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Regarding Oaths of Office

Allan W. Vestal*

In 2006, the voters of Minnesota's 5th Congressional district sent Keith Ellison to Congress, the first Muslim elected to that body.¹ Congressman Ellison's election became especially controversial when he chose to be sworn in using a Quran rather than a Bible. The negative comments concerned both the inclusion of Muslims in Congress and society, and the symbolism of the use of the Quran in the ceremony.

Republican Congressman Virgil H. Goode, Jr. from Virginia's rural 5th District wrote his constituents that he did "not subscribe to using the Quran in any way" and warned that "if American citizens don't wake up and adopt the Virgil Goode position on immigration there will likely be many more Muslims elected to office and demanding the use of the Quran."² Congressman Ellison, who converted from Catholicism to Islam in college, corrected Congressman Goode's apparent confusion as to his heritage: "I'm not an immigrant," added Mr. Ellison, who traces his American ancestors back to 1742, "I'm an African-American."³ For purposes of this

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1. In a four-person race, Ellison, the Democratic-Farmer-Labor candidate, received 136,060 votes, or 55.56%. *Official Results General Election - Nov. 7, 2006*, MINN. SEC'Y OF STATE, <http://minnesotaelectionresults.sos.state.mn.us/20061107/ElecRslts.asp?M=CGS&CD=05> (last visited Sept. 30, 2016).

2. *Lawmaker Won't Apologize for 'Islamophobic' Letter*, CNN.COM (Dec. 21, 2006, 8:38 AM), <http://www.cnn.com/2006/POLITICS/12/20/lawmaker.koran/>. Goode was narrowly defeated in the next election. He was the 2012 Presidential candidate of the Constitution Party, but failed to win election. See Bobby Ilich, *How Many People are Running for President? Full List Shows a lot More than Just Hillary Clinton, Donald Trump and Gary Johnson*, INT'L BUS. TIMES (Sept. 28, 2016, 7:49 PM), <http://www.ibtimes.com/how-many-people-are-running-president-full-list-shows-lot-more-just-hillary-clinton-2423515>.

3. Rachel L. Swarns, *Congressman Criticizes Election of Muslim*, N.Y. TIMES (Dec. 21, 2006), <http://www.nytimes.com/2006/12/21/us/21koran.html>. Congressman Ellison converted to Islam in college. Frederic J. Frommer, *Ellison Uses Thomas Jefferson's Quran*, WASH. POST (Jan. 5, 2007, 7:32 AM), <http://www.washingtonpost.com/wp->

discussion, the relationship between the oath of office and inclusiveness in public office is cast in terms of whether the oaths function as a formal or informal barrier to members of minority faith traditions serving in public office.

Conservative radio talk show personality Dennis Prager declared Ellison's use of the Quran would undermine American civilization, asserting that for the new Congressman to be sworn in on the Quran would do "more damage to the unity of America and to the value system that has formed this country than the terrorists of 9-11."⁴ Prager asserted his comments had nothing to do with Congressman Ellison's religion; he was not advocating for any religious test for office, Prager said, but rather he was opposing the substitution of the Quran for the Bible on symbolic grounds.⁵ Congressman Ellison had a different view of the symbolism in his use of the Quran; consistent with the historical importance of his election, he opted to be sworn in using a Quran that belonged to Thomas Jefferson "because it showed that a visionary like Jefferson believed that wisdom could be gleaned from many sources."⁶

Both lines of criticism of Congressman Ellison's use of the Quran in his swearing-in were in error. The suggestion that

[dyn/content/article/2007/01/05/AR2007010500512.html](http://townhall.com/columnists/dennisprager/2006/11/28/america%2c_not_keith_ellison%2c_decides_what_book_a_congressman_takes_his_oath_on/).

4. Dennis Prager, *America, Not Keith Ellison, decides what book a congressman takes his oath on*, TOWNHALL (Nov. 28, 2006, 12:01 AM) [hereinafter *America, Not Keith Ellison*], http://townhall.com/columnists/dennisprager/2006/11/28/america%2c_not_keith_ellison%2c_decides_what_book_a_congressman_takes_his_oath_on/. The article states:

Keith Ellison, D-Minn., the first Muslim elected to the United States Congress, has announced that he will not take his oath of office on the Bible, but on the bible of Islam, the Koran. He should not be allowed to do so – not because of any American hostility to the Koran, but because the act undermines American civilization.

Id.

5. Dennis Prager, *A Response to my Many Critics - and a Solution*, TOWNHALL (Dec. 5, 2006, 12:01 AM) [hereinafter *A response*], http://townhall.com/columnists/dennisprager/2006/12/05/a_response_to_my_many_critics_-_and_a_solution/page/full. After a tumultuous public reaction to his initial column, Prager published a second column in which he further defined his views and offered a solution: to have Congressman Ellison be sworn in holding a Quran and a Bible. *Id.*

6. Frommer, *supra* note 3.

the oath of office could serve as a barrier to the inclusion of Muslims in Congress and other public offices is wrong on several levels. It is wrong as a matter of Constitutional law and legal history. It is wrong because it ignores both the provisions of the constitutions and the language of the oaths themselves, at both the Federal and state levels.

The argument over symbolism is more subtle and nuanced. I believe Prager is correct in generally identifying the symbolic function of the oath of office, but he is in error in suggesting what ought to constitute that emblematic core. His error would cast oaths of office free from their traditional mooring and transform what ought to be a unifying civic ceremony into an occasion of endless religious conflict and division.

This discussion starts with an analysis of oaths of office at the Federal level, considering both whether oaths function as barriers to service and whether they are appropriate in symbolic terms. We then turn to the same questions with reference to the oaths of office of the various states. Finally, we consider the purpose behind oaths of office and determine whether any changes should be made to oaths of office at either the Federal or state level.

I. Federal Oaths of Office

Of course, oaths of office are not solely the province of important elected officials. Just a few years ago, the United States Air Force refused to allow an airman to reenlist solely because he crossed the words “so help me God” from the printed oath of office on a reenlistment form.⁷ Negative public reaction to the Air Force’s position was immediate, one academic commentator writing:

It is not only a violation of this constitutional rights under the First Amendment but an offense to the many atheists who have served and

7. See Allan W. Vestal, *The Lingering Bigotry of State Constitution Religious Tests*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 55, 95-101 (2015) [hereinafter *Tests*]; *Group: Airman denied reenlistment for refusing to say ‘so help me God,’* AIR FORCE TIMES (Sept. 4, 2014), <https://www.airforcetimes.com/story/military/capitol-hill/2014/09/04/group-airman-denied-reenlistment-for-refusing-to-say-so-help-me-god-/15098573/>.

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.⁸

A number of commenters supported the position of the Air Force to exclude the airman on the basis of his refusal to swear the religious oath. The comments touched on both the exclusionary and the symbolic issues concerning oaths of office; one thought the airman's refusal to swear a religious oath made him unfit to serve.⁹ The Director of Issues Analysis for the American Family Association agreed with the Air Force's 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

8. Jonathan Turley, *Air Force Bars Atheist From Reenlisting Unless He Signs and Orally Repeats an Oath to God*, JONATHAN TURLEY (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/>.

9. AlvaJane, Comment to William Bigelow, *Atheist Group Makes Air Force Accept Enlistment Oath Without 'So Help Me God,'* BREITBART (Sept. 17, 2014), <http://www.breitbart.com/big-government/2014/09/17/air-force-permits-airman-to-reenlist-without-saying-so-help-me-god/> ("Serving in the US Military is a PRIVILEGE it's NOT A RIGHT. We are a Christian country. Our military reflects our society. The US Air Force has moral standards. The American people do not want Godless heathens populating the armed forces for OBVIOUS reasons. If this gutless little heathen doesn't agree then he can go and join something else. Why should the entire country change the established traditions that define us, unite us, and keep us secure over the self-serving, hedonistic desires of some left wing political operative. What a miserable, hateful, despicable petty, immoral coward. He does not DESERVE to wear an American military uniform. Repulsive!").

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 our rights.

.....
Military service should be reserved for genuine Americans - and genuine Americans, like the Founders, believe in God.¹⁰

Another commentator asserted that using a religious oath would keep undesirables out of the service: "One Nation Under G-D' weather [sic] you like it or not. Doing things like an Oath keeps jihadists and unwanted/immoral people from our armed services."¹¹

Not this time. The Air Force quickly reconsidered and reversed its position.¹² The airman reenlisted without having

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

The American Family Association, formerly the National Federation for Decency, describes itself as being "on the frontlines of America's culture war." *About Us*, AM. FAM. ASS'N, <https://www.afa.net/who-is-afa/about-us/> (last visited Oct. 1, 2016).

11. Sourcecode-v14, Comment to *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/>.

12. 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

to swear the religious oath.¹³ But the questions raised once again by this episode as to inclusiveness and symbolism deserve to be addressed.

A. Federal Oaths of Office as Barriers to Service.

The answer to whether oaths of office at the Federal level are barriers to service is simple. Such barriers have always been directly prohibited in the Constitution, violate the religious free exercise guarantee, and are inconsistent with the language of the oaths themselves.

Construing Federal oaths of office as barriers to service based on a citizen's beliefs on matters of religion has always been directly prohibited in the Constitution; Article VI provides: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."¹⁴ Further, such a construction of the Federal oaths of office would violate the free exercise clause of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

airmen would be allowed to reenlist without having to include the affirmation "so help me God" in the process. *Air Force Nixes 'So Help Me God' Requirement in Oaths*, USA TODAY (Sept. 17, 2014, 7:50 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.christianitydaily.com/articles/676/20140918/help-god-made-optional-air-force-enlistment-oath.htm>.

13. The Air Force policy requiring the religious oath clearly violated existing Department of Defense policy. U.S. DEP'T OF DEF., INSTRUCTION 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (2009). The instruction states:

It is DoD policy that: a. The DoD places a high value on the rights of members of the Military Services to observe the tenets of their respective religions or to observe no religion at all. It protects the civil liberties of its personnel and the public to the greatest extent possible, consistent with its military requirements, in accordance with DoD Instruction (DoDI) 1000.29 (Reference (c)).

Id.

14. U.S. CONST. art. VI, cl. 3.

thereof . . .”¹⁵

The suggestion that Federal oaths of office are barriers to service is also inconsistent with the language of the oaths themselves. The key is the availability of a non-religious alternative to the religious oath, the argument being that the religious oath cannot function as a barrier to office on the basis of religious belief if there is a non-religious “affirmation” alternative provided.

The general oath of office provision of the Federal Constitution requires either an oath or affirmation: “The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .”¹⁶

As does the other general oath of office provision, the Article II Presidential provision uses the “Oath or Affirmation” language, providing that:

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: – ‘I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’¹⁷

The Constitution contains two additional provisions requiring oaths, which contain the oath or affirmation language of accommodation: Article I provides that when the Senate is sitting to try impeachments, “they shall be on Oath or Affirmation,”¹⁸ and the Fourth Amendment provides that search warrants be “supported by Oath or affirmation.”¹⁹

The only Constitutional provision that does not adopt the “oath or affirmation” form of accommodation is the Fourteenth

15. U.S. CONST. amend. I.

16. U.S. CONST. art. VI, cl. 3.

17. U.S. CONST. art. II, § 1, cl. 8.

18. U.S. CONST. art. I, § 3, cl. 6.

19. U.S. CONST. amend. IV.

Amendment disqualification from Federal office of certain participants in the Rebellion; it speaks of individuals “who, having previously taken an oath . . . ,” not individuals who, having previously taken an oath or made an affirmation.²⁰ Presumably this was a drafting oversight, and the framers of the Fourteenth Amendment did not intend to allow traitors to assume Federal office simply because they had affirmed allegiance to the Rebellion and not sworn it.²¹

20. U.S. CONST. amend. XIV, § 3.

21. Such was a possibility, as the constitution of the “Confederate States of America” included the same oath or affirmation forms of accommodation as the Federal constitution from which it was in large part copied. C.S.A. CONST. art. I, § 3, cl. 6 (Senate hearing impeachments to sit “on oath or affirmation”); C.S.A. CONST. art. I, § 9, cl. 15 (search warrants supported by “oath or affirmation”); C.S.A. CONST. art. II, § 1, cl. 10 (President to take “the following oath or affirmation”). The constitution of the Rebellion also tracked the Federal Constitution as to a prohibition on religious tests for office and the oath or affirmation accommodation:

The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the Confederate States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the Confederate States.

C.S.A. CONST. art. VI, § 4.

That the use of the “oath” formulation and not the “oath or affirmation” formulation was not an indication of a policy shift is suggested by a nearly contemporaneous and substantively related modification of the oath itself. During the Civil War, the oath of office for the Federal government was changed to include an affirmation relating to the Rebellion by the addition of the following:

I, A. B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted nor attempted to exercise the functions of any officers whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto.

Act of July 2, 1862, ch. 128, 12 Stat. 502 (1862). The language was eliminated in 1868, after the Rebellion had been suppressed. *See* Act of July

Because such a construction would violate the Constitution and be inconsistent with the Constitutional provisions on oaths, Federal oaths of office are not barriers to service.

B. The Symbolism of Federal Oaths of Office.

During the controversy over Congressman Keith Ellison's use of Quran, Dennis Prager argued that all elected officials should use the same form of oath to affirm a common American value system: "When all elected officials take their oaths of office with their hands on the very same book, they all affirm that some unifying value system underlies American civilization."²²

The second step in Prager's analysis says that the very same book that should be used to affirm the unifying value system of the nation is the Christian Bible; his argument was that using a Christian Bible is appropriate – and has always been seen as appropriate – even for public officials whose religious beliefs vary from the dominant Christian religion, stating:

for all of American history, Jews elected to public office have taken their oath on the Bible, even though they do not believe in the New Testament, and the many secular elected officials have not believed in the Old Testament either. Yet those secular officials did not demand to take their oaths of office on, say, the collected works of Voltaire or on a volume of New York Times editorials, writings far more significant to some liberal members of Congress than the Bible. Nor has one Mormon official demanded to put his hand on the Book of Mormon.²³

11, 1868, ch. 139, 15 Stat. 85 (1868).

22. *America, Not Keith Ellison*, *supra* note 4.

23. *Id.* In his subsequent column, Prager acknowledged that "[a] tiny number of Jews have used only the Old Testament," and said "[a]s a religious Jew, I of course understand their decision, but I disagree with it." *A response*, *supra* note 5. Prager's observation, "[n]or has one Mormon official demanded to put his hand on the Book of Mormon," is misleading. *America, Not Keith Ellison*, *supra* note 4. As Christians, members of the Church of Jesus Christ of Latter-day Saints believe in the Bible. Whether a member of the LDS

Under Prager's argument, Keith Ellison should have been excluded from Congress, not because he is a Muslim, but because he wouldn't swear the oath on a Bible in which he does not believe: "Insofar as a member of Congress taking an oath to serve America and uphold its values is concerned, America is interested in only one book, the Bible. If you are incapable of taking an oath on that book, don't serve in Congress."²⁴ Thus, Prager's assertion to the Congressman was that "America, not you, decides on what book its public servants take their oath."²⁵

If the Federal Constitutional oaths of office conformed to Prager's Biblically-based common values rationale, one might expect to find that they contain religious language beyond the optional nomenclature of swearing, not to make swearing the oath a religious act, but rather to acknowledge the Judeo-Christian derivation of the values underlying the oaths of office. One might also expect to find a provision that the oaths be taken on a Bible, as Prager would have required of Congressman Ellison.

But such is not the case. Neither Constitutional oath of office includes any religious language beyond the optional nomenclature of swearing or requires that the oath be taken on a Bible; both provide for an affirmation alternative.²⁶

Prager may be correct about the symbolic role of the Federal Constitutional oaths of office; I rather think he is. But the language of the Constitutional oath of office provisions suggests he is wrong about their symbolic core: he seems to

church would want to swear on the Book of Mormon, the Doctrine & Covenants, and the Pearl of Great Price, in addition to the Bible, would be a matter of individual discretion.

24. *America, Not Keith Ellison*, *supra* note 4. Televangelist Pat Robertson made a somewhat incoherent argument along the same lines during the Air Force controversy over the "so help me God" language, apparently arguing that reciting the phrase "so help me God" does not connote a belief in God: "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." Raw Story, *Pat Robertson Loses it After Air Force Nixes 'God' Oath for Atheists*, YOUTUBE (Sept. 18, 2014), <https://www.youtube.com/watch?v=GMIZAUrbyJM>.

25. *America, Not Keith Ellison*, *supra* note 4.

26. See U.S. CONST. art. II, § 1; U.S. CONST. art. VI, cl. 3.

have misidentified “the very same book” that should be used.

II. State Oaths of Office.

In 1959, Roy Torcaso, a Maryland bookkeeper, 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.²⁷

The Maryland Court of Appeals upheld his exclusion: “[W]e 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.”²⁸

The United States Supreme Court reversed Torcaso’s exclusion; 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.”²⁹ Justice Black noted “that there is much historical precedent for such laws,”³⁰ and also wrote:

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

27. *Tests*, *supra* note 7, at 58-60. Torcaso was an atheist and Maryland had (and retains to this day) 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 . . .*” *Id.* at 59 (quoting MD. CONST. art. XXXVII).

28. *Torcaso v. Watkins*, 162 A.2d 438, 443 (Md. 1960).

29. *Torcaso v. Watkins*, 367 U.S. 488, 489-90 (1961).

30. *Id.* at 490.

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.³¹

Having quoted *Girouard v. U.S.* that "the test oath is abhorrent to our tradition,"³² Justice Black quoted *Everson v. Board of Education* about the establishment of religion and the use of test oaths:

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. 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.'³³

31. *Id.*

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

33. *Id.* at 492-93 (quoting *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15-16 (1947)). Justice Black also quotes Justice Frankfurter's concurrence in *Illinois ex rel. McCollum v. Board of Education*, 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

Justice Black noted *Zorach v. Clauston*:

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.³⁴

The *Torcaso* Court was clear in its declaration that religious oaths cannot function as barriers to office:

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 founded on different beliefs.³⁵

A. State Oaths of Office as Barriers to Service.

Torcaso correctly held the use of state oaths of office as barriers to service based on religious belief to be in violation of the Federal Constitution.³⁶ But even without the Federal

best for the state and best for religion.’

Id. at 493-94 (quoting Illinois *ex rel.* McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 213 (1948)).

34. *Id.* at 494.

35. *Id.* at 495.

36. Thirty years after *Torcaso*, Herb Silverman applied to be a notary public in South Carolina. See *Tests*, *supra* note 7, at 59. His application was rejected because he had stricken through the portion of the required oath that read “[s]o help me God.” *Id.* Silverman was an atheist and South Carolina had (and retains to this day) a constitutional provision that imposed a religious test for state office holders: “No person who denies the existence of

Constitutional bar set forth in *Torcaso*, state oath of office provisions would not constitute barriers to service, because of state constitutional prohibitions on religious tests for office, state constitutional guarantees against religious preferences, and the language of the various state oaths of office.

State constitution prohibitions on religious tests for office are a powerful counter to the use of oaths of office as barriers to service based on religious belief. “Thirty-two states have had prohibitions on religious tests for office in their constitutions.”³⁷ Only twelve states have had religious tests for office in their constitutions; eight states retain them today despite their invalidity under *Torcaso*.³⁸ State constitution guarantees against religious preferences are also a powerful counter to the use of oaths of office as barriers to service based on religious belief. Thirty-one states have constitutional prohibitions against the state favoring one religion over another, such as the Mississippi guarantee that “no preference shall be given by law to any religious sect or mode of worship”³⁹ Only nine

the Supreme Being shall hold any office under this Constitution.” *Id.*; S.C. CONST. art. VI, § 2. *See also* S.C. CONST. art. XVII, § 4. The trial court had found two provisions of the South Carolina constitution to violate both the First Amendment and the religious test clause of the Federal Constitution, and the South Carolina Supreme Court affirmed the trial court’s holding. *See Tests, supra* note 7, at 67 (citing *Silverman v. Campbell*, 486 S.E.2d 1 (S.C. 1997)).

37. *Tests, supra* note 7, at 61 n.36 (Alabama, Arizona, Arkansas, California, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming). Twenty-six states retain such constitutional prohibitions today. *Id.* at 63 n.44 (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).

38. *Id.* at 60 (Arkansas, Delaware, Maryland, Massachusetts, Mississippi, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Vermont). Eight states retain such constitutional prohibitions today. *Id.* at 62 (Arkansas, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee, and Texas).

39. ALA. CONST. art. I, § 3; ARK. CONST. art. 2, § 24; CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4; CONN. CONST. art. I, § 3; DEL. CONST. art. I, § 1; IDAHO CONST. art. I, § 4; ILL. CONST. art. 1, § 3; IND. CONST. art. I, § 4; KAN. CONST. Bill of Rights, § 7; KY. CONST. Bill of Rights, § 5; ME. CONST. art. I, § 3;

states do not include either a prohibition on religious tests for office or a guarantee against religious preferences, or both, in their current state constitutions.⁴⁰

The final counter to the use of oaths of office as barriers to service based on religious belief is the language of the oaths themselves. As with the Federal Constitutional analysis, the key is the availability of a non-religious alternative to the religious oath, the argument being that the religious oath cannot function as a barrier to office on the basis of religious belief if there is a non-religious “affirmation” alternative provided. Here, the record is compelling: all fifty states provide some form of accommodation.⁴¹ Forty-five states included a formulation of accommodation, either “oath or affirmation” or “swear or affirm.”⁴² Seven states provide that the form of oath or affirmation should be individualized.⁴³ Massachusetts and

MASS. CONST. Articles of Amend., art. XI; MINN. CONST. art. I, § 16; MISS. CONST. art. 3, § 18; MO. CONST. art. I, § 7; NEB. CONST. art. I, § 4; NEV. CONST. art. I, § 4; N.H. CONST. PT. FIRST art. V; N.M. CONST. art. II, § 11; N.Y. CONST. art. I, § 3; N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7; PA. CONST. art. I, § 3; S.D. CONST. art. VI, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 6; VA. CONST. art. I, § 16; W. VA. CONST. art. III, § 15; WIS. CONST. art. I, § 18; and WYO. CONST. art. I, § 18.

40. Alaska, Florida, Hawaii, Louisiana, Maryland, North Carolina, Oklahoma, South Carolina, and Vermont.

41. See *infra* Appendix A, items 2 through 51.

42. See *infra* Appendix A, items 2 (Alabama), 3 (Alaska), 5 (Arkansas), 6 (California), 7 (Colorado), 8 (Connecticut), 9 (Delaware), 10 (Florida), 11 (Georgia), 12 (Hawaii), 13 (Idaho), 14 (Illinois), 15 (Indiana), 16 (Iowa), 17 (Kansas), 18 (Kentucky), 19 (Louisiana), 20 (Maine), 23 (Michigan), 24 (Minnesota), 25 (Mississippi), 26 (Missouri), 27 (Montana), 28 (Nebraska), 29 (Nevada), 31 (New Jersey), 32 (New Mexico), 33 (New York), 34 (North Carolina), 35 (North Dakota), 36 (Ohio), 37 (Oklahoma), 38 (Oregon), 39 (Pennsylvania), 40 (Rhode Island), 41 (South Carolina), 42 (South Dakota), 43 (Tennessee), 44 (Texas), 45 (Utah), 46 (Vermont), 47 (Virginia), 49 (West Virginia), 50 (Wisconsin), and 51 (Wyoming). Of these, nine might be seen to undermine the formula of accommodation by concluding the oath or affirmation with “so help me God,” without alternative language for affirmations. See *infra* Appendix A, items 2 (Alabama), 8 (Connecticut), 9 (Delaware), 10 (Florida), 18 (Kentucky), 19 (Louisiana), 25 (Mississippi), 41 (South Carolina), and 44 (Texas). Of the forty-five states with a formulation of accommodation, six include the language “so help me God” for oaths, but include an appropriate alternative for affirmations. See *infra* Appendix A, items 27 (Montana), 29 (Nevada), 35 (North Dakota), 40 (Rhode Island), 46 (Vermont), and 47 (Virginia).

43. See *infra* Appendix A, items 4 (Arizona), 15 (Indiana), 18 (Kentucky), 21 (Maryland), 38 (Oregon), 44 (Texas), and 48 (Washington).

New Hampshire provide accommodations, but only for Quakers.⁴⁴

B. The Symbolism of State Oaths of Office.

Do the various state constitutional oath of office provisions support Dennis Prager's suggestion that oaths of office affirm a unifying value system? They do. Do they support his suggestion that the unifying value system they affirm is some Biblically-based value system that underlies American civilization? Hardly.

The state constitutional oath of office provisions are remarkably consistent in the values they affirm. Forty-seven states have substantive oath of office provisions in their constitutions.⁴⁵ They are strikingly uniform in content, with only minor differences in phraseology. In all forty-seven states, the person making the oath or affirmation promises to support the state constitution; in forty-five of the forty-seven states, the person promises to support the Federal Constitution.⁴⁶ In

44. See *infra* Appendix A, items 22 (Massachusetts), and 30 (New Hampshire).

45. See *infra* Appendix A. The three exceptions are Arizona and Maryland, which have general oath provisions that provide that the mode of administering an oath or affirmation should be that most effectual for the individual, *infra* Appendix A, items 4 (Arizona), and 21 (Maryland), and Georgia, the constitutional oath provisions of which defer to the oath or affirmation prescribed by law. *Infra*, Appendix A, item 11.

46. See *infra* Appendix A. Forty-five states include both the Federal Constitutions and the state constitution. *Infra* Appendix A, items 2 (Alabama), 3 (Alaska), 5 (Arkansas), 6 (California), 7 (Colorado), 8 (Connecticut), 9 (Delaware), 10 (Florida), 12 (Hawaii), 13 (Idaho), 14 (Illinois), 15 (Indiana), 16 (Iowa), 17 (Kansas), 18 (Kentucky), 19 (Louisiana), 20 (Maine), 23 (Michigan), 24 (Minnesota), 25 (Mississippi), 26 (Missouri), 27 (Montana), 28 (Nebraska), 29 (Nevada), 30 (New Hampshire), 31 (New Jersey), 32 (New Mexico), 33 (New York), 34 (North Carolina), 35 (North Dakota), 36 (Ohio), 37 (Oklahoma), 38 (Oregon), 39 (Pennsylvania), 40 (Rhode Island), 41 (South Carolina), 42 (South Dakota), 43 (Tennessee), 44 (Texas), 45 (Utah), 47 (Virginia), 48 (Washington), 49 (West Virginia), 50 (Wisconsin), and 51 (Wyoming). The oaths of two states promise to support the constitution of the state, but do not include the Federal Constitution. See *infra* Appendix A, items 22 (Massachusetts), and 46 (Vermont). New Hampshire is something of a puzzle. In that oath, the maker promises "that I will bear faith and true allegiance to the United States of America and the state of New Hampshire, and will support the constitutions thereof." *Infra* Appendix A, item 30. The constitutional compilation notes that the New Hampshire provision was amended in 1970 adding allegiance to the United

twenty-four states, the person promises to discharge the office to the best of his or her ability.⁴⁷ In thirty-nine states, the person promises to faithfully discharge the duties of the office, or to act with fidelity.⁴⁸

The promises to support the state constitution, support the Federal Constitution, be faithful, and perform to the best of one's ability pretty much exhaust the field. The only other promise that has more than one state is the representation that the person making the pledge has not fought a duel with deadly weapons, found in the constitutions of Kentucky and Texas.⁴⁹

If the state oaths of office conformed to Prager's Biblically-based common values rationale, one might expect to find that they contain religious language beyond the optional nomenclature of swearing. One might also expect to find provisions that the oaths be taken on a Bible. But such is not the case. No state constitutional oath of office provision includes any religious language other than the nomenclature to "swear" and the phrase "so help me God," or provides for the use of a Bible in connection with the oath of office; all provide an affirmation alternative.⁵⁰ State drafters well understood how to frame such requirements. Although not present in any state constitutional oath of office provisions, some state statutory provisions on *testimonial* oaths have included

States of America. Perhaps the author of the amendment simply neglected to substitute "constitutions" for "constitution." *Infra* Appendix A, item 30.

47. See *infra* Appendix A, items 3 (Alaska), 6 (California), 8 (Connecticut), 14 (Illinois), 18 (Kentucky), 19 (Louisiana), 20 (Maine), 23 (Michigan), 24 (Minnesota), 28 (Nebraska), 30 (New Hampshire), 31 (New Jersey), 32 (New Mexico), 33 (New York), 35 (North Dakota), 37 (Oklahoma), 40 (Rhode Island), 41 (South Carolina), 44 (Texas), 46 (Vermont), 47 (Virginia), 48 (Washington), 49 (West Virginia), and 50 (Wisconsin).

48. See *infra* Appendix A, items 2 (Alabama), 5 (Arkansas), 6 (California), 7 (Colorado), 8 (Connecticut), 10 (Florida), 12 (Hawaii), 13 (Idaho), 14 (Illinois), 17 (Kansas), 18 (Kentucky), 19 (Louisiana), 20 (Maine), 23 (Michigan), 24 (Minnesota), 25 (Mississippi), 26 (Missouri), 27 (Montana), 28 (Nebraska), 29 (Nevada), 30 (New Hampshire), 31 (New Jersey), 32 (New Mexico), 33 (New York), 34 (North Carolina), 35 (North Dakota), 37 (Oklahoma), 39 (Pennsylvania), 40 (Rhode Island), 42 (South Dakota), 43 (Tennessee), 44 (Texas), 45 (Utah), 46 (Vermont), 47 (Virginia), 48 (Washington), 49 (West Virginia), 50 (Wisconsin), and 51 (Wyoming).

49. See *infra* Appendix A, items 18 (Kentucky), and 44 (Texas).

50. U.S. CONST. art. II, § 1; U.S. CONST. art. VI, cl. 3.

religious language, beyond the swearing nomenclature, and provided for the use of a Bible.⁵¹

51. Although each state provides for an affirmation in lieu of the statutory oath, some of the oaths contain religious language and provide for the use of a Bible. *See* ARK. CODE ANN. § 16-2-101(a) (2016) (referring to “[t]he usual mode of administering oaths practiced by the person who swears, laying his or her hand on and kissing the Gospels . . .”); DEL. CODE ANN. tit. 10, § 5321 (2016) (“Method of administering. The usual oath in this State shall be by swearing upon the Holy Evangelists of Almighty God. The person to whom an oath is administered shall lay his or her right hand upon the book.”); DEL. CODE ANN. tit. 10, § 5322 (2016) (“Uplifted hand. A person may be permitted to swear with the uplifted hand; that is to say, a person shall lift up his or her right hand and swear by the ever living God, the searcher of all hearts, that etc., and at the end of the oath shall say, ‘as I shall answer to God at the Great Day.’”); KAN. STAT. ANN. § 54-102 (2016) (“How administered. All oaths shall be administered by laying the right hand upon the Holy Bible, or by the uplifted right hand.”); 42 PA. CONS. STAT. § 5901 (2016) (“Judicial oath (a) General rule.--Every witness, before giving any testimony shall take an oath in the usual or common form, by laying the hand upon an open copy of the Holy Bible, or by lifting up the right hand and pronouncing or assenting to the following words: ‘I, A. B., do swear by Almighty God, the searcher of all hearts, that I will , and that as I shall answer to God at the last great day.’”).

Illinois includes the religious imagery of the “ever-living God,” but forbids the compulsory use of the Bible in the administration of oaths. 5 ILL. COMP. STAT. 255/3 (2016) (“The person swearing shall, with his hand uplifted, swear by the ever-living God, and shall not be compelled to lay the hand on or kiss the gospels.”). Virginia charts an intermediate course on the use of the Bible: individuals being sworn can be required to place their hand on the Bible but cannot be required to kiss it. VA. CODE ANN. § 49-10 (2016) (“Use of Bible in administration of oaths. No officer of this Commonwealth, or any political subdivision thereof, shall, in administering an oath in pursuance of law, require or request any person taking the oath to kiss the Holy Bible, or any book or books thereof, but persons being sworn for any purpose may be required to place their hand on the Holy Bible.”).

The apotheosis of religious entanglement in oath statutes has to be North Carolina. Their statute starts with a justification for oaths as “being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood . . .” N.C. GEN. STAT. § 11-1 (2016). Moving to the default procedure for oaths, the statute provides a religious justification for placing a hand on the Bible. N.C. GEN. STAT. § 11-2 (2016) (“ . . . require the party to be sworn to lay his hand upon the Holy Scriptures, in token of his engagement to speak the truth and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of that holy book and made liable to that vengeance which he has imprecated on his own head.”). A person who has conscientious scruples against using the Bible can use an alternative, but equally religious, protocol. N.C. GEN. STAT. § 11-3 (2016) (“ . . . He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth he would draw down the vengeance of

III. Considering Oaths of Office.

Why do we even have oaths of office? There appear to be three plausible explanations:

Oaths of office might perform a gatekeeper function, as barriers to exclude disfavored religious minorities from public service. There is little indication this was ever the case, given the presence of Federal and state constitutional prohibitions against religious tests for office, state constitutional guarantees against religious preferences, and the language of the oaths themselves.⁵² And of course after *Torcaso*, such a rationale for oaths of office is impossible to maintain.

Oaths of office might perform an individual affirmation function, as rituals for individuals holding public office to make a solemn religious promise within their faith tradition, invoking their deity to both assist them and judge them during their tenure in office. Such a purpose would explain the universal provision of an affirmation alternative. But it is inconsistent with the language of the oaths of office themselves. For example, other than the use of the nomenclature “swear,” the two oaths of office in the Federal Constitution are starkly secular: binding the speaker “to support this Constitution . . .”⁵³ and to “faithfully execute the Office of President of the United States, and . . . preserve,

heaven upon his head, and shall introduce the intended oath with these words, namely: I, A.B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known (etc., as the words of the oath may be).”). Ultimately, a person with conscientious scruples against either of the religious forms can affirm. N.C. GEN. STAT. § 11-4 (2016).

It should be noted that a North Carolina decision permits the substitution of the Quran for Bible. Allan W. Vestal, *Fixing Witness Oaths: Shall We Retire the Rewarder of Truth and Avenger of Falsehood?*, 27 U. FLA. J.L. & PUB. POL’Y (forthcoming 2016) (on file with author) [hereinafter *Fixing Witness Oaths*]; *Judge Says Multiple Religious Texts Must be Allowed for Swearing-In Proceedings*, AM. CIV. LIBERTIES UNION (May 24, 2007), <https://www.aclu.org/news/aclu-north-carolina-applauds-court-ruling-preventing-religious-discrimination-courtroom>.

52. See *Fixing Witness Oaths*, *supra* note 51, at 3-6. In contrast, the oaths required of witnesses were used as instruments of exclusion from 1215 until into the 20th Century. *Id.*

53. U.S. CONST. art. VI, cl. 3.

protect and defend the Constitution of the United States.”⁵⁴ The oaths of the various states are similarly non-religious.

Oaths of office might perform a collective affirmation function, as rituals for those holding public office to pledge to each other and society their commitment to a common set of principles, beliefs, or values. This is consistent with the practice, as in the House of Representatives, of having the oath of office administered *en masse*, and with the language of both Federal and state constitutional oaths of office.

Dennis Prager supports the collective affirmation rationale: “[w]hen all elected officials take their oaths of office . . . [.] they all affirm that some unifying value system underlies American civilization.”⁵⁵ I think he is correct about the symbolic role of oaths of office; they should be a ritual in which those holding public office pledge themselves to a common set of principles, beliefs, or values. But, of course, to agree to the symbolic function of oaths of office only raises the question: which principles, what beliefs, whose values should be affirmed?

The common values to which Prager would have oaths of office relate are Christian, to be sure. But his argument is that it is appropriate to use Biblical values as a matter of historical fact and not of universal belief:

You don’t have to be Christian to acknowledge that the Bible is the source of America’s values. Virtually every founder of this country knew that and acknowledged it. The argument that founders such as Thomas Jefferson and Benjamin Franklin were deists, even if accurate (it is greatly exaggerated), makes my point, not my opponents’. The founders who were not believing Christians venerated the Bible as the source of America’s values just as much as practicing Christians did.⁵⁶

54. U.S. CONST. art. II, § 1, cl. 8.

55. *America, Not Keith Ellison*, *supra* note 4.

56. *A response*, *supra* note 5.

There are two fundamental problems with Prager's argument. The first is that in making his historical argument that the Bible is the source of common American values, Prager sometimes blurs the line between the fact of historical influence of a message and a belief in the truth of the message. In theory, citizens from non-Judeo-Christian faith traditions might agree that some set of American values are congruent with or even derived from Biblical values. Thus, they might agree with Prager's statement: "America derives its laws from its Constitution. It derives its values from the Bible."⁵⁷ But they clearly would not agree with other statements of Prager's that move from historical relationship to religious belief, such as, "[w]e don't get inalienable rights from the Constitution; we get them from God" and, "[i]t was understood from the beginning of the republic that liberty is derived from God, not from man alone."⁵⁸

The second problem with Prager's argument is that, by his own admission, the American values he would place as the objects of the oath of office are not the subject of general acceptance. Indeed, this is precisely why Prager identifies them. A column he wrote at the time of the 2015 *Obergefell* decision on marriage equality explains his analysis.⁵⁹ He starts with the assertion that, "[f]rom well before 1776 until the second half of the 20th century, the moral values of the United States were rooted in the Bible and its God."⁶⁰ During this period, all Americans, even those from non-Judeo-Christian faith traditions "understood that without God, there is no moral truth, only moral opinion—and assumed that those truths were to be gleaned from the Bible more than anywhere else."⁶¹ But starting with Supreme Court decisions barring compulsory school prayer and ending with marriage equality, the world shifted:

57. *Id.*

58. *Id.*

59. See Dennis Prager, *The Formal End to Judeo-Christian America*, TOWNHALL (June 30, 2015, 12:01 AM) [hereinafter *The Formal End*], <http://townhall.com/columnists/dennisprager/2015/06/30/the-formal-end-to-judeochristian-america-n2018986/page/full>.

60. *Id.*

61. *Id.*

Beginning with the Supreme Court's ban on nondenominational school prayer in 1962, the same-sex marriage decision has essentially completed the state's secularization of American society. . . . And what has replaced Judaism, Christianity, Judeo-Christian values and the Bible? The answer is: feelings. More and more Americans rely on feelings to make moral decisions. The heart has taken the place of the Bible.⁶²

This is not the place to contest Prager's historical narrative as to which beliefs, values and convictions brought forth the Constitution. It is perhaps sufficient to briefly recount what President John Adams wrote about the influences that brought forth the first American constitutions. He started by noting that past nations had been founded upon divinity and superstition:

It was the general opinion of ancient nations, that the Divinity alone was adequate to the important office of giving laws to men. . . . Is it that obedience to the laws can be obtained from mankind in no other manner? Are the jealousy of power, and the envy of superiority, so strong in all men, that no considerations of public or private utility are sufficient to engage their submission to rules for their own happiness? . . . There is nothing in which mankind have been more unanimous; yet nothing can be inferred from it more than this, that the multitude have always been credulous, and the few are always artful.⁶³

Adams contrasted the creation of the United States with what had preceded it; that men were sufficiently enlightened to cast aside superstition and the inspiration of heaven:

62. Prager, *supra* note 59.

63. 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 291-92 (Charles C. Little & James Brown, eds., 1851).

The United States of America have exhibited, perhaps, the first example of governments erected on the simple principles of nature; and if men are now sufficiently enlightened to disabuse themselves of artifice, imposture, hypocrisy, and superstition, they will consider this event as an era in their history. . . . It will never be pretended that any persons employed in that service had interviews with the gods, or were in any degree under the inspiration of Heaven, more than those at work upon ships or houses, or laboring in merchandise or agriculture; it will forever be acknowledged that these governments were contrived merely by the use of reason and the senses. . . . The people were universally too enlightened to be imposed on by artifice; and their leaders, or more properly followers, were men of too much honor to attempt it. Thirteen governments thus founded on the natural authority of the people alone, without a pretence of miracle or mystery . . .⁶⁴

Prager sees this all as “the war to replace God, Judeo-Christian values and the Bible as moral guides.”⁶⁵ Whether one agrees with Prager’s analysis or not is immaterial to the question of whether it is appropriate to require those swearing an oath or making an affirmation of office to do so on the symbol of Prager’s side in his cultural war.

We might profit by considering an episode from George Washington. It is widely believed that at his initial inauguration, in the spring of 1789, Washington deviated from the oath provided by the Constitution by adding the language “So help me God” at the conclusion of the Constitutional oath;

64. *Id.* at 292-93. In fairness, Adams does include the Christian religion together with reason and morality in one passage: “The experiment is made, and has completely succeeded; it can no longer be called in question, whether authority in magistrates and obedience of citizens can be grounded on reason, morality, and the Christian religion, without the monkery of priests, or the knavery of politicians.” *Id.* at 293.

65. *The Formal End*, *supra* note 59.

although one historian convincingly argues, “the historical evidence demonstrates that such a claim is almost certainly false,”⁶⁶ Washington did include an appeal to God in his inaugural *address*, stating:

it would be peculiarly improper to omit in this first official Act, my fervent supplications to that Almighty Being who rules over the Universe, who presides in the Councils of Nations, and whose providential aids can supply every human defect, that his benediction may consecrate to the liberties and happiness of the People of the United States⁶⁷

In making this reference to God, though, Washington noted his belief that it was a universal sentiment: “[i]n tendering this homage to the Great Author of every public and private good I assure myself that it expresses your sentiments not less than my own; nor those of my fellow-citizens at large, less than either.”⁶⁸

One can only wonder whether Washington would have made his reference to God if it had not expressed the nearly universal sentiments of his fellow-citizens. In the same way, it is reasonable to question whether Prager’s laudable desire to use oaths of office to affirm that which we hold in common fails because he proposes as the object of the affirmation something we simply do not any longer hold in common: Judeo-Christian religious belief. What might have been appropriate in Washington’s day is arguably not appropriate in our greatly changed society where only a minority of adult Americans

66. Peter R. Henriques, “*So Help Me God*”: A George Washington Myth That Should Be Discarded, HISTORY NEWS NETWORK (Jan. 11, 2009), <http://historynewsnetwork.org/article/59548>. See also Joanna Lin, *Bible Has a Storied Role in Inaugurations*, L.A. TIMES (Jan. 18, 2009), <http://articles.latimes.com/2009/jan/18/nation/na-inaug-religion18> (“Many historians think George Washington was the first to use the phrase [So help me God], but Donald R. Kennon, a historian at the United States Capitol Historical Society, said there was little evidence to support the idea.”).

67. George Washington, Inaugural Address (Apr. 30, 1789) (transcript available at http://www.archives.gov/exhibits/american_originals/inaugtxt.html).

68. *Id.*

identify as Protestant Christians,⁶⁹ where the fifty-six million “unaffiliated” – atheists, agnostics, and those who identify as “nothing in particular”⁷⁰ – outnumber both Catholics and mainline Protestants,⁷¹ and where some 10.3 million identify with non-Christian faiths.⁷²

If one agrees with Prager that oaths of office should be seen as an opportunity for those holding public office to affirm to society their commitment to a common set of principles, beliefs, or values, but disagrees that the object of the affirmation should be the asserted primacy of Christianity in establishing American values, is there an alternative? Of course there is, and it is as old as the Constitution.

We ought to look for guidance to the framers who drafted the Constitution, and the language they used in its oath of office provisions. The general oath of office in Article VI provides for an oath or affirmation “to support this Constitution”⁷³ The Presidential oath of office in Article II provides for an oath or affirmation to “faithfully execute the Office of President of the United States, and . . . preserve,

69. *America's Changing Religious Landscape*, PEW RES. CTR. (May 12, 2015), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape> (reporting 46.5% of adults identifying as Christian protestants). The study uses nearly 245 million for the number of adult Americans. *Id.*

70. *Id.* The study reports 2014 allocations of 3.1% (atheists), 4.0% (agnostics), and 15.8% (nothing in particular), for an aggregate unaffiliated score of 22.8%. Using the 245 million figure for American adults, these translate into 7.6 million atheists, 9.8 million agnostics, and 38.7 identified as “nothing in particular.” *Id.*

71. *Id.* (reporting 20.8% of adults identifying as Catholics; 14.7% as mainline Protestants; and 3.1% as atheists, 4.0% as agnostics, and 15.8% as “nothing in particular,” for an unaffiliated total of 22.8%).

72. *Id.* The study uses an overall adult population of nearly 245 million, with 2014 allocations of Jewish 1.9% (4.7 million), Muslim 0.9% (2.2 million), Buddhist 0.7% (1.7 million), and Hindu 0.7% (1.7 million). The research suggests that our religious diversity is only going to increase. Between 2007 and 2014, Protestant Christians went from majority to minority status (51.3% in 2007 to 46.5% in 2014, a 4.8% decline); the percentages for Christians, Protestants, Catholics, evangelicals, mainline Protestants, historically black Christian groups, Orthodox Christians, and Mormons all declined; and the percentages for Jews, Muslims, Hindus, atheists, agnostics, and those responding “nothing in particular” all increased. Muslims increased from 0.4% to 0.9%, Hindus from 0.4% to 0.7%, atheists from 1.6% to 3.1%, agnostics from 2.4% to 4.0%, and nothing in particular from 12.1% to 15.8%. *Id.*

73. U.S. CONST. art. VI, cl. 3.

protect and defend the Constitution of the United States.”⁷⁴ Neither Constitutional oath of office provides that it be taken on a Bible; neither invokes any mandatory religious language or deity. We ought also look to the framers who drafted the oath of office provisions of our state constitutions for guidance. They virtually all provided oaths and affirmations to support the Constitution; they universally avoided rituals using a Bible and requirements that involved any religious language or a deity.

The Constitution, not some ambiguous and divisive notion of Biblically-derived “American values,” is the thing that unites us, the common element we ought to affirm. The most appropriate course would be to retain the Federal oaths as they were written at the dawn of the Republic.⁷⁵ And if the oath or affirmation of office is to be done using any “very same book,” it ought to be the writing to which the speaker is pledging fidelity: our Constitution.

IV. Conclusion.

On March 4, 1825, John Quincy Adams was sworn in as the sixth President of the United States; the day was cold and rainy, and the inaugural ceremony was held inside the Capitol, in the House of Representatives Chamber.⁷⁶ Adams’ inaugural address began with a religious reference:

In compliance with an usage coeval with the existence of our Federal Constitution, and sanctioned by the example of my predecessors in the career upon which I am about to enter, I appear, my fellow-citizens, in your presence and in that of Heaven to bind myself by the

74. U.S. CONST. art. II, § 1, cl. 8.

75. As to the state constitutional oaths and affirmations of office, few changes are indicated. It would probably be appropriate for Massachusetts and Vermont to include a promise to support the Constitution, and for New Hampshire to make that clear.

76. It is reported that the day was rainy, with a total rainfall of .79 inches, and that the temperature at noon was only 47°. *The 10th Presidential Inauguration*, JOINT CONG. COMM. ON INAUGURAL CEREMONIES, <http://www.inaugural.senate.gov/about/past-inaugural-ceremonies/10th-inaugural-ceremonies> (last visited Oct. 2, 2016).

solemnities of religious obligation to the faithful performance of the duties allotted to me in the station to which I have been called.⁷⁷

But Adams' address was really about the Constitution, as became clear when the new President outlined the principles which would guide his service:

In unfolding to my countrymen the principles by which I shall be governed in the fulfillment of those duties my first resort will be to that Constitution which I shall swear to the best of my ability to preserve, protect, and defend. That revered instrument enumerates the powers and prescribes the duties of the Executive Magistrate, and in its first words declares the purposes to which these and the whole action of the Government instituted by it should be invariably and sacredly devoted – to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to the people of this Union in their successive generations.⁷⁸

The President spoke of the Constitution as the foundation of society's progress: “[i]t has promoted the lasting welfare of that country so dear to us all; it has to an extent far beyond the ordinary lot of humanity secured the freedom and happiness of this people.”⁷⁹ He spoke of the Constitution as an inheritance

77. John Quincy Adams, Inaugural Address (Mar. 4, 1825) (transcript available at Yale Law School, The Avalon Project, http://avalon.law.yale.edu/19th_century/qadams.asp). One historian has labeled this passage “an interminable sentence” in one of the five worst inaugural addresses of the 19th Century. Robert McNamara, *The Five Worst Inaugural Addresses of the 19th Century*, ABOUT EDUC., <http://history1800s.about.com/od/presidentialcampaigns/ss/worstinaugural.htm#step3> (last visited Oct. 2, 2016) (describing the address as “pedantic and defensive”).

78. Adams, *supra* note 77.

79. *Id.*

from the founders and a legacy to future generations:

We now receive it as a precious inheritance from those to whom we are indebted for its establishment, doubly bound by the examples which they have left us and by the blessings which we have enjoyed as the fruits of their labors to transmit the same unimpaired to the succeeding generation.⁸⁰

Given the content of his address, it was perfectly appropriate that President John Quincy Adams was sworn in on a copy of the Constitution, not on a Bible.⁸¹ His explanation for the decision to use the Constitution is as true today as it was in 1825: it was the Constitution he was swearing to preserve, protect, and defend.⁸²

One hundred and eighty-eight years after John Quincy Adams' inauguration, John O. Brennan was sworn in as Director of the Central Intelligence Agency; he elected to be sworn in holding an original draft of the Constitution, rather than a Bible, "because he wanted to reaffirm his commitment to the rule of law as he took the oath of office as director of the CIA."⁸³ Brennan's desire to affirm his fidelity to the Constitution was controversial. Numerous right-wing blogs

80. *Id.*

81. See *The 10th Presidential Inauguration*, *supra* note 76 ("According to his own version of his Inauguration, Adams took the oath upon a volume of law.").

82. "[John Quincy] Adams in his diary notes that he swore the oath on a book of laws. Again, why did he do that? John Quincy Adams was a deeply religious person, but my interpretation is that he did so because as he points out in his diary, he was swearing the oath to uphold the Constitution and laws of the United States, so he took the oath on a book of laws." Donald Kennon, Vice President for Scholarship and Educ., U.S. Capitol Historical Soc'y, Remarks on Historical Perspectives on the Inaugural Swearing in Ceremony (Jan. 14, 2009) (transcript available at <http://fpc.state.gov/114510.htm>). See also Lin, *supra* note 66 ("Although he was a devout Christian, John Quincy Adams took his presidential oath upon a 'Volume of Laws' because, he wrote in a March 1825 diary entry, it was the Constitution he swore to preserve, protect and defend.").

83. Clare Kim, *What, No Bible? Conservatives Angered that Brennan Took Oath on Constitution*, MSNBC (Mar. 11, 2013, 10:45 PM), <http://www.msnbc.com/the-last-word/what-no-bible>.

reported another theory on why Director Brennan chose to be sworn in on the Constitution rather than a Bible: “a shocking report . . . [that] Brennan actually converted to Islam years ago while living in Saudi Arabia.”⁸⁴

We would do well to decline the counsel of those who would make oaths of office into a field of never-ending religious conflict by emulating the examples of John Quincy Adams and John Brennan. In the oath of office ceremony, we should repair to the Constitution as the fundamental common element of our civic life.

84. *No Bible for Brennan Swearing In*, WND (Mar. 8, 2013, 7:49 PM), <http://www.wnd.com/2013/03/no-bible-for-brennan-swearing-in>. See also *Sharia Unveiled, Muslim CIA Chief Brennan Refuses to Take Oath Of Office With Bible*, BEFORE IT'S NEWS (Mar. 9, 2013, 2:08 PM), <http://beforeitsnews.com/bloggng-citizen-journalism/2013/03/muslim-cia-chief-brennan-rufuses-to-take-oath-of-office-with-bible-2446078.html>.

Appendix A – Constitutional Oath of Office Provisions

Federal. U.S. CONST. art. II, § 1, cl. 8 (“Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: – ‘I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’”); art. VI., cl. 3. (“The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution . . .”).

Alabama. ALA. CONST. art. XVI, § 279 (“swear (or affirm, as the case may be)” but concludes “So help me God.”).

Alaska. ALASKA CONST. art. XII, § 5 (“swear or affirm”).

Arizona. ARIZ. CONST. art. II, § 7 (“The mode of administering an oath, or affirmation, shall be such as shall be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.”).

Arkansas. ARK. CONST. art. XIX, § 20 (“swear (or affirm)”).

California. CAL. CONST. art. XX, § 3 (“swear (or affirm), [as the case may be,]”).

Colorado. COLO. CONST. art XII, § 8 (“oath or affirmation”).

Connecticut. CONN. CONST. art. XI, § 1 (“swear (or affirm, as the case may be)” but concludes “So help you God.”).

Delaware. DEL. CONST. art. XIV, § 1 (“swear (or affirm)” but concludes “so help me God”).

Florida. FLA. CONST. art. II, § 5 (“swear (or affirm)” but concludes “So help me God.”).

Georgia. GA. CONST. art. III, § 4, ¶2 (“oath or affirmation prescribed by law”); *id.* art. V, § 1, ¶6. (“oath or affirmation as prescribed by law.”).

Hawaii. HAW. CONST. art. XVI, § 4 (“swear (or affirm)”).

Idaho. IDAHO CONST. art III, § 25 (“swear (or affirm, as the case may be)”).

Illinois. ILL. CONST. art. XIII, § 3 (“swear (affirm)”).

Indiana. IND. CONST. art. I, § 8 (“The mode of administering an oath or affirmation, shall be such as may be most consistent with, and binding upon, the conscience of the person, to whom such oath or affirmation may be administered.”); *id.* art. XV, § 4. (“Every person elected or appointed to any office under this Constitution, shall, before entering on the duties thereof, take an oath or affirmation, to support the Constitution of this State, and of the United States, and also an oath of office.”).

Iowa. IOWA CONST. art. XI, § 5 (“Every person elected or appointed to any office, shall, before entering upon the duties thereof, take an oath or affirmation to support the constitution of the United States, and of this State, and also an oath of office.”).

Kansas. KAN. CONST. art. XV, § 14 (“oath or affirmation”).

Kentucky. KY. CONST. § 228 (“swear (or affirm, as the case may be)” but concludes “so help me God.”); § 232 (“The manner of administering an oath or affirmation shall be such as is most consistent with the conscience of the deponent, and shall be esteemed by the General Assembly the most solemn appeal to God.”).

Louisiana. LA. CONST. art. X, § 30 (“oath or affirmation,” “swear (or affirm),” but concludes “so help me God.”).

Maine. ME. CONST. art. IX, § 1 (gives oath forms which include “swear” and “So help me God” but then provides: “Provided, that an affirmation in the above forms may be substituted, when the person shall be conscientiously scrupulous of taking and subscribing an oath.”).

Maryland. MD. CONST. Dec. of Rights, art. 39 (“That the manner of administering an oath or affirmation to any person, ought to be such as those of the religious persuasion, profession or denomination, of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being.”).

Massachusetts. MASS. CONST. Art. of Amend., art. VI (“*Provided*, That when any person shall be of the denomination called Quakers, and shall decline taking said oath, he shall make his affirmation in the foregoing form, omitting the word ‘swear’ and inserting instead thereof the word ‘affirm,’ and omitting the words ‘So help me God,’ and subjoining, instead

thereof, the words ‘This I do under the pains and penalties of perjury.’”).

Michigan. MICH. CONST. art. XI, § 1 (“swear (or affirm)”).

Minnesota. MINN. CONST. art. IV, § 8 (“oath or affirmation”); art. V, §6 (“oath or affirmation”).

Mississippi. MISS. CONST. § 40 (“swear (or affirm)” but concludes “So help me God.”), §155 (“swear (or affirm)” but concludes “So help me God.”), §268 (“swear (or affirm)” but concludes “So help me God.”)

Missouri. MO. CONST. art. III, § 15 (“swear, or affirm,”).

Montana. MONT. CONST. art. III, § 3 (“swear (or affirm)” and concludes with optional “(so help me God.”).

Nebraska. NEB. CONST. art. XV, § 1 (“oath, or affirmation,” “swear (or affirm)”).

Nevada. NEV. CONST. art. XV, § 2 (“swear (or affirm)” and “(if an oath) so help me God; (if an affirmation) under the pains and penalties of perjury.”).

New Hampshire. N.H. CONST. art. 84 (“*Provided always*, when any person chosen or appointed as aforesaid shall be of the denomination called Quakers, or shall be scrupulous of swearing, and shall decline taking the said oaths, such person shall take and subscribe them, omitting the word ‘swear,’ and likewise the words ‘So help me God,’ subjoining instead thereof, ‘This I do under the pains and penalties of perjury.’”).

New Jersey. N.J. CONST. art. VII, § 1, para. 1 (“oath or affirmation”).

New Mexico. N.M. CONST. art. XX, § 1 (“oath or affirmation”).

New York. N.Y. CONST. art. XIII, § 1 (“oath or affirmation,” “swear (or affirm)”).

North Carolina. N.C. CONST. art. II, § 12 (“oath or affirmation”), *id.* art. III, § 4 (“oath or affirmation”).

North Dakota. N.D. CONST. art. XI, § 4 (“oath or affirmation,” “swear (or affirm as the case may be),” “so help me God’ (if an oath), (under pains and penalties of perjury) if an affirmation . . .”).

Ohio. OHIO CONST. art. XV, § 7 (“oath or affirmation” and “also and oath of office.”).

Oklahoma. OKLA. CONST. art. XV, § 1 (“oath or

affirmation,” “swear (or affirm)”).

Oregon. OR. CONST. art. I, § 7 (“The mode of administering an oath, or affirmation shall be such as may be most consistent with, and binding upon the conscience of the person to whom such oath or affirmation may be administered.”); *id.* art. XV, § 3 (“oath or affirmation” and “also an oath of office.”).

Pennsylvania. PA. CONST. art. VI, § 3 (“oath or affirmation,” “swear (or affirm)”).

Rhode Island. R.I. CONST. art. III, § 3 (“swear (or, affirm),” and “So help you God. [Or: This affirmation you make and give upon the peril of the penalty of perjury.]”).

South Carolina. S. C. CONST. art. III, § 26 (“oath,” “swear (or affirm),” but concludes “So help me God.”).

South Dakota. S.D. CONST. art. XXI, § 3 (“oath or affirmation”).

Tennessee. TENN. CONST. art. X, § 1 (“oath”); Art. X., § 2 (“oath or affirmation,” “oath,” “swear (or affirm)”).

Texas. TEX. CONST. art. I, § 5 (“ . . . all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury.”); *id.* art. XVI, § 1 (“oath or affirmation,” “swear, (or affirm),” but concludes “so help me God.”).

Utah. UTAH CONST. art. IV, § 10 (“oath or affirmation,” “swear (or affirm)”).

Vermont. VT. CONST. ch. II, § 56 (“oath or affirmation,” “swear (or affirm)”); *id.* (“oath,” “swear (or affirm),” “So help you God. (If an affirmation) Under the pains and penalties of perjury.”); *id.* (“oath or affirmation,” “swear (or affirm),” “(If an oath) So help you God. (If an affirmation) Under the pains and penalties of perjury.”).

Virginia. VA. CONST. art. II, § 7 (“oath or affirmation,” and “swear (or affirm),” “(so help me God)” as optional language.).

Washington. WASH. CONST. art. I, § 6. (“The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.”).

West Virginia. W. VA. CONST. art. IV, § 5 (“oath or

affirmation”).

Wisconsin. WIS. CONST. art IV, § 28 (“oath or affirmation”).

Wyoming. WYO. CONST. art. VI, § 20 (“oath or affirmation,” “swear (or affirm)”).