²¹² The Arkansas constitution can be amended either by a measure passed by

²¹⁰ *Id.* at 143 (citations omitted).

²¹¹ Laurie Goodstein, *In Seven States, Atheists Push to End Largely Forgotten Ban*, N.Y. TIMES, Dec. 6, 2014, at A23.

²¹² Franklyn C. Niles, *Change and Continuity in Arkansas Politics after the 1874 Arkansas State Constitutional Convention*, in THE CONSTITUTIONALISM OF AMERICAN STATES 251 (George E. Connor & Christopher W. Hammons eds., University of Missouri Press 2008), at 261 (“[T]he constitution, unlike in most states, is easy to amend. Rather than supermajorities or approvals of two legislative sessions, a simple majority in both chambers is sufficient.”); *see also id.* at 266 (“By some estimates, only five other states have constitutions as easy to amend as Arkansas[.]”)

majorities in both houses of the legislature and by a majority of voters,²¹³ or by a measure initiated by ten percent of the voters and passed by a majority of voters.²¹⁴

But the amendment process has “pitted *modernizers* against *traditionalists* in the state” in “the passage of amendment after amendment in a desperate attempt to catch up to modernization.”²¹⁵ The attempt, it is suggested, has not been successful: “. . . amending the constitution has . . . failed to fully allocate social and political rights . . .”²¹⁶ The Arkansas constitution “reflects values shared by most Americans: faith in God and belief in the sovereignty of God.”²¹⁷ The challenge for removing the religious tests is suggested by the experience in an earlier attempt to replace the 1874 constitution:

To further illustrate the importance of religion in Arkansas government, it is noteworthy that opponents to the proposed 1970 Arkansas state constitution argued the document was “atheistic” because “Almighty God” was removed from the bill of rights. In response to this accusation, proponents reinserted the phrase in the preamble, but the proposal was defeated nonetheless. . . Clearly, the 1874 constitution, and the vision it promulgates, is firmly rooted in the religiously conservative soil of Arkansas’s political culture.²¹⁸

The prospects for removing the Arkansas constitutional religious tests for public office and testimonial competency are not favorable, as was evidenced by a 2009 effort to repeal the Arkansas provision.²¹⁹ The constitutional amendment was introduced by

²¹³ ARK. CONST. Art. XIX., §22, construed in Jewell, *supra* note 69, at 431.

²¹⁴ *Id.*

²¹⁵ NILES, *supra* note 212, at 252.

²¹⁶ *Id.* at 268.

²¹⁷ *Id.* at 256.

²¹⁸ *Id.* at 257.

²¹⁹ Radio Interview with Richard Carroll, Arkansas State Representative, at Ind. Pol. Report (May 2009), available at <http://www.blogtalkradio.com/ind-pol-report/2009/05/10/richard-carroll-arkansas-state-representative>; see also David Waters, *Atheist Revival in Arkansas*, ONFAITH (Feb. 13, 2009), <http://www.faithstreet.com/onfaith/2009/02/13/an-advocate-for-atheists-in-ar/8289>

Representative Richard L. Carroll, a first-term member from North Little Rock.²²⁰ The proposed amendment was the subject of “considerable debate” with other members of the House before it was introduced.²²¹ Testimony was taken, but some non-believers were reluctant to testify.²²² Some legislators didn’t think the measure was necessary: “. . . they feel like as long as no one is persecuted for those beliefs and they are not kept from holding office or they are not kept from testifying in court, that there is no need to address it in the constitution.”²²³ Representative Carroll disagreed, looking at the effect that the constitutional provision had on those against whom it is directed:

But with it being there in the constitution it injects the fear that will I be persecuted for seeking office and being an atheist or will I be persecuted for coming to testify in a courtroom and being an atheist. Those are fears that are injected into individuals, and that was what I was trying to address. Those individuals shouldn’t have to go through those fears they should be able to testify with a clear conscience and they should be able to run for office if they want to run for office with a clear conscience not worry about if I win and this comes out will I be seated.²²⁴

(reporting on HJR 1009, to repeal the Arkansas constitution prohibition on atheists holding office and testifying).

²²⁰ Interview with Richard Carroll, *supra* note 219 (noting Rep. Carroll, a boilermaker by profession, was elected in 2008 on the Green Party ticket, making him for a time the highest-ranking elected official of the Green Party in the nation. He ran as a Green because of a situation involving the Democratic candidate which arose too late to get Rep. Carroll on the ballot as a Democrat. At the conclusion of the legislative session, he switched to the Democratic Party. Representative Carroll’s biography on the Arkansas State Legislature site lists his “church affiliation” as Catholic).

²²¹ *Id.* (“[A]fter considerable debate with some individuals in the House I decided that I would go ahead and bring it forward[.]”). *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Interview with Richard Carroll, *supra* note 219.

The proposal was referred to committee, where it died.²²⁵ Representative Carroll explained the resistance on the part of other members: “As far as the bill itself, they . . . being a southern, Bible-belt area, the right-wing legislators weren’t willing to go forward with that piece because of . . . it could possibly go against their constituents’ viewpoints.”²²⁶

Representative Carroll expected that there would be a political price to pay for his advocacy of the constitutional amendment: “. . . I decided that I would go ahead and bring it forward no matter what it would do to me politically.”²²⁷ He was defeated in the next Democratic primary by a margin of over sixty percentage points.²²⁸

IV. CONCLUSION

. . . religious toleration, in which this State has taken pride, was never thought to encompass the ungodly.

Judge William L. Henderson
Maryland Court of Appeals
*Torcaso v. Watkins*²²⁹

As he was about to find out from Justice Black, Judge Henderson was simply wrong about whether non-believers are owed the protection of the Constitution:

²²⁵ Amending the Arkansas Constitution to Repeal the Prohibition against an Atheist Holding an Office in the Civil Departments of the State of Arkansas or Testifying as a Witness in any Court, H.R. 1009, 87th Gen. Assemb., Reg. Sess. (Ark. 2009).

²²⁶ Interview with Richard Carroll, *supra* note 219.

²²⁷ *Id.*

²²⁸ *Statewide Results by Contest*, ARKANSAS SECRETARY OF STATE (June 18, 2010, 4:56 PM), http://www.sos.arkansas.gov/electionresults/index.php?ac:show:contest_statewide=1&elecId=211&contestid=192 (2011); *see also* *November 4, 2014 Arkansas General Election and Nonpartisan Runoff Election Official County Results*, ARKANSAS SECRETARY OF STATE (last updated Nov. 14, 2014, 6:27 PM), <http://results.enr.clarityelections.com/AR/Pulaski/53298/147403/Web01/en/summary.html> (showing Carroll losing the November 2014 election for District 14 by over nineteen percentage points).

²²⁹ *Torcaso*, 162 A.2d at 443–44.

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can . . . force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs . . .²³⁰

Judge Henderson was also wrong to frame the question as one of “religious toleration.” From the Second Great Awakening, Americans have had a commitment to voluntarism and individual competence, and to democracy, in matters of religious belief. Voluntarism and individual competence mean that we expect individual’s decisions on matters of religion to be voluntary and not compelled.²³¹ The necessary corollary of voluntarism is the proposition that governmental compulsion ought have no role in matters of religion or, as the Southern Baptist Convention so eloquently stated it almost sixty years ago, the “aversion to any effort to use the . . . powers of government to lay the weight of a feather upon the conscience of any man in the realm of religion by privilege or penalty.”²³²

The centrality of voluntarism and an absence of governmental compulsion was nicely illustrated in a tract published in Boston in 1835 during the blasphemy trial of Abner Kneeland, the last man imprisoned in the United States for blasphemy:

A religion that cannot withstand the force of argument, the shafts of ridicule, and the thunder of invective – a religion that requires for its support, the axe, the rack and the faggot, has but weak claims to divinity, and is hardly worth protecting at such cost. A religion

²³⁰ *Torcaso*, 367 U.S. at 492–93 (quoting *Everson v. Board of Education*, 330 U.S. 1, 15–6 (1947)).

²³¹ DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848* 188 (Oxford University Press 2007).

²³² *Resolution on Religious Liberty*, SOUTHERN BAPTIST CONVENTION (last visited Mar. 3, 2015), <http://www.sbc.net/resolutions/934/resolution-on-religious-liberty>.

founded upon coercion in this world, and upon menace in the next, is surely but poorly calculated to soften the heart, to chasten the feelings, or to increase, in the aggregate, the sum of human felicity.²³³

Our commitment to voluntarism and individual competency was accompanied by the democratization of religion:

The democratization of Christianity . . . has less to do with the specifics of polity and governance and more with the incarnation of the church into popular culture. In at least three respects the popular religious movements of the early republic articulated a profoundly democratic spirit. First, they denied the age-old distinction that set the clergy apart as a separate order of men, and they refused to defer to learned theologians and traditional orthodoxies . . . Second, these movements empowered ordinary people by taking their deepest spiritual impulses at face value rather than subjecting them to the scrutiny of orthodox doctrine and the frowns of respectable clergymen . . . [Third,] Religious outsiders flushed with confidence about their prospects, had little sense of their limitations . . .²³⁴

A commitment to voluntarism and individual competence in matters of religion carried with it the possibility that some individuals would come to non-belief. A commitment to democracy required that such individuals, even as to those who thought them in error, be accorded equal treatment under the law as a matter of right, not grace.

Given our commitment to voluntarism and individual competence, and to democracy, framing our approach to religious liberty as one of toleration is inapt. As Baptist abolitionist and religious liberty advocate John Leland declared in 1790: “the very idea of toleration is despicable; it supposes that some have a pre-eminence

²³³ A COSMOPOLITE, A REVIEW OF THE PROSECUTION AGAINST ABNER KNEELAND FOR BLASPHEMY 10 (Boston 1835).

²³⁴ NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY 9–10 (Yale University Press 1989).

above the rest, to grant indulgence; whereas, all should be equally free, Jews, Turks, Pagans and Christians.²³⁵ The right of the non-believer to make decisions on matters of religion makes the concept of toleration inapplicable, as Andrew Dunlap stated in his 1834 defense of Abner Kneeland:

This is the boasted land of toleration. No, gentlemen, that is not the proper word, for who shall presume to tolerate another, when the latter has an undeniable right to enjoy and maintain his own opinions? I should have said this is the boasted land of civil and religious freedom, guaranteed by written Constitutions of Government, so plain that he who runs may read the privileges which they secure, and the rights they proclaim.²³⁶

In 1776, at a time when the constitutions of the emerging American states were rife with religious discrimination, Virginia adopted a Declaration of Rights provision on religion that charted a very different direction:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.²³⁷

Only by reason and conviction, not by force or violence. Genuine respect and humility. These noble sentiments are precisely

²³⁵ DICKSON D. BRUCE, JR., *EARNESTLY CONTENDING: RELIGIOUS FREEDOM AND PLURALISM IN ANTEBELLUM AMERICA* 124 (University of Virginia Press 2013).

²³⁶ ANDREW DUNLAP, *A SPEECH DELIVERED BEFORE THE MUNICIPAL COURT OF THE CITY OF BOSTON IN DEFENSE OF ABNER KNEELAND ON AN INDICTMENT FOR BLASPHEMY* 17 (Kessinger Publishing 2010) (1834); BRUCE, *supra* note 235, at 124–25.

²³⁷ VA. CONST. of 1776, art. I, §16.

why the six states that still have religious tests for public office in their state constitutions – Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee, and Texas – and the two states that have both religious tests for public office and religious tests for testimonial competency – Arkansas and Maryland – should remove them.

Appendix A. State Constitutions with Religious Tests for Office.

1. Arkansas

- a. ARK. CONST. of 1836, art. IX, § 2 (“No person who denies the being of a God, shall hold any office in the civil departments of this State, nor be allowed his oath in any court.”).
- b. ARK. CONST. of 1864, art. IX, § 2 (“No person who denies the being of a God, shall hold any office in the civil departments of this State, nor be allowed his oath in any court.”).
- c. ARK. CONST. of 1868, art. I, § 21 (“No religious test or amount of property shall ever be required as a qualification for any office of public trust under this State. . .”).
- d. ARK. CONST. of 1874, art. VIII, § 3 (“No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any court.”).

2. Delaware

- a. DEL. CONST. of 1776, art. XXII (“Every person who shall be chosen a member of either House, or appointed to any office or place of trust, before taking his seat, or entering upon the execution of his office, shall take the following oath, or affirmation, if conscientiously scrupulous of taking an oath, to wit: ‘I _____, will bear true allegiance to the Delaware State, submit to its constitution and laws, and do not act wittingly whereby the freedom thereof may be prejudiced.’ and also make and subscribe the following declaration, to wit: ‘I _____, 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 Testament and New Testament to be given by Divine Inspiration.”).

3. Maryland

- a. MD. CONST. of 1851, Declaration of Rights, art. 34 (“That no other test or qualification ought to be required on admission to any office of trust or profit, than such oath of office as may be prescribed by this Constitution, or by the Laws of the State, and a declaration of belief in the

- Christian religion; and if the party shall profess to be a Jew, the declaration shall be of his belief in a future state of rewards and punishments.”).
- b. MD. CONST. of 1864, Declaration of Rights, art. 37 (“That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of allegiance and fidelity to this State, and the United States, as may be prescribed by this Constitution; and such oath of office and qualification as may be prescribed by this Constitution, or by the laws of the State, and a declaration of belief in the Christian religion, or in the existence of God, and in a future state of rewards and punishments.”).
 - c. MD. CONST. of 1867, Declaration of Rights, art. 37 (“That no religious test ought ever 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 . . .”).
4. Massachusetts
- a. MASS. CONST. of 1780, ch. VI, art. I. (“Any person chosen governor, lieutenant-governor, councilor, senator, or representative, and accepting the trust, shall, before he proceed to execute the duties of his place or office, make and subscribe the following declaration, viz: ‘I, A.B., do declare that I believe the Christian religion, and have a firm persuasion of its truth; and that I am seized and possessed, in my own right, of the property required by the constitution as one qualification for the office or place to which I am elected. . . .”).
5. Mississippi
- a. MISS. CONST. of 1817, art. VI, § 6 (“No person who denies the being of God, or of a future state of rewards and punishments, shall hold any office the civil department of this State.”).
 - b. MISS. CONST. of 1832, art. VII, § 5 (“No person who denies the being of a God, or of a future state of rewards and punishments, shall hold any office the civil department of this state.”).
 - c. MISS. CONST. of 1868, art. I, § 23 (“No religious test, as a qualification for office, shall ever be required, and no preference shall ever be given by law to any religious sect or mode of worship; but the free enjoyment of all religious

sentiments, and the different modes of worship shall ever be held sacred; Provided, The rights hereby secured shall not be construed to justify acts of licentiousness, injurious to morals, or dangerous to the peace and safety of the State.”).

- d. MISS. CONST. of 1868, art. XII, § 3 (“No person who denies the existence of a Supreme Being shall hold any office in this State.”).
 - e. MISS. CONST. of 1890, art. XIV, § 265 (“No person who denies the existence of a Supreme Being shall hold any office in this state.”), *but see* Miss. Con. (1890), Art. III., §18 (“No religious test as a qualification for office shall be required.”).
6. New Jersey
- a. N.J. CONST. of 1776, art. XIX (“That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.”).
7. North Carolina
- a. N.C. CONST. of 1776, § 32 (“That no person who shall deny the being of God, or the truth of the Protestant religion, or the divine authority of either 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.”).
 - b. N.C. CONST. of 1835 (Amendments of 1835) art. IV, § 2 (“The thirty-second section of the constitution shall be amended to read as follows: No person who shall deny the being of God, or the truth of the Christian religion, or the divine authority of the Old and New Testament, or who shall hold religious principles incompatible with the

- freedom or safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this State.”).
- c. N.C. CONST. of 1861 (Amendments of 1861-1862) § IX (“Be it ordained by the delegates of the people of North Carolina in Convention assembled, and it is hereby ordained by the authority of the same, That the second section of the fourth article of the amendments to the Constitution shall be amended to read as follows: ‘No person who shall deny the being of God, or the divine authority of both the Old and New Testaments, or who shall hold religious opinions incompatible with the freedom or safety of the State, shall be capable of holding any public office or place of trust or profit in the civil department of this State.’”).
 - d. N.C. CONST. of 1868, art VI, § 5 (“The following classes of persons shall be disqualified for office: First, All persons who shall deny the being of Almighty God. Second; All persons who shall have been convicted of treason, perjury or any other infamous crime, since becoming citizens of the United States, or of corruption, or malpractice in office, unless such persons shall have been legally restored to the rights of citizenship.”).
 - e. N.C. CONST. of 1971, art. VI, § 8 (“The following persons shall be disqualified for office: First, any person who shall deny the being of Almighty God. . .”).
8. Pennsylvania
- a. PA. CONST. of 1776, § 10 (“ . . . And each member, before he takes his seat, shall make and subscribe the following declaration, viz: 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. And no further or other religious test shall ever hereafter be required of any civil officer or magistrate in this State.”).
 - b. PA. CONST. of 1790, art. IX, § 4 (“That no person who acknowledges the being of a God, and a future state of rewards and punishments, shall on account of his religious

- sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth.”).
- c. PA. CONST. of 1838, art. IX, § 4 (“No person, who acknowledges the being of a God and a future state of rewards and punishments, shall on account of his religious sentiments be disqualified to hold any office or place of trust or profit under this commonwealth.”).
 - d. PA. CONST. of 1874, art. I, § 4 (“No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth.”).
 - e. PA. CONST. of 1968, art. I, § 4 (“No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth.”).
9. South Carolina
- a. S.C. CONST. of 1895, art. VI, § 2 (“No person who denies the existence of a Supreme Being shall hold any office under this Constitution.”); art. XVII, § 4 (“No person who denies the existence of a Supreme Being shall hold any office under this Constitution.”).
10. Tennessee
- a. TENN., CONST. of 1796, art. VIII, § 3 (“No person who denies the being of God or a future State of rewards and punishments shall hold any office in the civil Department of this State.”).
 - b. TENN., CONST. of 1796, art. VIII, § 4 (“That no religious test shall ever be required as a qualification to any Office or public trust under this State.”).
 - c. TENN., CONST. of 1870, art. IX, § 2 (“No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this state.”), *but see*, TENN., CONST. of 1870, art. I, § 4 (“That no political or religious test, other than an oath to support the Constitution of the United States and of this state, shall ever be required as a qualification to any office or public trust under this State.”).
11. Texas

- a. TEX., CONST. of 1876, art. I, § 4 (“No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.”).

12. Vermont

- a. VT. CONST. of 1777, ch. II, § IX. (“ . . . And each member, before he takes his seat, shall make and subscribe the following declaration, viz. ‘I _____ do believe in one God, the Creator and Governor of the Diverse, the warder of the good and punisher of the wicked. And I do acknowledge the scriptures of the old and new testament to be given by divine inspiration, and own and profess the protestant religion.’ And no further or other religious test shall ever, hereafter, be required of any civil officer or magistrate in this State.”).
- b. VT. CONST. of 1786, ch. II, § XII. (“ . . . And each member, before he takes his seat, shall make and subscribe the following declaration, viz. You do believe in one God, the Creator and Governor of the Diverse, the warder of the good and punisher of the wicked. And you do acknowledge the scriptures of the Old and New Testament to be given by divine inspiration, and own and profess the protestant religion. And no further or other religious test shall ever, hereafter, be required of any civil officer or magistrate in this State.”).

Appendix B. State Constitutions with Prohibitions on Religious Tests for Office.

Alabama

Ala. Const. of 1819, art. I, § 7.

Ala. Const. of 1861, art. I, § 7.

Ala. Const. of 1865, Art I, § 4.

Ala. Const. of 1875, art. I, § 4.

Ala. Const. of 1901, art. I, § 3.

Arizona

Ariz. Const. of 1912, art. II, § 12.

Arkansas

Ark. Const. of 1868, art. I, § 21.

California

Cal. Const. of 1849, art. XI, § 3.

Cal. Const. of 1880, art. XX, § 3.

Delaware

Del. Const. of 1792, art. I, § 2.

Del. Const. of 1831, art. I, § 2.

Del. Const. of 1897, art. I, § 2.

Georgia

Ga. Const. of 1861, art. I, § 7.

Ga. Const. of 1865, art. I, § 5.

Ga. Const. of 1868, art. I, § 6.

Ga. Const. of 1877, art. I, Par. XIII.

Ga. Const. of 1945, art. I, Par. XIII.

Ga. Const. of 1976, art. I, § I, Par. III.

Ga. Const. of 1983, art. I, § I, Par. IV.

Illinois

Ill. Const. of 1818, art. VIII, § 4.

Ill. Const. of 1848, art. VIII, § 4.

Indiana

Ind. Const. of 1816, art. I, § 3.

Ind. Const. of 1851, art. I, § 5.

Iowa

Iowa Const. of 1846, art. II, § 4.

Iowa Const. of 1857, art. I, § 4.

Kansas

Kan. Const. of 1859, Kansas Bill of Rights, § 7.

Louisiana

- La. Const. of 1868, art. I, § 12.
Maine
Me. Const. of 1820, art. I, § 3.
Michigan
Mich. Const. of 1835, art. XII, § 1.
Mich. Const. of 1850, art. 18, § 1.
Mich. Const. of 1908, art. XVI, § 2.
Mich. Const. of 1963, art. XI, § 1.
Minnesota
Minn. Const. of 1857, art. I, § 17.
Missouri
Mo. Const. of 1820, art. XIII, § 5.
Mo. Const. of 1865, art. I, § 9.
Mo. Const. of 1875, art. II, § 5.
Mo. Const. of 1945, art. I, § 5.
Montana
Mont. Const. of 1973, art. III, § 3.
Nebraska
Neb. Const. of 1875, art. I, § 4.
New Jersey
N.J. Const. of 1844, art. I, § 4.
N.J. Const. of 1947, art. I, § 4.
New York
N.Y. Const. of 1821, art. VI, § 1.
N.Y. Const. of 1846, art. XII, § 1.
North Dakota
N.D. Const. of 1889, art. XI, § 4.
Ohio
Ohio Const. of 1802, art. VIII, § 3.
Ohio Const. of 1851, art. I, § 7.
Oregon
Ore. Const. of 1859, art. I, § 4.
Rhode Island
R.I. Const. of 1986, art. I, § 3.
South Dakota
S.D. Const. of 1889, art. VI, § 3.
Tennessee
Tenn. Const. of 1835, art. I, § 4.
Texas
Tex. Const. of 1845, art. I, § 3.

Tex. Const. of 1866, art. I, § 3.

Tex. Const. of 1869, art. I, § 3.

Utah

Utah Const. of 1895, art. I, § 4.

Virginia

Va. Const. of 1830, art. III, § 11.

Va. Const. of 1971, art. I, § 16.

Washington

Wash. Const. of 1889, art. I, § 11.

West Virginia

W.Va. Const. of 1863, art. II, § 9.

W.Va. Const. of 1872, art. III, § 11.

W. Va. Const. of 1872, art. III, § 15.

Wisconsin

Wis. Const. of 1848, art. I, § 19.

Wyoming

Wyo. Const. of 1889, art. I, § 18.

Appendix C. State Constitutions with Religious Tests for Witness Competency.

1. Arkansas

- a. ARK. CONST. of 1836, art. IX, § 2 (“No person who denies the being of a God, shall hold any office in the civil departments of this State, nor be allowed his oath in any court.”).
- b. ARK. CONST. of 1864, art. IX, § 2 (“No person who denies the being of a God, shall hold any office in the civil departments of this State, nor be allowed his oath in any court.”).
- c. ARK. CONST. of 1874, art. XIX, § 1 (“No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any court.”).

2. Maryland

- a. MD. CONST. of 1851, Declaration of Rights, art. 33 (“ . . . nor shall any person be deemed incompetent as a witness or juror, who believes in the existence of a God, and that under his dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or the world to come.”).
- b. MD. CONST. of 1864, Declaration of Rights, art. 36 (“ . . . nor shall any person be deemed incompetent as a witness or juror, who believes in the existence of God, and that under his dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or the world to come.”).
- c. MD. CONST. of 1867, Declaration of Rights, art. 36 (“no person otherwise competent shall be deemed incompetent as a witness or juror on account of his religious belief, provided that he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and will be rewarded or punished therefor either in this world or the world to come.”).