The Christian Nation Debate and Witness Competency

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In recent years historians have vigorously debated the question of whether the United States was founded as a Christian nation. An extensive literature also has examined related issues involving the intent and meaning of the First Amendment to the Constitution, Jefferson's and Madison's understanding of church–state relations, and, more broadly, the role played by religion in the public sphere during the early years of the American republic. One prominent and longstanding line of interpretation has taken as its theme Jefferson's famous metaphor of a "wall of separation between church and state," expressed in his letter to the Danbury Baptists in 1802. Moreover, that reading of the Founders' intentions has enjoyed substantial support in American jurisprudence.

The most contentious issue among scholars—often paralleled in the political arena—concerns the reading of the First Amendment's prohibition of Congress's making any law "respecting an establishment of religion." Historians as well as conservative and liberal advocates in contemporary politics have scrutinized the Founders' writings and actions, as well as the debates in the constitutional convention and ratifying conventions, and in the First Congress, looking for evidence to support their arguments for or against the federal government's ability to encourage religion in a general, public, and nonpreferential way toward any particular denomination or type of worship. Those scholars who ap-

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prove of the courts' maintenance of the "wall of separation" at the federal level read the First Amendment broadly to mean unambiguously that "religion as a subject of legislation was reserved exclusively to the states." In contrast, others, including recently Philip Hamburger, have argued that separation was a long-term unintended consequence of disestablishment, and that "the constitutional authority for separation is without historical foundation."[1]

Historians generally agree that the First Amendment clause prevented the federal government from interfering with existing state religious establishments that survived the Revolutionary era of constitution-making. Further, no one doubts that it protected individual freedom of worship or belief, while also preventing the federal government from favoring any church or denomination. Nevertheless many scholars have argued that in the early decades of the republic "the wall" was not absolute, either in the founders' thinking or in their actions, or at either the state or federal level. Proponents of a Christianity-friendly public culture have pointed out that the federal government itself in its early decades frequently crossed "the line of separation" between common religious practice and civil government. Not all historians who recognize the sometimes inconsistent ideas or actions of the founders, however, necessarily favor a narrow reading of the First Amendment.[2]

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1. Quotation from Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York, 1986), 74. McGarvie contends that the legal basis for separation existed in the contract clause of the constitution, and credits legislatures and courts for promoting separation by transforming churches from public to private corporations; Mark Douglas McGarvie, *One Nation Under Law: America's Early National Struggles to Separate Church and State* (DeKalb, IL, 2004), 3; Philip Hamburger, *Separation of Church and State* (Cambridge, MA, 2002), 481. For a good introduction to some of the issues at stake: James H. Hutson, "Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined," *William and Mary Quarterly* 56 (Oct. 1999), 775–90, with comments from several other scholars, "Forum," 791–824. Michael J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (Washington, DC, 1978) is an example of advocacy for nondiscriminatory aid to religion by the federal government.

2. The literature is voluminous; some important works include Joseph M. Snee, S.J., "Religious Disestablishment and the Fourteenth Amendment," *Washington University Law Quarterly* 4 (Dec. 1954), 371–405; Sidney E. Mead, "Neither Church nor State: Reflections on James Madison's 'Line of Separation,'" *Journal of Church and State* 10 (Autumn 1968), 349–63; Robert L. Cord, *Sepa-*

Evidence abounds that the new United States government did not always adhere to strict separation. The first Congress decided to open with a prayer, and appointed a chaplain to be paid from federal funds. James Madison served on the committee that proposed the chaplain system. Meanwhile, Congress, after approving the First Amendment, proclaimed a "day of public Thanksgiving and prayer to be observed . . . [for] the many signal favors of Almighty God." The legislators also appointed chaplains for the military and reenacted the Northwest Ordinance, including a provision that "Religion, morality and knowledge" should be forever encouraged in the territories as "necessary to good government." President Washington proclaimed at least two days of National Thanksgiving, Adams at least two, and Madison four. Through treaties with various Indian tribes, every president from Washington to Van Buren provided federal money to support churches, priests, or religious schools.[3]

In the states, especially New England, the connection between religion and civic life waxed even stronger. Eleven of the thirteen colonies had established churches, most of which were supported by taxes on all citizens, who expected their churches to be involved in public affairs. Not only did several of these "establishments" continue after 1789, but some state constitutions required governors and office holders to take oaths to

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ration of Church and State: Historical Fact and Current Fiction (New York, 1982); William Lee Miller, *The First Liberty: Religion and the American Republic* (New York, 1986); Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York, 1986); John F. Wilson, "Religion, Government, and Power in the New American Nation," in *Religion and American Politics: From the Colonial Period to the 1980s*, ed. Mark A. Noll (New York, 1990), 77–91; Daniel L. Dreisbach, ed., *Religion and Politics in the Early Republic: Jasper Adams and the Church–State Debate* (Lexington, KY, 1996), and *Thomas Jefferson and the Wall of Separation Between Church and State* (New York, 2002); James H. Hutson, *Religion and the Founding of the American Republic* (Washington, DC, 1998), and *Forgotten Features of the Founding: The Recovery of Religious Themes in the Early American Republic* (Lanham, MD, 2003). For a recent balanced approach to the implications of the Founders wanting religious freedom and a public life with space for religion to thrive, see Jon Meacham, *American Gospel: God, The Founding Fathers, and the Making of a Nation* (New York, 2006).

3. Quotations from Curry, *First Freedoms*, 217, 218; Cord, *Separation of Church and State*, 51–54, 57–61.

support the Christian or even Protestant religion. Moreover, historians have recognized for some time that the dissenting religious sects that struggled to end the continuing state establishments did not envision a complete separation of religion and public affairs. Baptists in New England and elsewhere, for example, "did not object to laws supporting Sabbath observance, legislative and military chaplains, or other government measures designed to uphold an evangelical Protestant moral code. Often enough they wanted them extended and strengthened."[4]

Some state church establishments disappeared in the Revolution, and others lingered on (Connecticut's ended in 1818, and Massachusetts's in 1833, though substantially modified years earlier). Disestablishment did not inevitably reduce the role of religion in public life. On the contrary, it inspired evangelicals to greater exertions to infuse political affairs with religion, specifically Protestant Christianity, and to lobby for laws promoting Sabbath observance and moral behavior. Indeed, the "vast majority of Americans assumed theirs was a Christian, i.e. Protestant country, and they automatically expected that government would uphold the commonly agreed upon Protestant ethos and morality."[5]

However accurate this characterization of the status of Christianity in the states' public life in the early republic, it does not resolve the debate

4. Quotation from Thomas E. Buckley, S.J., "Reflections on a Wall," *William and Mary Quarterly* 56 (Oct. 1999), 797. Notwithstanding different general interpretations, this particular view is echoed by McGarvie, *One Nation Under Law*, 7, and Hamburger, *Separation of Church and State*, 89–107; a foundational work here is William G. McLoughlin, *New England Dissent, 1630–1833: The Baptists and the Separation of Church and State* (2 vols., Cambridge, MA, 1971). Even states that never had religious establishments, including Pennsylvania, Delaware, and New Jersey, imposed religious tests for office. Levy, *Establishment Clause*, 64.

5. Quotation from Curry, *First Freedoms*, 219.Thomas E. Buckley, "After Disestablishment: Thomas Jefferson's Wall of Separation in Antebellum Virginia," *Journal of Southern History* 61 (Aug. 1995), 445–80; John F. Wilson, *Public Religion in American Culture* (Philadelphia, 1979), 8–9. Emphasizing the role of women in benevolent and associational activity, see Kathleen D. McCarthy, *American Creed: Philanthropy and the Rise of Civil Society, 1700–1865* (Chicago, 2003), 49–77. Regarding Christianity's "pursuit of institutional power and authority" and the expansion of denominational authority between 1790 and 1840, see Jon Butler, *Awash in a Sea of Faith: Christianizing the American People* (Cambridge, MA, 1990), 256–65, 272–82, quotation 256; also, John G. West, *The Politics of Revelation and Reason: Religion and Civic Life in the New Nation* (Lawrence, KS, 1996).

over the First Amendment and the Founders' intentions. This article does side with scholarship that argues against drawing conclusions about the clause "as if the historical evidence permits complete certainty. It does not." But rather than engaging the establishment clause debate the article focuses attention on a different feature of the prominence of Protestant Christianity in public life during the early republic. Religious tests for witness competency in courts of law, that historians have neglected, shed light on the enduring and evolving influence of Christianity. Even as common law in other sectors of jurisprudence underwent dramatic change, witness competency tests revealed how religion was imbedded in the common law of the republic well into the nineteenth century.[6]

James H. Hutson, head of the manuscripts division of the Library of Congress, has been one of the most persuasive proponents of the argument that the Founding Era generation believed religion and its promotion by the state essential to the existence of virtue among citizens. He also identified the "lynchpin" of this process: "the dynamic element . . . that was assumed to produce its singular effectiveness was . . . encapsulated by eighteenth-century Americans in a formula—'a future state of rewards and punishments.'" Derived from English common law, this principle, the so-called "future state doctrine," contained "incentives/disincentives" that made individuals "obedient Christians as well as respectable citizens."[7]

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6. Quotation from Levy, *Establishment Clause*, xiii. Even with respect to Christianity's suffusion of public culture in various states we agree that no "straightforward lessons" should be drawn from the history of "official religiosity in post-Revolutionary America," Stephen Botein, "Religious Dimensions of the Early American State," in *Beyond Confederation: Origins of the Constitution and American National Identity*, ed. Richard Beeman, Stephen Botein, and Edward C. Carter, III (Chapel Hill, NC, 1987), 315. The discussion of Madison's thoughts and actions seems to us particularly fraught with nuance and complexity. See, e.g., Levy, *Establishment Cause*, 97, 99, 100, and Donald L. Drakeman, "Religion and the Republic: James Madison and the First Amendment," *Journal of Church and State* 25 (1983), 427–45. However, with respect to the common law, the founders in the 1830s of what became Harvard Law School, prominent lawyer Simon Greenleaf and Justice Joseph Story, believed that Christianity and common law were "interwoven," and "inextricably bound up with one another." Daniel D. Blinka, "The Roots of the Modern Trial: Greenleaf's *Testimony* to the Harmony of Christianity, Science, and Law in Antebellum America," *Journal of the Early Republic* 27 (Summer 2007), 323.

7. Hutson, *Forgotten Features of the Founding*, 10.

Several Revolutionary-era state constitutions incorporated the principle and required officeholders to swear oaths affirming such a belief. Pennsylvania's quite democratic constitution restricted civil rights to people "who acknowledge the being of a God" and required state legislators to take an oath declaring belief "in one God, the creator and governor of the Universe, the rewarder of the good and the punisher of the wicked." Critics of the federal constitution in Maryland, Virginia, and Pennsylvania lamented the omission of such a required oath in all three branches of government. One specific use of the future state doctrine, according to Hutson, overshadowed all its other benefits, namely "preserving the integrity of the judicial process by guaranteeing the sanctity of oaths." Indeed, in his Farewell Address, George Washington emphasized this very point: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . Where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths which are instruments of investigation in the courts of justice?"[8]

Hutson recognizes that the future state doctrine functioned in the courts of the early republic to exclude the testimony of atheists and others, notably Universalists, who believed in salvation for all and who denied a future state of rewards and punishments. But he asserted that with the formal end of the church establishment in Massachusetts in 1833 the doctrine rapidly waned, becoming increasingly "incompatible with the optimistic democratic society that began to flourish . . . in the 1830s."[9]

While Hutson deserves credit for his singular emphasis on the "future

8. Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence, KS, 1985), 42. Hutson, *Forgotten Features of the Founding*, 17–18, 33–34. Hutson is one of the few historians to call attention to this passage in the Address. The quotation here is from Henry Steele Commager, ed., *Documents of American History* (sixth ed., New York, 1958), 173. Americans, observed McDonald, were habituated "to thinking in Protestant terms," 42. Massachusetts's 1780 constitution required state officials to be ineligible "unless he declare himself to be of the Christian religion," and to take an oath disclaiming the authority of any "foreign Prince, Person, Prelate, State, or Potentate." Some towns went further and voted to insert the word *Protestant* before *Christian* wherever used in the constitution. Gaspar G. Bacon, "The State Constitution, 1770–1780," in *Commonwealth History of Massachusetts, Colony, Province, and State, 1775–1820*, Vol. 3, ed. Albert Bushnell Hart (New York, 1929), 198.

9. Hutson, *Forgotten Features of the Founding,* 35.

state" doctrine, the fact is that religious tests for "witness competency" remained on state statute books and in judges' decisions a much longer time than he thinks. Many state courts retained religious tests for most of the nineteenth century. Indeed, an older body of scholarship by lawyers and legal historians dating at least to the early twentieth century, demonstrated the grip of the future state doctrine and Christianity more generally on common law during the antebellum period. These publications, quite absent from recent discussion of church–state relations, mostly appeared from 1903 to 1939, especially in the 1920s and 1930s. Their authors were primarily free-thinking or secular-minded and progressive lawyers or law professors imbued with the Progressive spirit of scientific rationalism. Some clearly reacted to the culture wars of the 1920s, especially the Ku Klux Klan crusade for an "American Protestant nationalism," and also to the outpouring of religious bigotry that greeted Catholic Al Smith's run for the presidency in 1928. Importantly, this literature emerged because religious tests for witness competency, although no longer as pervasive as in the early republic, continued in the courtrooms of some states into the twentieth century.[10]

A 1903 article in *The American Law Register* reviewed the effects of judicially required oaths on witness competency and referred to a long list of cases in which witnesses had been ruled incompetent on religious belief grounds, including their lack of belief in "a future state." Although the growth of "religious toleration" had alerted "the legal world that perhaps an unbeliever or even an atheist might on some occasions tell the truth," the author estimated that "in fourteen and probably fifteen [states] the common law rule [excluding witnesses] is still unchanged." A year later an unsigned note in *The Columbia Law Review* hailed a recent New York case, *Brink* v. *Stratton*, that had purged "the last trace of the old common law rule that atheists and persons not Christians

10. On the Ku Klux Klan of the 1920s as an expression of white Protestant nationalism, see esp. Leonard J. Moore, *Citizen Klansmen: The Ku Klux Klan in Indiana, 1921–1928* (Chapel Hill, NC, 1991). One of the early legal scholars whose work seemed inspired by Progressive rationalism referred to the "present zeal of bigots" as reflected in the American Protestant Association, the KKK, the Lord's Day Alliance, the Anti-Saloon League, and the "Protestant Church's part in the late presidential campaign against Governor Smith." B. H. Hartogensis, "Denial of Equal Rights to Religious Minorities and Non-Believers in the United States," *Yale Law Journal* 39 (1930), quotations 660–61, 666.

could not testify," though it noted that similar provisions persisted in other states. That same year a treatise on evidence in common law trials also commented on the continuation of witness competency religious tests, but deemed "the injustice" to be passing away. A 1914 legal compendium, however, affirmed the importance of oaths based on religious beliefs, and approvingly quoted Washington's Farewell Address. It noted that some states held no person incompetent because of religious opinions while other states required simple belief in the existence of God, and asserted that New York still required a witness to believe in a Supreme Being who would in a future state punish false swearing.[11]

By the 1920s and 1930s legal scholars were still publishing articles and books addressing the historical background of religious tests for witness competency, and were reacting to the continuation of religious bigotry in general and specifically to continuing religious tests in some courtrooms. They also demonstrated that in the first decades of the nineteenth century courts almost uniformly ruled against the competency of witnesses who did not believe in God or punishment in this life or a future state. The historical scholarship of the last thirty years on church–state relations and the role of Christianity in public life has neglected these admittedly dated and somewhat obscure publications, despite their intrinsic value for the light they shed on their own period as well as the nineteenth century.

The most prolific and earnest of these twentieth-century legal scholars, Frank Swancara, a freethinking Denver lawyer, published several articles and three books dealing with religious intolerance. His 1936 book, *Obstruction of Justice by Religion: A Treatise on Religious Barbarities of the Common Law*, specifically adressed religious restrictions on witness credibility and competency, and conveyed Swancara's crusading intent. His first article, "Medieval Theology in Modern Criminal Law,"

11. Thomas Raeburn White, "Oaths in Judicial Proceedings and Their Effect upon the Competency of Witnesses," *American Law Register* 51 (1903), quotations 392, 395, and 392n37; "Questioning a Witness as to his Belief in a Supreme Being," *Columbia Law Review* 4 (1904), 134–35, quotation 134; John Henry Wigmore, *Evidence in Trials at Common Law [Chadbourne Revision]* (1904; rep. Boston, 1976), 6: 414; Burr W. Jones, *Commentaries on the Law of Evidence in Civil Cases* (San Francisco, 1914), 4: 315, 324–26. "Religious Liberty in the United States," *Columbia Law Review* 15 (1915), 704–6, also discussed the issue of religious tests for witness competency.

referred to a ruling in a case before the Supreme Court of the United States in 1895 (*Carver* v. *United States)* that dying declarations "may be discredited by proof that he (the deceased) did not believe in a future state of rewards and punishments." Swancara, of course, advocated that everyone whatever their religious beliefs or nonbeliefs, atheism included, should be regarded as equal before the law.[12]

In a subsequent article Swancara traced the evolution of the future state doctrine from its origins in English common law to its application in American courts throughout the nineteenth century. Judges often stretched the requirement to allow testimony by Universalists who believed in punishment in *this life*, while other courts in the first decades of the nineteenth century invoked the more exclusionary test, requiring belief in a *future* state of rewards and punishments. Swancara observed that even after some state legislatures liberalized witness competency statutes, the future state doctrine persisted as "reactionary courts" evaded statuatory remedies into the mid nineteenth century and after.[13]

Other articles in legal journals in the 1930s paralleled Swancara's critique of continuing denial of equal rights to Universalists, atheists, and other heterodox believers. This scholarship evoked an engaged, reformist point of view similar to Swancara's and pointed to Christianity's presence in the common law of the country, particularly with regard to religious tests for participation in public life.[14]

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12. Frank Swancara, *The Obstruction of Justice By Religion: A Treatise on Religious Barbarities of the Common Law, and a Review of Judicial Oppression of the Non-Religious in the United States* (1936; rep. New York, 1971); "Medieval Theology in Modern Criminal Law," *Journal of the American Institute of Criminal Law and Criminology* 20 (1930), 491; *Carver* v. *U.S.* 164 U.S. 694, 697; lack of belief in future state punishment still invalidated dying declarations into the 1920s, Swancara, "Religion in the Law of Dying Declarations," *United States Law Review* 66 (1932), 192–203. See also by the same author, "Iniquity in the Name of Justice," *Virginia Law Review* 18 (1932), 415–22; "Judicial Aspersions on the Non-Religious," *Journal of Criminal Law and Criminology* 23 (1932), 231–37; "A Religious Fiction of the Common Law," *Journal of Criminal Law and Criminology* 23 (1932), 614–19; "Judicial Disregard of the Equal Protection Clause as It Affects the Non-Religious," *United States Law Review* 68 (1934), 309–16.

13. Frank Swancara, "Non-Religious Witnesses," *Wisconsin Law Review* 8 (1932–1933), 50, quotation 55.

14. Hartogensis, "Denial of Equal Rights to Religious Minorities and Non-Believers in the United States" (1929–1930), 660–65, quotation 661–62. Hartogensis had published an earlier article on the long struggle for Jewish citizens of

By 1948 a standard source for legal historians, William George Torpey's *Judicial Doctrines of Religious Rights in America*, noted briefly the prevalence of witness disqualification in early American court decisions based on lack of belief in a God or ultimate punishment. Torpey seemed satisfied that by his time forty states by court decision or statute had modified or dropped religious tests for witness competency, but his book too has received little attention from nonlegal historians in recent discussions of religion and government in the early republic.[15]

All of these observers from 1903 to Torpey in 1948 knew the importance of the eighteenth-century English court case credited with shaping common law regarding witness competency. *Omichund* v. *Barker*, decided in 1745, involved objections to a non-Christian East Indian being sworn as a witness. The Court of Chancery sent a commission to India to inquire into the "Gentoo" faith and decided that its belief in a god and the binding nature of the oath could qualify certain non-Christians. Although regarded by the progressive commentators of the early twentieth century as regressive, *Omichund* (also given as *Omychund*) actually expanded the pool of competent witnesses.

A complication arose, however, from two conflicting English reports of the case. In a 1765 report Atkins (also "Atkyns") interpreted *Omichund* as deeming a witness incompetent unless "he believed in a God and *future* rewards and punishments." But an 1800 report of the case written by Lord Willes set the standard of belief as punishment *either* in this world *or* the next—not just future punishment.[16]

This contradiction in the authorities led to two streams of court rulings in the United States in the early nineteenth century, both of which,

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Maryland to attain equal civil rights, "Unequal Religious Rights in Maryland Since 1776," *Publications of the American Jewish Historical Society* 25 (1917), 93–107; D. G., "Witness—Competency—Religious Belief," *Tulane Law Review* 7 (1932–1933), 457–48; Scott Rowley, "The Competency of Witnesses," *Iowa Law Review* (1939), 482, 490–91; J. Crawford Biggs, "Religious Belief as a Qualification of a Witness," *North Carolina Law Review* 31 (1929–1930), 31–43; also, "The American Judiciary and Religious Liberty," *American Law Review* 62 (1928), 666–68.

15. William George Torpey, *Judicial Doctrines of Religious Rights in America* (Chapel Hill, NC, 1948), 278; Torpey's book did appear in Arlin M. Adams and Charles J. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religious Clauses* (Philadelphia, 1990), 148n74.

16. Willes: 125 Eng. Rep. 1310 (ch. 1744).

however, applied some version of divine punishment for false oath swearing. While there seems to have been an evolution toward the more inclusive standard of belief in divine punishment at any time, both interpretations of witness competency were rendered in courts in different regions of the country throughout the period leading up to the Civil War.

In 1807 the more restrictive "view of the English authorities" appeared in the Tennessee Supreme Court's acceptance of a challenge to a witness's beliefs. Although the state's attorney general had argued that by the laws of England every rational person could be a witness "whatever his belief," the court ruled otherwise: "No person can be a witness who does not believe in a future state of rewards and punishments; but evidence of a settled belief, not slight or casual sayings, should be produced." In 1809 a Connecticut court cited the same English precedent in *Curtiss* v. *Strong*, wherein a person who did not believe in punishment after death for false swearing was held to be not a competent witness to a will, thus preventing the will being admitted to probate. An 1820 New York court invoked the rationale involved in this line of decisions, defining testimony as acceptable only if "delivered under the solemnity of an oath, which comes home to the conscience of the witness, and will create a tie arising from his belief that false swearing would expose him to punishment in the life to come." Echoing Washington's Farewell Address," the judge asserted: "On this great principle rest all our institutions." In 1827 a federal court in Rhode Island in *Wakefield* v. *Ross* disqualified a father and son from testifying because of lack of belief in future punishment. In an 1852 Pennsylvania case a nonbelieving attesting witness to a will was declared incompetent posthumously, and the will rejected.[17]

17. *Omichund* v. *Barker*, 1 Atkyns 21, Willes 538 (1745); *State* v. *Cooper*, 2 Tenn. 96 (1807); *Curtiss* v. *Strong*, 4 Day 51 (1809); *Jackson ex dem. Tuttle* v. *Gridley*, 18 Johns. 98, 106 (N.Y. Sup. Ct.1820); in *Atwood* v. *Welton*, 7 Conn. 66 (1828), belief in punishment in this life was insufficient for competency; *Wakefield* v. *Ross*, 5 Mason 16, 19, Fed. Cas. 17,050 (1827); *Harding* v. *Harding*, 18 Pa. 340 (1852), cited in Hartogensis, "Denial of Equal Rights," 670. In *State* v. *Townsend*, 2 Harr. 543 (1838) Del., a witness at first denied the existence of "a future state of rewards and punishments" and expressed disbelief "altogether in a future state of existence." After he changed his mind, but was unable to produce a witness as to his change of belief, the court disqualified him.

By contrast many other cases accorded with Willes, where Universalists of all persuasions escaped disqualification by professing belief in punishment in *this world*. An 1823 New York judge admitted a witness, probably a Universalist, who believed in *some* though not *eternal* punishment in the afterlife. A Pennsylvania judge in 1841 declared the "true test" of competency was whether the witness believes in a God "who will punish him if he swears falsely," and that included "those who believe future punishments are not eternal." In this case the court dismissed reports of religious opinions the witness had expressed earlier in life; his "present religious belief" was what mattered. In 1856 in North Carolina, a judge not only deemed a witness competent who believed in divine punishment in this world, but reviewed the history of English common law from Lord Coke and pointed to the discrepancy between the reports of Willes and Atkins. Atkins, he argued, had "misconceived" the meaning of *Omichund* v. *Barker*. Every oath must have religious sanction, but even an infidel (i.e., non-Christian) may be competent if he believes "in the existence of a Supreme Being, who punishes the wicked, without reference to the *time* of punishment."[18]

In a variation of the less restrictive approach some courts, such as Massachusetts's Supreme Court in 1818, accepted a witness who professed lack of faith in "a future state of existence," but said that the jury could weigh the witness's religious beliefs in determining his credibility. That case, *Hunscom* v. *Hunscom*, was cited eleven years later in Boston Municipal Court when a judge again ruled that objections to a Universalist should go to the witness's credibility rather than his competence. The judge, however, while regretting the questioning of witnesses as to their religious beliefs, nevertheless affirmed the principle that "the sanctions of an oath" were paramount and that "if a man believes in the being of God, and his attributes as a righteous avenger of wickedness, and in the existence of a future state,—I consider it my duty to admit him to the oath."[19]

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18. *Butts* v. *Swartwood*, 2 Cow. 431 (N.Y. Sup. Ct. 1823); *Cubbison* v. *M'Creary*, 2 Watts & Serg. 262 (Pa. 1841); *Shaw* v. *Moore*, 49 N.C. 25 (1856); also *Blocker Adm'r* v. *Burness*, 2 Ala. 354 (1841).

19. *Hunscom* v. *Hunscom*, 15 Mass. 184 (1818); regarding *Commonwealth* v. *Bachelor*, Nathan Dane, "Review of *A General Abridgement and Digest of American Law*," *American Jurist and Law Magazine* 4 (1830), 80, 81. Still another variation on this theme occurred in *Commonwealth* v. *Buzzell*, 33 Mass. 153, 16 Pick. 153 (1834), a case resulting from the infamous burning of a Charlestown

No court, however, issued a ruling on witness competency more progressive than that of a Virginia judge in 1846. A prisoner charged with felonious homicide challenged a witness who, when questioned, said he believed in God but not in future punishments but rather "punishment here." The court held that the state constitution and bill of rights secured "to every citizen perfect freedom of opinion in all matters of religion." On review the judge affirmed his ruling and regretted permitting the witness to be examined as to his religious opinion. He further observed that the common law rule requiring belief in punishment in a future state persisted in England "and in some of our sister States, [which] have exercised an inquisitorial power over the religious beliefs of witnesses." While in some states the rule has been "relaxed or annulled" by statutes or constitutional provision, in Virginia it was "abrogated by our Bill of Rights." Religious opinion did not affect the "capacity" to testify.[20]

Although the evidence is not conclusive, examinations of the two trains of court decisions, one based on Atkyns's requirement of belief in divine future punishment and the other on Willes's more flexible interpretation of common law, suggest that most courts in the early and mid nineteenth century chose to follow Willes.[21]

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convent by a Protestant mob. Defense counsel objected to the testimony of Catholics on grounds closely tied to the future state doctrine, claiming that "a witness belonging to that sect might testify what was not true, in the expectation of afterwards obtaining absolution." If a witness's belief in future punishment guaranteed his honesty, any mitigation of the divine wrath to come would result in a lesser tier of witness reliability. The prosecution countered that the defense's argument created a gradation of witness truthfulness impractical for the judge to decide. The judge agreed and overruled the defense's objection.

20. *Perry* v. *Commonwealth*, 3 Gratt. 632 (Va. 1846) 3–4, 11, 15, 19, 21; also Hartogensis, 669n46. The Virginia legislature, of course, had passed Jefferson's Bill for Establishing Religious Freedom in 1786 and disestablishment had come early to Virginia.

21. Swancara, *Obstruction of Justice*, 52 concluded that most states followed Willes. A 1977 anonymous essay cautiously agreed but noted that the conclusion "that a *majority* of courts had articulated such a position . . . may be subject to some imprecision, given the possibilities that some decisions may have remained undigested or unreported or that the courts of the several states may not have had an appropriate opportunity to declare themselves on the matter. Majority status for the less restrictive rule at mid-century seems nonetheless evident from those

Of course, witness competency routinely foundered on grounds of lack of belief in any divine punishment, God, the truth of the Bible, or in Christianity itself. Judges often asserted that while the court could not interfere with the rights of conscience, that is, individuals were free to believe what they chose to believe, the court needed, as in a Delaware case in 1835, to "protect the tests of truth," and thus declare incompetent a witness who did not believe "in the existence of a Deity and a future state of rewards and punishments"; there could be no sanction for an oath without a belief in a future state "where secret falsehood may be punished."[22]

The aforementioned cases extend from the early republic through the antebellum decades, and represent but the tip of an iceberg. Religious tests for witnesses, though diminishing in frequency, persisted well through the nineteenth century. Courts' insistence on belief in eternal punishment in a future state was perhaps the less frequently used requirement; more courts declared competency for witnesses who believed in punishment in this world, or punishment of limited duration in a future state. But atheists and various other nonbelievers in "God or his providence" rarely if ever were allowed to testify.

Tests of the religious opinions and beliefs of witnesses persisted in spite of strong if sporadic opposition, both outside and, less often, inside

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cases discoverable by conventional research techniques." "A Reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century," *Michigan Law Review* 75 (Aug. 1977), 1690n48. This extremely pertinent essay addresses the two streams of cases discussed here.

22. *Noble* v. *The People*, 1 Ill. (Breese) 54 (1822); *Norton* v. *Ladd*, 4 N.H. 444 (1828); *United States* v. *Lee*, 26 F.Cas. 908 (C.C.D.C. 1834) (No. 15,586); *Arnold* v. *Estate of Arnold*, 13 Vt. 362, 368 (1841); *Scott* v. *Hooper*, 14 Vt. 535 (1842); *Thurston* v. *Whitney*, 56 Mass. (2 Cush.) 104 (1848); *Central Military Tract R.R. Co.* v. *Rockafellow*, 17 Ill. 541 (1856). Quotation from Samuel L. Harrington, *Reports of Cases Argued and Adjudged in the Superior Court and Court of Errors and Appeals of the State of Delaware Vol. 2* (Dover, DE, 1841), 37. In *Jackson* v. *Gridley* the judge declared religion "a subject on which every man has a right to think according to the dictates of his understanding. It is a solemn concern between his conscience and his God, with which no human tribunal has a right to meddle. But in the development of facts, and the ascertainment of truth, human tribunals have a right to interfere."

courts of law, as well as in state legislatures. Protests against religious tests or courts examining witnesses' religious beliefs did occasionally receive legislative redress, but more often not.[23]

Various nonbelievers and freethinkers objected to religious tests of any kind relating to civil rights. The groups most clearly identifiable with opposition, however, were Universalists whose views of the afterlife differed from most other denominations, and supporters of the anticlerical Workingmen's parties that sprouted up briefly in the 1820s and 1830s. Although the issue did not enter into political campaigns between political factions or the major parties, old-school Jeffersonian Republicans and many Jacksonian Republicans and their successor Democrats tended to oppose religious tests, and changes in state laws occurred generally during their sway in legislatures. At least in New York state, however, opponents of the Jacksonians led the struggle for freedom of belief.

In the early nineteenth century, Universalists encountered "massive opposition, even persecution" on the grounds that their teaching rejected the basic Christian proposition "that all people were responsible before God for their actions, that goodness would be rewarded and evil punished." Many critics regarded the sect as worse than atheism "in that it made people sin all the more boldly, and take greater risks." In western New York Universalism flourished during the Second Great Awakening, paralleling the more numerous evangelical revivalists who regarded the sect with great hostility. The Universalist press in turn criticized the excesses of enthusiastic religion, while the more orthodox press "constantly labeled criminals prominent in the news as Universalists, suggesting that without the fear of eternal punishment one could not remain moral."[24]

Universalists disagreed over the nature of the afterlife and retribution

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23. The final section will outline sources and instances of resistance to religious tests for witness competency, partly to suggest an agenda for future research.

24. Ann Lee Bresler, *The Universalist Movement in America, 1770–1880* (New York, 2001), quotations 31, 40; Whitney R. Cross, *The Burned-Over District: The Social and Intellectual History of Enthusiastic Religion in Western New York, 1800–1850* (1950; New York, 1965), 17, 18, 43–44, 106, last quotation 44. Cross observed that historians had neglected Universalists, though they had played a significant role in reform movements and their impact on "the growth of modern religious attitudes might prove to be greater than that of either the Unitarians or the freethinkers," 323.

for sins, and thus split into sectarian branches. In politics many sided with the Jacksonian Democrats, who shared their anticlericalism and support for freedom of conscience. But others took up temperance, antislavery, and women's rights, causes unpopular with most Democrats. In Massachusetts, "as a denomination" Universalists had not taken an active role in the campaign for disestablishment, but beginning in 1831 they led the last two years of the fight against the last vestiges of the state church.[25]

Some Universalists became radical labor reformers and, although few in number, were leaders and editors of the anticlerical Workingmen's parties and their newspapers. An 1833 conference of Workingmen in Keene, New Hampshire, adopted a series of resolutions designed to remove aristocratic vestiges of English common law from the state's constitution, and it aimed firstly to abolish "the Religious Test" requiring that only Protestants could hold office.[26]

Universalists and other dissenters would have been involved in a protest against the 1820 New York case cited above (*Jackson* v. *Gridley*) where the court referred to English common law establishing that those who "do not think that he [God] will either reward or punish them *in the world to* come, cannot be witnessess." In response to this ruling, by Chief Justice Ambrose Spencer, a "large number of citizens" gathered to dissent in Whitesborough, Oneida County (near Utica). The protesters regarded the exclusion of the witness as contrary to the state's constitution and its guarantee of "free exercise . . . of religious profession," as

25. McLoughlin, *New England Dissent,* 2: 1230–62, quotation 1234; Ernest Cassera, *Universalism in America: A Documentary History* (Boston, 1971), 171–77, 182–84, 190–93. 211; Arthur M. Schlesinger, *The Age of Jackson* (Boston, 1945), 136–40; Sean Wilentz, *Chants Democratic: New York City & the Rise of the American Working Class 1788–1850* (New York, 1984), 79, 83, 84; Ronald P. Formisano, *The Transformation of Political Culture: Massachusetts Parties, 1790s–1840s* (New York, 1983), 154, 239, 280, 288, 293–95.

26. *Address, Resolutions and Proceedings of the County Law Reform and Workingmen's Convention, Holden at the Eagle Hotel in Keene, in the County of Cheshire, New-Hampshire Oct. 8, 1833, and Jan. 1, 1834* (Concord, NH, 1834), 11–12, 16–17. A favorable notice of Workingmen's parties appeared in the New Haven *Herald of Universalist Salvation*, Oct. 15, 1833. Although at one time virtually half of Universalist ministers (of 303) protested slavery, not all embraced reform; see Lewis Perry, *Radical Abolitionism: Anarchy and the Government of God in Antislavery Thought* (Ithaca, NY, 1973), 135.

well as the constitution's rejection of any English common law that "may be construed to establish or maintain any particular denomination of christians." While the protesters recognized that "the inferior courts in this state, in many instances," had concurred with the opinion of the chief justice, they argued that no judge had any right to make any particular religious faith a test by which a citizen could be deprived of civil rights. The meeting considered "*moral character* the *only test of credibility in a witness*."[27]

In some states exclusionary court decisions led legislatures to enact remedies to remove religious tests. In a Connecticut Superior Court usury case (*Atwood* v. *Welton*, 1828), a majority ruled that "any person who disbelieves in punishment in a future state, though he believes in the existence of a Supreme Being, and that men are punished in this life for their sins, is not a competent witness." In dissent, however, one justice argued that "the moral character of a witness is the only safe criterion," and that a man's reputation for truthfulness "by his conduct in society" was more important than "*mere opinion*" [emphasis original].[28]

Conservatives in the Connecticut legislature reacted by getting a bill through the lower house supporting the court's decision, but the following year the state's Jackson Republicans succeeded in eliminating the requirement for belief in future accountability while retaining the necessity of belief in a Supreme Being, accompanied by heavy fines for false testimony. The same legislature, allegedly for reasons of "economy," also dispensed with any state religious ceremonies on Election Day.[29]

The 1827 decision of the U.S. Circuit Court in Rhode Island disqualifying two witnesses who did not believe in a future state (or much else according to some sources) sparked a controversy that engaged Univer-

27. Meeting reported in Thomas Herttell, *Demurrer: Or, Proofs of Error in the Decision of the Supreme Court of the State of New-York, Requiring Faith in Particular Religious Doctrines as a Legal Qualification of Witnesses* (New York, 1828), 145, 146, 147.

28. *Atwood* v. *Welton* 7 Conn. 66, 85 (1828); "Testimony of Witnesses," State Docs. General Court. House of Representatives, Massachusetts. House Doc. No. 13. "Petition, & Co. Relating to the Testimony of Witnesses," [1837], 8.

29. Jarvis Means Morse, *A Neglected Period of Connecticut's History, 1818–1850* (New Haven, CT, 1933), 102, 104–5; Dorothy Ann Lipson, *Freemasonry in Federalist Connecticut, 1789–1835* (Princeton, NJ, 1977), 299; *Hartford Times* (CT), Jan. 25, 1830, May 16, 1831.

salists and non-Universalists, and spilled over into other states. Aside from the provocative nature of such a decision in the land of Roger Williams, the case attracted attention because the presiding judge was the distinguished U.S. Supreme Court Justice Joseph Story, from nearby Massachusetts, appointed to the Court in 1811 by President Madison. Although Story did not say so in this decision because he did not need to, on other occasions he expressed his belief that Christianity and common law were "interwoven."[30]

The editor of the Universalist *Christian Telescope*, Rev. David Pickering, also pastor of Providence's Universalist Church, vehemently denounced the decision. Correspondents and editors of other papers also decried it as a violation not only of the U.S. constitution, but also of Rhode Island law that held that no man should suffer for his religious beliefs, and that whatever religious opinion anyone might hold, that "shall in no wise *diminish, enlarge, or affect their civil capacities*." The Providence *Patriot* published criticism of the decision as well as learned essays defending it by the Curcuit Court's clerk, Benjamin Cowell, who invoked Blackstone, *Omichund*, Starkie, and, surprisingly, the less restrictive Willes's Report to argue that oath takers must believe not just in the existence of God "but in the judgements of Heaven" that would fall in a future state on false swearing. He referred also to a recent decision of the Supreme Court of Pennsylvania that made the same demands on a witness.[31]

In Massachusetts the young Caleb Cushing, at the start of a long career as state legislator, congressman, Mexican War brigadier general, and diplomat, offered a moderate contrary view anonymously, as "A Member of the Bar." In a pamphlet, *The Right of Universalists to Testify in Court*

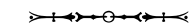
30. Blinka, "Roots of the Modern Trial," 323. Story was an establishment Unitarian who regularly attended church, had served several terms as president of the American Unitarian Association, and believed in the "'divine authority' of the Scriptures," R. Kent Newmeyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill, NC, 1985), 180.

31. Quotations from Providence (RI) *Patriot*, Nov. 28, Dec. 5, 1827; Newport (RI) *Mercury*, Nov. 24, 1827, *Patriot*, Nov. 22, 24, 1827; Philadelphia (PA) *Universalist Magazine*, Nov. 22, Dec. 1, 15, 1827. Accounts of the grounds of the witnesses' dismissal varied. More than one account suggested that one of the witnesses was a Universalist, and the *Universalist Magazine* referred to the father as "Elder Richardson," Nov. 22.

Vindicated, Cushing addressed the "repeatedly discussed" issue of the requirement for belief in future state punishment, that he said operates "with extreme hardship upon a numerous body of Christians." Cushing observed that the courts throughout the country displayed no "unanimity of practice or principle" in this matter, and specifically argued that many courts had misinterpreted the more lenient standard of witness competency enunciated by Willes. But Cushing defended Story's ruling in *Wakefield* v. *Ross* because the witnesses excluded were atheists, and reports that they were Universalists were incorrect. Indeed, Cushing devoted his closing pages to rebuking "popular agitation" against courts, even should they render unpopular decisions. In any event the Rhode Island legislature in January 1828 responded to *Wakefield* by providing that a man's religious opinions would in no way affect his civil rights, nor could his religious beliefs or disbeliefs be inquired into by anyone acting judicially or legislatively.[32]

In Maine in 1832 Universalists agitated for the right to "take an oath of office or trust" without prejudice and objected to the ability of the "orthodox" to "catechize Universalists" in court. The next year the legislature acted to secure "freedom of opinion in matters of Religion." No person who believed in a Supreme Being could be judged incompetent, nor could religious opinions be the subject of any "investigation or inquiry."[33]

A similar effort in Vermont the following year, that would have allowed witnesses to testify even if they did not believe in future state punishment, failed in the state legislature. The measure originated from a representative from a town populated by Universalists and other dissenting sects.[34]



32. A Member of the Bar [Caleb Cushing], *The Right of Universalists to Testify in Court Vindicated* (Boston, 1828), 3, 9–10, 13, 23–28. "Caleb Cushing," *Dictionary of American Biography*, ed. Allen Johnson and Dumas Malone (New York, 1930), 4: 623–30.

33. Portland (ME) *Christian Pilot*, first quotation Aug. 16, 1832, Apr. 18, 25, 1833; *Smith* v. *Coffin,* Maine (1841).

34. Paul Goodman, *Towards a Christian Republic: Antimasonry and the Great Transition in New England, 1826–1836* (New York, 1988), 142.

Probably the most publicized case involving disqualification of a witness on religious grounds occurred in 1828 in western New York during the initial stages of the growth of the Antimasonic movement that created such social and political turmoil from 1826 to 1833 (and in some states, longer). Various lodges and members of the Masonic fraternity of the region had been implicated in the 1826 kidnapping and perhaps murder of an itinerant stonemason, William Morgan, who hoped to profit from an exposé of the secret society. From October 1826 to mid 1831, five western counties held over twenty grand jury investigations and indicted dozens of Masons. As at least eighteen separate trials took place, the involvement of many law officers became apparent, with some still participating in what amounted to a massive cover-up.[35]

The Masonic sheriff of Niagara County and two other Masons who had participated in the kidnapping stood trial in August 1828 and pled guilty. Antimasons as well as impartial observers believed the trial could have shed light on Morgan's demise if a defecting Mason, Edward Giddings, had been allowed to testify regarding what he knew of Morgan's final hours, spent near Niagara Falls. The Masonic defense lawyers, however, objected to Giddings as a competent witness and produced evidence that he was "an unbeliever in the Christian religion," who had often declared that there was no God or higher being and that he did not believe in "futurity." The prosecution tried to counter these claims with testimony from other witnesses as to his belief in God, but when they attempted to prove his "good character" the judge intervened, ruling that "moral character, however stainless, would not obviate the objection" that the law required "a higher sanction for the administration of an oath." The court thus declared Giddings an incompetent witness because he did not "believe in a supreme being who holds men accountable for their conduct."[36]

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35. Ronald P. Formisano and Kathleen Smith Kutolowski, "Antimasonry and Masonry: The Genesis of Protest, 1826–1827," *American Quarterly* 29 (Summer 1977), 148–49, 154.

36. The account of the trial from which Giddings was disqualified is based on William Leete Stone, *Letters on Masonry and Antimasonry* (New York, 1832), 341–44, quotations 342, 344. Stone, a journalist, man of letters, and friend of John Quincy Adams, attempted to write a dispassionate account of the controversy between Masons and Antimasons. Although he regarded the disqualification of Giddings as regrettable in terms of getting more information about the Morgan

This episode was filled with irony. Simultaneously, Antimasons wanted Masons prohibited from jury duty because Masonic sheriffs packed juries at trials of Masons with fellow Masons to win not-guilty verdicts. Meanwhile, Masonic partisans fought back by denouncing the "persecuting, proscribing spirit of Antimasonry" and Masons all across the North from Michigan to Maine called for "Toleration and Equal Rights." Freemasonry, moreover, acquired a deserved reputation for attracting men of various denominations who sought an alternative to established, conventional churches, and whose religious principles strayed into Deism and freethinking.[37]

The irony deepened as Antimasons in the state legislature, now the principal foes of the Jacksonian Republicans and the "Albany Regency" led by Martin Van Buren, embraced the Jeffersonian cause of complete freedom of religious opinion. They proposed changing the witness law so that "all objections now made to the competency of witnesses on account of their religious belief, or want of it, shall hereafter go to the credibility alone." Slight revisions in the law regarding witness competency allowed Giddings to be sworn as a witness in trials in early 1831, although the court again examined his religious beliefs.[38]

In 1831 a young Antimasonic state legislator, Millard Fillmore, continued the effort to eliminate religious rests for witnesses in courts of law. Fillmore had earlier drafted a successful bill to abolish imprisonment for debt, and in that instance, as with witness competency, received help from veteran state senator John C. Spencer, who had served on a committee to revise New York's statutes in 1827. Spencer had also been one of the state's special prosecutors investigating the Morgan kidnapping and the subsequent obstructions of justice, and in the process embraced the Antimasons' view of Masonic wrongdoing and tampering with the

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episode, he too accepted the rule that witnesses needed to believe in a Supreme Being and future punishment and reward, 348, 349. The trial was held in Ontario County in August 1828.

37. Regarding Masonry as a "counterculture," see Lipson, *Freemasonry in Federalist Connecticut,* 228–66; quotations from Donald J. Ratcliffe, "Antimasonry and Partisanship in Greater New England, 1826–1836," *Journal of the Early Republic* 15 (Summer 1995), 219.

38. Elizabeth Bruckholz Kay, "New York Antimasons, 1826–1833" (PhD diss., University of Rochester, 1980), 198, 218–19.

legal system. The legislature, however, rejected a thoroughgoing elimination of any religious test for witness competency.[39]

The following year Fillmore published a pamphlet making an extended and learned argument for abolishing any religious test. He did so anonymously, under the pseudonym "Juridicus," perhaps because, as one of his biographers pointed out, removing the religious basis for the oath troubled his "more orthodox constituents" and the more evangelical Antimasons. Fillmore reviewed the history of English and New York state legislation and concluded that "every change has been in favor of admitting persons to testify who were before excluded" and that bigotry and prejudice were giving way to liberal views. Fillmore advocated no test whatsoever, whether of belief in a future or present state of punishment or in a Supreme Being. He would admit persons of any or no religion. The fear of punishment from human laws, dread of shame, pride of character, love of justice, the sense of right and wrong affected equally "the believer and the unbeliever, pagan and Christian, Jew and Mahometan." Inducement to tell the truth existed independently of religious beliefs. Fear of future punishment was of little use in preventing perjury, and false swearing witnesses could easily get around any tests. Beliefs were not palpable, he averred, and conscience indeterminate.[40]

Fillmore also pointed to the folly of disqualifying the "honest, honorable, upright man, who would not tell an untruth to save his right arm, whether under oath or not," but who candidly confesses his belief "though it varies from the common standard." He condemned the "absurdity" of the state's laws and proposed also that there be no religious test for any public office, including the governor's chair.[41]

If the more pragmatic leaders of the Antimasonic party, which has been characterized correctly as "Christian Republican," seem to be unlikely champions of eliminating a formidable residue of Christianity's

39. Robert C. Schelin, "Millard Fillmore: Anti-Mason to Know Nothing: A Moderate in New York Politics, 1828–1856" (PhD diss., State University of New York at Binghamton, 1975), 33, 38. John Spencer was the son of Justice Ambrose Spencer.

40. Juridicus [Millard Fillmore], *An Examination of the Question, "Is It Right to Require any Religious Test as a Qualification to be a Witness in a Court of Law?"* (Buffalo, NY, 1832), reprinted in Buffalo Historical Society *Publications*, Vol. 10, *Millard Fillmore Papers*, Vol. 1 (Buffalo, NY, 1907), 71, 72–75.

41. Juridicus, *An Examination*, 77–78, quotation 80.

legal legacy, the Giddings case sparked protest from a more typical opponent of religious tests for witness competency, the freethinking lawyer Thomas Herttell. Besides advocacy of freedom of opinion in relation to witness competency, Herttell championed several causes, some radical, during these years of reform ferment. A long-time judge of the Maritime Court in New York City, Herttell associated with Manhattan's labor reformers and other radicals and was elected to the state legislature with support from Workingmen's partisans.[42]

Hertell's secularism with regard to religious tests accompanied his concern for other causes favored by Workingmen: He was an early temperance and strict abstinence advocate, an opponent of imprisonment for debt, and a supporter of universal education. He also opposed laws relating to Sabbath-keeping, and "for suppressing immorality," and sought to prevent the appointment of official chaplains to the state legislature. In the 1830s Herttell earned a place in the history of the women's rights movement by introducing a bill in the legislature "to restore to married women 'the right of property' as guaranteed by the constitution of the state."[43]

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42. The characterization of the Antimasons as defenders or promoters of a "Christian Republic" originated with Goodman, *Towards a Christian Republic.* Regarding the wings of Antimasonry, see Ronald P. Formisano, *For the People: American Populist Movements from the Revolution to the 1850s* (Chapel Hill, NC, 2008), 91–139. Regarding Hertell, see Roderick French, "Liberation from Man and God in Boston: Abner Kneeland's Free-Thought Campaign, 1830–1839," *American Quarterly* 32 (Summer 1980), 202.

43. Thomas Herttell, *An Expose of the Causes of Intemperate Drinking, and the Means By Which It May Be Obviated* (New York, 1819); *Remarks on the Law of Imprisonment for Debt: Showing Its Unconstitionality, and Demoralizing Influence on the Community* (Boston, 1825); *The People's Rights Re-claimed: Being an Exposition of the Unconstitutionality of the Law of the State of New-York Compelling the Observance of a Religious Sabbath Day* (New York, 1826); *Remarks Comprising in Substance Judge Hertell's Argument in the House of Assembly of the State of New-York, in the session of 1837, in Support of the Bill to Restore to Married Women "the Right of Property" as Guaranteed by the Constitution of This State* (New York, 1839). Some of Herttell's activities are mentioned variously in Lori Ginsberg, *Untidy Origins: A Story of Women's Rights in Antebellum New York* (Chapel Hill, NC, 2005), 135; Judith Wellman, *The Road to Seneca Falls: Elizabeth Cady Stanton and the First Woman's Rights Convention* (Urbana, IL, 2004), 146; and Norma Basch, "Equity vs. Equality: Emerging Concepts of Women's Political Status in the Age of Jackson," in *New Perspectives on the Early Republic:*

In 1828, well before Fillmore's "Juridicus" pamphlet, he weighed in on witness competency in a book-length tract expressing his belief that New York's constitution invalidated any religious test for witness competency as had been levied in *Jackson* v. *Gridley* and the Giddings case. In both cases, Herttell argued, the right to "*liberty of conscience*" had been invaded. English law, he continued, did not form the basis of the state's constitution, nor did any state statutes provide a rationale for those court rulings. The 35th article of the constitution in fact said that all common law statutes and acts that may be construed to establish any particular denomination of Christianity "are *repugnant to this constitution* . . . and *hereby rejected*."[44]

The 38th article provided for liberty of conscience and the free exercise of religion without discrimination. Herttell rejected the proposition, going back to Washington's Farewell Address and repeated by many judges, that the belief in "future punishment" constituted the "*great principle*" on which our institutions or the distribution of justice rested, rather "the equal rights of man, protected by equal laws, and the administration of equal 'justice between man and man' are the 'great principles on which all our institutions rest.'" With a populist flourish, Herttell asserted that the judicial department "is the *creature* of its *creator*," the people.[45]

In 1835 Herttell introduced a bill in the New York legislature designed to eliminate any competency test for witnesses in any court "on account of his or her opinions on the subject of religion; nor shall any witness be questioned, nor any testimony be taken or received, in relation thereto, either before or after such witness shall have been sworn." Herttell argued "for the equal right of all mankind to *think*, *believe*, and *worship* as they please." His initiative failed in the legislature, as did his bill the following year protecting women's property rights. Into the 1840s, however, Herttell continued to agitate for the separation of religion from government and civil society.[46]

Essays from the Journal of the Early Republic*, 1981–1991*, ed. Ralph D. Gray and Michael A. Morrison (Urbana, IL, 1994), 430–31.

44. Herttell, *Demurrer,* iv, 11–12, 13.

45. Herttell, *Demurrer,* 21, quotations 121, 123.

46. Thomas Herttell, *Rights of Conscience Defended, In a Speech of Thomas Herttell, Esq.* (New York, 1835), 3, 5; Wellman, *Road to Seneca Falls*, 146–47; Herttell, *The Spirit of Truth: Being an Exposition of Infidelity, or Religious Un-*

Opponents of religious tests in court finally prevailed in New York's 1846 constitutional convention. Moses Taggart, a Whig from Genessee County, moved to insert into the clause on religious freedom that no person should be "rendered incompetent as a witness, on account of his religious belief or unbelief." Fittingly, Taggart, a temperance man like Herttell, hailed from the heart of Antimasonic country and had been an active Antimason, so he was continuing the campaign of Fillmore and Spencer.

In the brief discussion on Taggart's motion the delegate who spoke against it did not raise the issue of future rewards and punishments but simply insisted on belief in "a Supreme moral Governor of the Universe." Taggart's supporters argued for "entire liberty of conscience," and that the religious beliefs of any person should not be determined by "any earthly tribunal." The convention approved the insertion of Taggart's clause by a vote of 63 to 46.[47]

In December 1836 forty-three residents of Barnstable (Cape Cod), long home to Baptists and other dissenters, challenged the common law tradition regarding witness competency. They appealed to the United States constitution and bill of rights in a petition to the Massachusetts legislature seeking remedy for the rejection, "in courts of justice, of the testimony of an individual on account of their religious views." The federal constitution clearly, in their view, barred any religious test for "*office or public trust*," and thus they requested a state law allowing any person "to testify in our courts . . . without being subject to an examination of his religious views." In a January 1837 report a Special Committee of the legislature noted that the problem lay not in any specific law, as implied by the petitioners, but "in [court] decisions founded on the laws of England." By way of showing "what the law is on this subject," the committee selected a passage from a popular legal reference work,

belief (Boston, 1845); also, *The Right of Free Discussion* (New York, 1829), bound in *Infidel Miscellany*, Vol. 1 [1846], American Antiquarian Society.

47. Sherman Croswell and Richard Sutton, eds., *Debates and Proceedings in the New York State Convention, For the Revision of the Constitution* (Albany, NY, 1846), 429, 808–9. We are indebted to Professor Kathleen Smith Kutolowski for information regarding Taggart.

Starkie on Evidence, which asserted that before a witness takes the oath he may be asked whether he believes in God, in the obligation of the oath, and "in a future state of rewards and punishments." If so, he may give evidence. "And it seems that he ought to be admitted, if he believes in the existence of a God who will reward or punish him in this world, although he does not believe in a future state." But the committee also referred to laws enacted by Rhode Island and "several of the sister states . . . giving to all persons the right to testify." The committee argued that interference with freedom of conscience and religious opinion was redolent of the "old and absurd" laws that once disgraced the state in less enlightened times. The legislators pointed to the illogic of taking a witness's words about religious beliefs that did not meet an anachronistic standard, and then discharging him as incompetent on the basis of the truth of his testimony. "The only necessary inquiry seems to be, 'what is the witness's general character for truth and veracity?' "[48]

In the same month as the Barnstable petition, a Baptist and Democratic Boston lawyer, John A. Bolles, published a long essay in the *Christian Review* arguing extensively that existing legal practice in regard to witness competency was "false, unsound, unjust, and hostile to the free spirit of our national and state constitutions." Bolles called upon his fellow Baptists, and admirers of Roger Williams, who "have ever stood foremost in the cause of unfettered conscience," to join him in calling for the rejection of religious tests. How could Baptists sustain such a practice, he asked. "The remembrance of our past sufferings is enough to awaken all our sympathies for those whom the laws unjustly offend."[49]

Bolles recommended that "*in the investigation of a case, every person should be admitted as a witness, who is possessed of facts relevant and material thereto, whatsoever may be his creed, and that every circumstance affecting his credibility should also be put into the case.*" A law magazine

48. "Testimony of Witnesses." State Docs. General Court, House of Representatives, Massachusetts, House Doc. No. 13, "Petition, & Co. Relating to the Testimony of Witnesses," [1837], 6–7, 8, 9, 14; the committee quoted from *Starkie on Evidence* (Boston, 1834), 188. Regarding Barnstable, Formisano, *Transformation of Political Culture*, 357 (preliminary research indicates that several of the signers of the Barnstable petition can be identified as having family surnames associated with dissenting sects, including Universalists).

49. John A. Bolles, "Qualification of Witnesses," *Christian Review* 4 (Dec. 1836), 488, 489.

report of Bolles' article observed that his subject presently "occupies a place so prominent in the minds of law reformers" that it would attract "great interest" by the legal profession and the public.[50]

Yet a religious test for witness competency, though sometimes loosened, persisted in Massachusetts. In *Thurston* v. *Whitney* (1846) the court initially refused to hear testimony regarding a witness's religious beliefs. Persuaded otherwise, however, it decided that the state constitution's provision that "no subject shall be hurt, molested, or restrained . . . for worshipping God in the manner and season most agreeable to the dictates of his own conscience" protected the religious, but not the "anti-religious." The witness in question had lacked belief in "the existence of God, or in a future state of rewards and punishments," and thus failed to meet the common law standard as interpreted by either Atkyns or Willes.[51]

No widespread upwelling of resistance to religious tests for witness competency occurred, however, nor was there sustained protest by religious dissenters comparable to the struggles against state church establishments. Resistance rather took the form of episodic protests inside and outside of courtrooms. Opposition to application of the future state standard for witnesses in court, and, for that matter, religious oaths for public office, tended to come from Universalists, other dissenters, Jacksonian Democrats, freethinkers, and the anticlerical Workingmen's parties. Yet opposition emerged in unexpected quarters, such as anti-Jacksonian Antimasonic leaders in New York state. Similarly, reformer Thomas Hertell shared an anticlerical mentality with Workingmen and labor reformers, but as a fervent temperance man and advocate of women's rights parted company with Democratic partisans. Moreover, many anticlerical Universalists also favored antislavery and other reforms

50. Bolles, "Qualifications of Witnesses," 482, emphasis original; *American Jurist and Law Magazine* 16 (1836–1837), 491–92.

51. *Thurston* v. *Whitney*, 56 Mass. 104, 2 Cush. 104. The judge had originally declined hearing testimony pertaining to the witness's religious beliefs, but changed his mind. In Boston during 1834–35 the radical former Universalist minister and editor Abner Kneeland was tried four times for the crime of "blasphemy." Jacksonian Democrats provided defense lawyers and championed his cause in public prints. Orthodox evangelicals evinced the most hostility to Kneeland. French, "Liberation from Man and God in Boston," 213; Formisano, *Transformation of Political Culture*, 292–93.

opposed by Democrats. In a society still moving unevenly toward religious pluralism and complete freedom of conscience, witness competency tests did not always attract support or opposition in predictable ways.

Meanwhile, in different regions and states judges gradually moved towards acceptance of various religious beliefs and more lenient tests regarding divine judgement for perjury, atheism excepted. Further research will likely uncover more incidents of both popular protest and dissenting lawyers and judges, *but also*, no doubt, other cases of courts upholding common law standards of belief in some kind of punishment in a future state or in this life.

Ironically, legal and economic historians have shown that the common law as it related to economic matters changed greatly during the early republic's first decades. This was remarkable because previously judges had conceived of common law doctrines as fixed and as "derived from natural principles of justice, [while] statutes were acts of will; common law rules were discovered, statutes were made." But in the period from 1790 to 1830 judges began changing and shaping common law to promote economic enterprise and development. In Massachusetts, for example, courts responded to changing economic conditions by not always following the common law, in some cases rejecting it outright. In the area of religion and morality, however, "lingering puritannical standards" embedded in the common law proved more durable and less flexible than those applied to property rights and unanticipated changes in industry.[52]

In economic and technological affairs, as legislatures and courts both promoted and adapted to rapid change, ordinary people, farmers, artisans, merchants, and others had become caught up in what historians have variously labeled a commercial, market, or communications revolution, or more broadly, the "transition to capitalism." No consensus ex-

52. First quotation Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA, 1977), 7; second quotation William E. Nelson, *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, MA, 1975), 37. Nelson asserts that the oath lost its divine sanction by 1818 after legislation allowing Quakers "to affirm" and not swear and after *Hunscom* v. *Hunscom*, but as shown here religious tests lingered, 113–14. His position is also at odds with Blinka, "Roots of the Modern Trial," loc.cit.

ists, however, regarding the timing of this transition or the degree to which agricultural and rural populations became enmeshed in a market economy. Some historians have argued rather for the persistence of a "moral economy" among farmers, as well as cultural and communal groupings that tended to resist commitment to a commercial social order. Even economic historians who emphasize the powerful pull of the surging market economy concede that farmers who adapted themselves to expanding markets reverted, under stress, to customary practices.[53]

Thus the transition to a commercial society was neither uniform nor complete, and changes in habits of thought and belief often lagged behind changes in material circumstances. Religious pluralism and greater freedom of religious opinion increased in the decades after the Revolution, but unevenly and sporadically, and vestiges of traditional practices and attitudes persisted. Nathan Hatch has argued persuasively that religious populism swept through the United States between 1780 and 1830, unsettling established denominations, creating new ones, and infusing many churches with an egalitarian and democratic spirit. He described a "crisis of authority" as dissenters crusaded against "official Christianity" and "Calvinist orthodoxy."[54]

Common law's retention of the traditional Christian tests of witness competency, however, shows how "authority" and "orthodoxy" kept their hold on courtroom practice. Many judges could not or would not ignore witnesses' religious beliefs, or, rather, nonbeliefs. Courts often applied religious tests for competency during the first decades of the early republic and well into the antebellum period. The specific requirement of belief in a future state of punishment and rewards, and "eternal hellfire" as the penalty did endure, but to a lesser extent, with Willes being invoked more often. While some states legislated against religious examination of witnesses, courts nevertheless continued to inquire into witnesses' religious beliefs and disqualify them on those grounds.

53. For an introduction to the debate and a critique of the "moral economy" historians, Naomi R. Lamoreaux, "Rethinking the Transition to Capitalism in the Early American Northeast," *Journal of American History* 90 (Sept. 2003), 437–61, esp. 458–59; for a cogent statement of the moral economy view, see James A. Henretta, "Families and Farms: Mentalité in Pre-Industrial America," *William and Mary Quarterly* 35 (Jan. 1978), 3–32.

54. Nathan O. Hatch, *The Democratization of American Christianity* (New Haven, CT, 1989), 17–46, quotations 170.

Swancara, for instance, pointed to an 1877 Ohio court decision that contravened the constitution adopted by the state in 1851.[55]

The work of Swancara and other legal scholars from early in the twentieth century, demonstrating that Christianity indeed was imbedded in the common law, merits a place alongside the recent scholarship that has discussed so fruitfully the complexity and ambiguity of the role of Christianity in the public culture of the states in the nation's early decades. The witness competency issue relates primarily to that facet of "the Christian nation debate" that is reflected in everyday life in the states, and *not* necessarily to discussions of the Founders' intentions regarding the First Amendment. Neither a narrow interpretation of the First Amendment nor what Levy calls the "nonpreferentialist" advocacy of federal aid to religion follows from the recognition of Christianity being "interwoven" in the common law and influencing other areas of governance and ritual within the states. And whereas the historical literature devoted to discussion of the Founders' intentions with regard to the First Amendment and religion is wide-ranging and often attempts to draw lessons for public policy, this essay has the more limited objective of illuminating one way that Christianity remained embedded in the common law and in courts across the country throughout the antebellum period and beyond.[56]

55. *Clinton v. The State*, 33 Ohio St., 27, 23 (1877), cited in Swancara, *Obstruction of Justice*, 157–58. According to one authority as of 1977 the effect of an individual's religious belief on her competency "remains unsettled" (Maryland, Arkansas, North Carolina). "Reconsideration of the Sworn Testimony Requirement," *Michigan Law Review*, 1695n73. Although a California law of 1856 held that no witness should be excluded "on account of his opinions or matters of religious belief," it appeared that courts prevented members of the growing Chinese population from testifying. Rev. William Speer, *An Answer to the Common Objections to Chinese Testimony, and an Earnest Appeal to the Legislature of California, For Their Protection By Our Law* (San Francisco, 1857).

56. Levy, *The Establishment Clause*, xii.