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Holy Scriptures and Unholy Strictures: Why the Enforcement of a Religious Orthodoxy in North Carolina Demands a More Refined Establishment Clause Analysis of Courtroom Oaths

Daniel Blau*

INTRODUCTION

In June 2005, Syidah Matteen was called as a witness during a state court proceeding in Guilford County, North Carolina. When it came time to swear under oath, Ms. Matteen, a Muslim, requested that she be allowed to swear in on the Qu’ran. The judge refused this request. Later that month, the Al Ummil Ummat Islamic Center of Greensboro offered to donate copies of the Qu’ran to the Guilford County courts to use to swear in Muslim jurors and witnesses, but this request was also turned down by judicial officials. The American Civil Liberties Union of North Carolina (ACLU-NC) was informed of the incidents, and so began a statewide debate over the proper interpretation of the state’s

* Juris Doctor Candidate, University of North Carolina School of Law, 2007.

1. Letter from Shelagh Kenney, Staff Attorney, American Civil Liberties Union of N.C. (ACLU-NC), and Seth Cohen, General Counsel, ACLU-NC Legal Foundation, to Ralph Walker, Director, N.C. Administrative Office of the Courts (June 28, 2005) (on file with author).


3. Amended Complaint, ACLU of N.C. v. N.C., No. 05 CVS 9872 (filed Nov. 30, 2005).

oath statutes, as well as the proper use of religious texts in the state’s courtrooms.

Under North Carolina statute, a person who is to be sworn in any official proceeding is provided three different options. First, section 11-2 of the North Carolina General Statutes (hereinafter “§ 11-2”) provides the “default” option for the swearing party:

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

In refusing requests to allow the use of the Qu’ran, Guilford County judges have stated that, under this statute, the Christian Bible is the only “Holy Scripture” allowed for oath administration. Second, under an adjacent statute, if the party is “conscientiously scrupulous” of placing his or her hand upon the “Holy Scriptures,” he or she shall recite the applicable oath “with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God . . . .” Third, if the party altogether objects to taking a religious oath, he or she may simply affirm, meaning that he or she would recite the applicable oath “except that the word ‘affirm’ shall be substituted for the word ‘swear’ and the words ‘so help me God’ shall be deleted.”


6. Id.
7. Amended Complaint, supra note 3.
9. N.C. GEN. STAT. § 11-4 (2005). For example, the default oath used to swear in an attorney at law is: “I, A. B., do swear that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability; so help me God.” N.C. GEN. STAT. § 11-11 (2005). One who wished to affirm under § 11-4 would instead recite: “I, A. B., do affirm that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability.”
On June 28, 2005, the ACLU-NC requested that the North Carolina Administrative Office of the Courts (AOC) "adopt a policy to enable members of different faiths to be sworn in on the religious text honored by their faith if they choose." The ACLU-NC, joined by the Council on American-Islamic Relations and other Muslim and interfaith religious groups, requested that Qu'ran use be permitted in order to respect religious diversity. The AOC refused to issue an interpretation of § 11-2, claiming that its proper interpretation was a matter for the judiciary and the legislature.

In addition to the issue of religious equality, the fact that Ms. Matteen was not allowed to swear on the Qu'ran troubled the ACLU-NC because state judicial officials had previously been willing to interpret § 11-2 broadly to allow the use of the Qu'ran when such an interpretation was necessary to serve the needs of the state. During a 2004 trial in North Carolina Superior Court, for example, a potential juror requested to be sworn in on the Qu'ran during the voir dire. The clerk of court consulted the judge, who responded that the potential juror's request should be granted because, due to low turnout of the juror pool, the court could not afford to lose a potential juror. The clerk procured a Qu'ran from the North Carolina Bar Association, and the juror was sworn as requested.

In July 2005, the ACLU-NC filed suit against North Carolina in Wake County Superior Court, claiming that "[b]y allowing only the Christian Bible to be used in the administration of religious oaths in the courtroom, the State is discriminating against people of non-Christian faiths." The organization, claiming standing on behalf of its 8,000 religiously diverse members, sought a declaratory judgment that the term "Holy Scriptures" in § 11-2

12. Amended Complaint, supra note 3.
13. Telephone conversation with a North Carolina clerk of court (name and location withheld) (July 13, 2005) (notes from conversation on file with author); see also Shimron, supra note 4.
15. Amended Complaint, supra note 3.
includes all religious texts;\textsuperscript{16} or, if § 11-2 was found to only include the Christian Bible, that the statute was unconstitutional in violation of the Establishment Clause of the First Amendment to the United States Constitution.\textsuperscript{17} The state's Answer did not reach these substantive issues, but instead sought to dismiss the ACLU's claims for lack of standing, arguing that because Ms. Matteen chose to affirm, no actual case or controversy existed between the parties.\textsuperscript{18}

The case was heard in Wake County Superior Court on December 5, 2005. Four days later, Judge Donald Smith issued a brief order finding that the court lacked jurisdiction because no justiciable controversy existed between the parties.\textsuperscript{19} The ACLU-NC is appealing Judge Smith's decision.\textsuperscript{20}

This Note examines the legality of North Carolina's interpretation of its oath statute, and uses this debate as an opportunity to analyze our country's historical practice of allowing religious oaths in courtrooms. Part I examines the history of the oath as an institution of society, as well as the history of North Carolina's oath statute. Part II considers North Carolina's common law regarding religious swearing, and concludes that its oath statute is violative of state common law. Part III introduces the relevant Establishment Clause analyses, applies the constitutional rules to North Carolina's oath statute, and concludes that the statute is likely unconstitutional. Part IV then considers the constitutionality of religious swearing in courtrooms generally, determines that previous Establishment Clause analysis in this area has been incomplete, and concludes that re-application of the appropriate constitutional tests to courtroom swearing raises serious concerns at each step of the Establishment Clause analysis.

\textsuperscript{16} Id. \\
\textsuperscript{17} Id. \\
\textsuperscript{18} Answer to Amended Complaint, ACLU of N.C. v. N.C., No. 05 CVS 9872 (filed Dec. 5, 2005). \\
\textsuperscript{19} Wake County Superior Court Order and Judgment, ACLU of N.C. v. N.C., No. 05 CVS 9872 (filed Dec. 9, 2005). \\
\textsuperscript{20} Notice of Appeal, ACLU of N.C. v. N.C., No. 05 CVS 9872 (filed Dec. 20, 2005).
I. THE OATH: AN INSTITUTION OF RELIGIOUS AND SECULAR SOCIETY

A. The Origins of Oath Swearing

It has been suggested that it is a fact of human nature that a person will lie if necessary to protect his or her own self-interests and those of his or her family.\(^{21}\) This leads to a general distrust between members of society, for if one person will lie in self-interest, then he or she will suspect another of committing similar deception.\(^{22}\) As one scholar noted:

> It is because we do not place confidence in the veracity of men in general, when they profess to speak the truth; it is because we cannot rely upon their good faith, when they make a bare promise, that we are driven to seek for something more satisfactory to ourselves, by imposing upon them a more binding responsibility than that of their mere word.\(^{23}\)

Thus, the oath, which has been defined as "an outward pledge given by [an individual] that his attestation [or promise] is made under an immediate sense of his responsibility to God,"\(^{24}\) developed as means to ensure a truthful exchange.\(^{25}\) The religious oath as an institution has "been supposed in every age and country of the world."\(^{26}\) For example, the Greeks, Romans, Egyptians, and Persians each crafted a variety of oaths for use in societal life in

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21. Thomas Raeburn White, *Oaths in Judicial Proceedings and Their Effect upon the Competency of Witnesses*, 51 U. PA. L. REV. (formerly AM. L. REG.) 373, 373 (1903) ("Self-interest is perhaps the fundamental fact in human nature. Every man naturally seeks to promote the welfare of himself and his family before that of his neighbor . . . . [H]e will, if necessary, tell a lie for that purpose.").
22. Id.
23. JAMES ENDELL TYLER, OATHS; THEIR ORIGIN, NATURE, AND HISTORY 6 (1834).
24. Id. at 15 (first alteration added).
accordance with the prevailing religious beliefs of the respective culture.\textsuperscript{27}

Religious oaths were also prevalent in Mosaical and Biblical law.\textsuperscript{28} In the Judeo-Christian tradition, oaths played an important role both in lawsuits and in state affairs.\textsuperscript{29} For example, in Exodus it was written that a dispute between neighbors would be settled by taking an oath before God.\textsuperscript{30} The Decalogue invoked supernatural punishment for false swearing: "You shall not misuse the name of the Lord your God, for the Lord will not hold anyone guiltless who misuses his name."\textsuperscript{31} Additionally, it was required that the person who "sins and is unfaithful to the Lord by . . . swear[ing] falsely . . . when he thus sins and becomes guilty, he must . . . make restitution in full."\textsuperscript{32}

The use of religious oaths multiplied in the Christian world after the Church grew populous and powerful.\textsuperscript{33} Placing one's hand

\textsuperscript{27} White, \textit{supra} note 21, at 375. \textit{See generally} Tyler, \textit{supra} note 23, at 97-191 (providing a detailed discussion of oath forms adopted in the Old Testament, Ancient Greece and Rome, China, India, Mexico, and modern Europe). In Greece, for example, Homer's \textit{Iliad} spoke of an oath ceremony in which those swearing were "to mingle wine to typify the union and concord which then prevailed between the parties, and then to offer a prayer and to pour the wine on the ground, with an imprecation, that whoever should first break the oath might have his brains and blood scattered in the same manner, as that wine was poured." \textit{Id.} at 120. In Rome, "[o]ne of the most ancient forms of oath . . . was that of slaying an animal, very generally a swine, and imprecating the curse of heaven, in case of falsehood, to fall as inevitably on the perjured head, as death was the fate of that victim." \textit{Id.} at 127. The Chinese would attest to the truth by burning paper containing sacred characters, by breaking saucers, or by decapitating fowl, believing that a party violating his oath would suffer a similar fate. \textit{Id.} at 165.


\textsuperscript{30} \textit{Exodus} 22:11 (New International Version) (noted at Bible History Online, \textit{supra} note 29).

\textsuperscript{31} \textit{Exodus} 20:7 (noted at Bible History Online, \textit{supra} note 29).

\textsuperscript{32} \textit{Leviticus} 6:2-5 (noted at Bible History Online, \textit{supra} note 29).

\textsuperscript{33} White, \textit{supra} note 21, at 377.
on the Bible, kissing the text, and raising the other hand towards Heaven were common forms of swearing an oath. No matter the particular form, the key element of the oath ceremony was the invocation of God's vengeance if the swearer spoke falsely. God, implicated as a witness to a lie, would "avenge the consequential insult or blasphemy." Thus, the oath acted to "frighten the swearer into telling the truth," not by calling upon God to "punish the false swearer, but to remind the witness that [God] will assuredly do so."

The above examples demonstrate that oaths developed as both a secular and religious tool for ensuring truthful testimony. These dual elements were not separate and distinct; rather, they worked in conjunction with one another to secure truthful testimony by invoking a divine witness to guarantee that promise by the threat of supernatural punishment. In the United States, for example, the South Carolina Supreme Court recognized in 1848 that the Bible oath was a daily acknowledgment of Christianity as "the most solemn part of our administration." So, too, in North Carolina, the religious oath also took root early in the state's statutory development.

34. See id.
35. See, e.g., Genesis 14:22 ("Abram said to the king of Sodom, 'I have raised my hand to the Lord, God Most High, Creator of heaven and earth, and have taken an oath that I will accept nothing belonging to you ... '") (noted at Bible History Online, supra note 29).
36. White, supra note 21, at 380. The penalty for bearing false witness was only suggested in the Bible. See, e.g., 2 Samuel 3:35 ("David took an oath, saying 'May God deal with me, be it ever so severely ... '") (noted at Bible History Online, supra note 29).
37. White, supra note 21, at 380.
39. With the advent of perjury laws and the affirmation option, however, the religious and secular features of the oath would become separate and distinct elements, each serving its own, independent purpose. See infra text accompanying notes 122-25, 206-10.
B. North Carolina's Oath Statute

It comes as no surprise that religious oaths found early support in the laws of North Carolina. In *Engel v. Vitale*, the United States Supreme Court noted that "[i]t is an unfortunate fact some of the groups which had most strenuously opposed the established Church of England . . . passed laws making their religion the official religion of their respective colonies." While early North Carolina state law did not technically create an official religion, there is some evidence that a particular religion was preferred. For example, the North Carolina Constitution of 1776 included a test oath that forbade officeholders from "deny[ing] . . . the truth of the Protestant religion." The state's oath statutes may have likewise been part of an effort to codify acceptable or official religious beliefs. First passed in 1777, § 11-2 was originally entitled "Administration of oath upon the Gospels." Rather than requiring a swearer to lay his or her hands upon the "Holy Scriptures," the swearer was to "lay his hands upon the Holy Evangelists of Almighty God." In 1856, the North Carolina Supreme Court, while not directly addressing the statute, adopted the English common law rule allowing a swearing party to choose his or her own method of oath administration. In 1985, two centuries after the passage of the original oath statute, the statute was amended by shortening the title to "Administration of oaths," and by substituting the term "Holy Scriptures" for "Holy Evangelists of Almighty God." The legislature's intent was arguably to make the statute more inclusive, so the Christian Bible would no longer be the only religious text statutorily acceptable for use in the swearing ceremony.

42. 370 U.S. 421 (1962).
43. *Id.* at 427.
46. *Id.*
47. *See infra* text accompanying notes 67-70.
48. Letter from Shelagh Kenney, *supra* note 1; *see also* N.C. GEN. STAT. § 11-2.
49. *Id.*
Not all North Carolinians have construed the state's oath statute in this manner. By failing to allow Muslim witnesses to swear on the Qu'ran, state judicial officials have declined to adopt an inclusive interpretation of § 11-2. Their narrow reading of the statute, however, raises serious concerns regarding religious inequality in North Carolina courts. These concerns must be addressed by appraising the statute's legality under both state common law and the Federal Constitution.

II. THE LEGALITY OF NORTH CAROLINA'S OATH STATUTE UNDER COMMON LAW

A. Early Common Law and the Omichund Rule

Christianity predominated in England during the development of the common law. Therefore, English oaths presupposed the Christian faith of the witness. At early common law, a witness was immediately disqualified if he or she did not profess a belief in the Christian God. Thus, oaths directly invoked the Christian God and were commonly taken upon the Bible. Only Christian oaths were deemed acceptable in English courts "due to the spirit of intolerance which . . . seemed to dominate most religious people of early times." The Church controlled both the religious and secular spheres, and claimed that all non-Christians were "wholly unfit to be believed."

In 1744, the rigid religious test for witnesses and jurors was significantly weakened by Omichund v. Barker. The English

50. See supra text accompanying notes 1-3.
51. For an example of the use of oaths in England, see BLACKSTONE, supra note 28, at 342 (describing the use of an oath by a party to a suit as a means of supporting his action should he lack the temporal evidence to do so).
52. White, supra note 21, at 386-87.
53. Duffie, supra note 38, at 548.
54. White, supra note 21, at 387.
55. Id.
56. Id.
court, faced with the question of admission of two religious but
non-Christian witnesses, held:

(1) That the oath is not a Christian institution,
but has existed from the earliest times. (2)
That an oath is of binding force when taken by
any person, Christian or infidel, if taken
according to the rites of his own religion. (3)
That the form of oath usually administered in
English courts is not essential, but that any
persons may be admitted sworn as above.58

All that was required to validate an oath, according to the
Omichund court, was "an appeal to a Supreme Being, and thinking
of Him as the rewarder of truth and the avenger of falsehood."59
This new rule, adopted in England60 and followed in America,
permitted any witness professing a religious faith to be sworn in
according to his or her own religious dictates.61

James Madison recognized the inherent problems
associated with selecting a specific religious text for public use, even
in a predominantly Judeo-Christian society. In his notes from a
religious freedom debate in the Virginia legislature,62 Madison
wondered, "[w]hat edition, Hebrew, Septuagint, or vulgate? What
copy – what translation?"63 By the early nineteenth century, it was
firmly established in both England and America that "[t]he form of
administering an oath is by no means an essential part of the oath
itself, and indeed, being of human institution, is in itself a matter of

58. White, supra note 21, at 389-90 (summarizing the holding in
Omichund).
1310 (Lord Hardwick, concurring)). Atheists and other nonbelievers,
however, were still "excluded from testifying" under the new rule. White,
supra note 21, at 390.
60. See, e.g., BLACKSTONE, supra note 28, at 365 n.4 (referencing an
English statute requiring that "any person either as a juryman or a witness . . .
is bound by the oath administered, provided it shall have been administered in
such form and with such ceremonies as he may declare to be binding").
61. White, supra note 21, at 390.
62. See infra note 75 and text accompanying notes 75-79.
63. James Madison, Notes on Debate (Dec. 1784), in JAMES MADISON
perfect indifference, provided . . . the individual sworn regards it as binding on his conscience." Nothing in more recent common law appears to prohibit a juror or witness from swearing on his or her own religious text, provided that the individual considers it binding on the conscience. During the twentieth century, courts continued to acknowledge the freedom to swear in accordance with one's religious beliefs. For example, in 1945, an American military tribunal allowed a Japanese soldier to swear on his beliefs in the ancient Japanese religion of Shinto. More recently, the federal courts have allowed Muslim witnesses to invoke Allah in the swearing ceremony.

B. North Carolina Common Law

In 1856, the North Carolina Supreme Court officially recognized the Omichund rule in Shaw v. Moore. The court acknowledged the old common law rule that only Christian witnesses were competent to be sworn but then recognized that the rule, "to say the least of it, is narrow-minded, illiberal, bigoted and unsound." The Shaw court then went further and determined that the state's oath statutes merely provided a common form of oath "adapted to the religious belief of the general mass of the citizens, for the sake of convenience and uniformity." Thus, the state could not demand that a witness choose his or her oath ceremony from only the listed suggestions, for this would, "despite of the progress

64. Tyler, supra note 23, at 89.
66. Id. ("It's up to judges to decide what passes for an oath. Most have apparently given [non-Christian] oaths wide latitude. In a federal terrorism case in 1997 in Washington D.C., for instance, the judge allowed Muslim witnesses to swear to Allah.").
67. 49 N.C. 37 (1856). Shaw has no subsequent appellate history and has not been overturned or superseded.
68. Id. at 39.
69. Id. at 41.
of the age . . . throw the country back upon the illiberal and intolerant [old common law] rule. 70

C. Conclusion: North Carolina's Oath Statute Violates State Common Law

As in Omichund, nothing in the Shaw decision prohibits a witness from selecting the religious text to be used in an oath ceremony. If an Islamic juror or witness determines that swearing on the Qu'ran is the ceremony "most sacred and obligatory on [his or her] conscience[,]" 71 the party's decision should be respected under the common law principles articulated above. 72 The form of oath described in § 11-2 serves only as a default suggestion, 73 and a contrary interpretation by North Carolina judicial officials is at odds with centuries-old, well-established common law.

70. Id. at 42.
71. Id.
72. But see Jonathan Belcher, Note, Religion-Plus-Speech: The Constitutionality of Juror Oaths and Affirmations Under the First Amendment, 34 WM. & MARY L. REV 287, 329 (1992). The author argues that "expanding the oath to allow 'personalized' alternative forms of ensuring truthfulness is in direct opposition to the history of the oath," and the affirmation evolved as the sole means of accommodating parties who objected to swearing an oath. This argument appears to be at-odds with the well-settled rule in Omichund and the subsequent development of American common law.
73. This statement is in accord with other codified state and federal law. In Arkansas, for example, if a court is satisfied that the party to be sworn has a non-statutory mode of swearing in which is "more solemn and obligatory in the opinion of the person, the court . . . may adopt that mode of swearing. . . . Every person believing in any religion other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion . . . instead of any of the other modes . . . ." ARK. CODE ANN. § 16-2-101(d)-(e) (2005). Similarly, under the Federal Rules of Evidence, a witness is required to swear or affirm "in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to [testify truthfully]." FED. R. EVID. 603.
III. THE CONSTITUTIONALITY OF NORTH CAROLINA'S OATH STATUTE UNDER THE ESTABLISHMENT CLAUSE

A. Establishment Clause Jurisprudence

The early American debate over religious liberty came to a head in 1785 when the Virginia legislature considered renewing a tax designed to support the official church of the commonwealth. In his famous "Memorial and Remonstrance," James Madison, a major opponent of the tax, set out a compelling plea for religious neutrality. His arguments were later summarized by the Supreme Court: "[Madison] argued that a true religion did not need the support of law . . . ; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions." Madison's Remonstrance won the day and led to the enactment of the "Virginia Bill for Religious Liberty." Authored by Thomas Jefferson, the Act established "[t]hat no man shall be compelled to
frequent or support any religious worship, place, or ministry . . . nor shall otherwise suffer on account of his religious opinions or belief.\textsuperscript{79}

The Establishment Clause of the First Amendment\textsuperscript{80} embodies these principles.\textsuperscript{81} It mandates that "neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another."\textsuperscript{82} Courts originally interpreted the First Amendment as prohibiting government from exhibiting a preference among the various Christian sects; however, it was not thought to demand the same level of respect either for adherents of non-Christian faiths, including Islam, or for those who embraced no faith.\textsuperscript{83} With the development of Establishment Clause jurisprudence, however, the Supreme Court has "unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."\textsuperscript{84}

The Court has enunciated a variety of tests for applying the Establishment Clause to governmental action. The three-prong Lemon test from the 1971 case Lemon v. Kurtzman\textsuperscript{85} is the starting

\textsuperscript{79} Thomas Jefferson, Act For Establishing Religious Freedom, reprinted in JAMES MADISON ON RELIGIOUS LIBERTY, supra note 63, at 61.
\textsuperscript{80} U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") (emphasis added).
\textsuperscript{81} Everson, 330 U.S. at 11 ("It was these feelings [regarding the ills of religious persecution] which found expression in the First Amendment.").
\textsuperscript{82} Id. at 15.
\textsuperscript{83} See Wallace v. Jaffree, 472 U.S. 38, 52 (1985). The court noted:
At one time it was thought that [the right to refrain from accepting the creed established by the majority] merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.
\textsuperscript{84} Id. at 52.
\textsuperscript{85} 403 U.S. 602 (1971).
point for most Establishment Clause analyses. The *Lemon* test states: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an 'excessive government entanglement with religion.'" The Supreme Court has not strictly followed the *Lemon* test, but it has provided a rough framework for the Court to analyze religion cases. Justice O'Connor refined the *Lemon* test in her concurrence in *Lynch v. Donnelly*. She advocated for a two-prong "purpose-and-effect" endorsement analysis, later adopted by the Court in *County of Allegheny v. ACLU*, that examines both what the government intended to communicate and what message the government actually conveyed. This test suggests a context-based, objective approach to determining the constitutional validity of the action in question from the perspective of the reasonable observer.

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86. Id. at 612-13 (internal citations omitted).
87. See *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) ("[W]e have often found it useful to [rely on the *Lemon* factors] ... [b]ut, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."); *Hunt v. McNair*, 413 U.S. 734, 741 (1973) ("[The *Lemon* factors] are no more than helpful signposts . . . ."); *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971). In *Tilton*, the court stated:

Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper that can be used . . . . Instead, our analysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause.

Id. at 677-78; see also *Wallace*, 472 U.S. at 108-12 (Rehnquist, J., dissenting) (discussing the origins, alternatives to, and difficulties in application of the *Lemon* test).

88. 465 U.S. at 690-93 (O'Connor, J., concurring).
89. 492 U.S. 573, 595 (1989) ("Although Justice O'Connor joined the majority opinion in *Lynch*, she wrote a concurrence that . . . . provides a sound analytical framework for evaluating governmental use of religious symbols.").
91. See *id.* at 692 ("[The question is] what viewers may fairly understand to be the purpose of the [crèche] display . . . ."); see also *id.* at 694 ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.").
The Court has also analyzed Establishment Clause cases by asking if the government action in question coerces support or participation in religion or in a religious exercise. This is ostensibly an element of the "effect prong" of the *Lynch* endorsement inquiry. Government is forbidden from using coercion, whether direct or indirect, obvious or subtle, in an "attempt to employ the machinery of the State to enforce a religious orthodoxy." The presence of a coercive effect is also context-based and may vary depending on the setting and the person(s) allegedly injured by the coercion.

Finally, the Supreme Court has justified religiously-based government action by looking to the role of religion in our nation's history and tradition. The Court has construed the Establishment Clause "in light of the 'government policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage... [T]he meaning of the Clause is to be determined by reference to historical practices and understandings.' This test recognizes that some acknowledgment of religion by the government is permissible. Such acknowledgement may take the form of either state-sponsored religious symbols, such as the erection of a cèche on public grounds, or of ceremonial deism, a "class of public activity which

93. *Id.* at 592.
94. *See id.* at 592-93 (noting that concerns with government coercion are heightened in elementary and secondary public school settings where peer pressure increases the risk of coercion).
95. *Id.* at 631 (Scalia, J., dissenting) (quoting County of Allegheny v. ACLU, 492 U.S. 573, 657, 670 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)); *see Lynch*, 465 U.S. at 673 (stating that the Court's interpretation of the Establishment Clause should "comport[] with what history reveals was the contemporaneous understanding of its guarantees"); Marsh v. Chambers, 463 U.S. 783, 790 (1983) ("[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to practice[s] authorized by the First Congress - their actions reveal their intent.").
96. *See Lynch*, 465 U.S. at 680 (upholding the constitutionality of a city's Christmas display in part because the city was merely "tak[ing] note of a significant historical religious event long celebrated in the Western World").
could be accepted as so conventional and uncontroversial as to be constitutional." Examples of seemingly permissible ceremonial deism include: the national motto "In God We Trust" on currency, the reference to God in the Pledge of Allegiance, and the celebration of a national day of Thanksgiving. The Court has reconciled such governmental acts with their religious elements by holding that they are "protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content." 

B. Application of the Lemon Test to North Carolina's Oath Statute

While much of the United States Supreme Court’s Establishment Clause jurisprudence has produced inconsistent results, at least one principle is clear: neither the federal nor state...
governments may "assert[] a preference for one religious denomination or sect over others."\textsuperscript{101} This concept was at the core of the Framers' intent in crafting the First Amendment; according to Madison, any preferential establishment "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."\textsuperscript{102} The Court has recognized, however, that the prohibition on establishment does not demand a total prohibition on religious advancement. Some religious advancement may permissibly result from government action, as long as it is merely indirect, remote, or incidental.\textsuperscript{103} It is therefore necessary to determine whether North Carolina's oath statute produces only innocuous consequences or whether it impermissibly prefers the holy text of one religion over all others.

Given the 1985 amendments to the oath statute\textsuperscript{104} and the common law tradition of inclusiveness,\textsuperscript{105} it may be assumed arguendo that North Carolina could posit a legitimate secular purpose for its oath statute: to provide a means of ensuring truthful testimony and faithful jury service. Such a purpose would presumably satisfy the "purpose" prong of Justice O'Connor's refined \textit{Lemon} test, which examines the message that the government intends to communicate. However, this does not end the analysis; under the second prong of Justice O'Connor's test, a determination must be made as to whether the message North Carolina actually communicates is legitimate.

Even if the statute's purpose is not to advance Christianity, "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion jurisprudence). Professor Marshall notes that "[f]rom the outset, it has been painfully clear that logical consistency and establishment clause jurisprudence were to have little in common." \textit{Id.} at 495.

\textsuperscript{101} \textit{Wallace}, 472 U.S. at 113 (Rehnquist, J., dissenting).
\textsuperscript{102} Madison, A Memorial and Remonstrance, \textit{reprinted in James Madison on Religious Liberty, supra} note 63, at 58.
\textsuperscript{103} \textit{Lynch}, 465 U.S. at 683.
\textsuperscript{104} \textit{See supra} text accompanying notes 48-49.
\textsuperscript{105} \textit{See discussion supra} Parts II.A-B.
... by reason of the power conferred." Justice Brennan recognized this in his dissent in *Lynch v. Donnelly*, in which he argued that a city’s display of a crèche during the holiday season provided this exact type of significant symbolic benefit to Christianity because the “prestige of the government has been conferred on the beliefs associated with the crèche.” This governmental association in turn has a devastating effect on both non-adherents and non-believers. The government has proclaimed that their religious views are not entitled to the same level of respect as the view embraced by the government and therefore need not be publicly recognized or supported. Although the majority of the Court disagreed with Justice Brennan in that particular instance, the Court has consistently confirmed that by favoring one religion to the exclusion of others, the government sends an impermissible message to non-adherents “that they are outsiders, not full members of the political community,” while assuring adherents that “they are insiders, favored members . . .”

These impermissible messages, however, are similar to those sent by North Carolina’s oath statute to the state’s Islamic and Christian communities. The state’s interpretation of § 11-2 requires Muslims to use the Christian Bible if they desire to be sworn in on a religious text. The North Carolina political community will not treat Muslims as equals if they cannot “embrace the Christian Bible and the God envisioned therein.” At the same time, the power and prestige of the state are placed behind the Christian religious text, thereby providing a significant symbolic benefit to Christianity. These results suggest that the advancement of Christianity occasioned by § 11-2 is not insubstantial. In fact, although the Justices disagreed over the

108. *Id*.
111. *Id*.
degree of advancement resulting from the erection of the crèche in *Lynch*, the advancement in North Carolina appears to be greater. In North Carolina courts, any Muslim who wishes to swear on a religious text must swear on the Christian Bible. If such a rule were applied in the *Lynch* context, not only would the crèche stay in place, but any Muslim who wished to erect a celebratory religious display on public grounds would only be allowed to do so if he or she erected a crèche as well.

Commentators have warned that this type of state action would "wound the civil community by compelling the severance of religious minorities and thus fracturing the community." 113 Such a result has already followed in North Carolina, where Muslims have found it necessary to resort to the courts in order to establish their equality under state law. 114

C. Conclusion: North Carolina's Oath Statute is Unconstitutional

These outcomes demonstrate that even if North Carolina has a secular legislative purpose for its oath statute (i.e., the message it intends to communicate is legitimate), the message the

114. Consider the important perspective provided by the Fifth Circuit in *Meltzer v. Bd. Of Pub. Instruction of Orange County, Fla.*, 548 F.2d 559 (5th Cir. 1977). The question in that case was the constitutionality of distributing Christian Bibles to public schoolchildren. Framing the situation, the court considered the converse: "If the Gideons, instead of distributing the King James Bible had distributed the . . . Koran . . . through the school system of an area whose inhabitants were strongly Protestant, we surmise that the Protestant groups would feel a sectarian resentment against the actions of the school authorities." *Id.* at 575 (quoting Brown v. Orange County Bd. of Pub. Instruction, 128 So.2d 181 (Fla. Dist. Ct. App. 1960)). For consideration of an interesting hypothetical situation in which Muslims comprise the majority population in the United States by the beginning of the twenty-second century, see Epstein, *supra* note 41, at 2083-85. In this future society, oaths are sworn on the Koran, and the national motto is "In Allah We Trust." *Id.* at 2084-85. Professor Epstein states that such practices, which seem like obvious First Amendment violations in this context, have been erroneously upheld by the Supreme Court in the context of our predominantly Christian society. *Id.* at 2085.
state actually communicates is unacceptable under the second prong of Justice O'Connor's refined *Lemon* analysis. As interpreted by judicial officials, § 11-2 violates the Establishment Clause by preferring the holy text of one religion to the exclusion of others. The state impermissibly confers a privileged status on Christianity, while at the same time singles out a bona fide faith for disadvantageous treatment. Once the state's religious preference is declared, the opportunity to affirm rather than to swear on a Christian Bible may be of little consolation to the minority adherent whose religious beliefs have been disrespected. Providing the option to affirm merely serves to run-around the illegality of § 11-2, and the constitutional violation remains uncured. The ultimate result in North Carolina may be that the injured juror or witness becomes "more likely to doubt the legitimacy of law itself."

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117. HALL, supra note 113, at 158. While the current focus of the injury to the non-adherent has centered on the courtroom setting, the denial of religious respect has broader implications. If a non-adherent cannot be allowed to swear on the religious text of his or her choice, he or she will also be precluded from doing so when taking the oath of any public office. Shaw recognized that this would constitute a test oath "which is wholly repugnant to the tolerant and enlightened spirit of our institutions and of the age in which we live." Shaw v. Moore, 49 N.C. 37, 43 (1856). As suggested above, the availability of the option to affirm under § 11-4 does not solve this constitutional problem, but merely provides a run-around the test oath as a precursor to holding office. For those who wish to take their oath of office upon a set of Holy Scriptures other than the Christian Bible, the constitutional violation still exists. But cf. Belcher, supra note 72, at 301 (distinguishing test oaths from juror oaths and affirmations because "[a] test oath asks one to swear to a belief in God, whereas a juror oath merely asks the juror to uphold the law and try the case fairly"). This may be definitionally true, but it ignores the message of endorsement by the state that a juror must agree with in order to exercise his or her right to be sworn on a religious text under § 11-2.
IV. THE CONSTITUTIONALITY OF RELIGIOUS COURTROOM OATHS GENERALLY UNDER THE ESTABLISHMENT CLAUSE

Although the Supreme Court has suggested in dicta that an optional religious oath is a permissible type of ceremonial deism, it has never undertaken a thorough analysis of the practice. Most courts and commentators considering the issue have only touched on it tangentially, and those that have upheld or supported the practice usually perform a three-part analysis: they (1) assign curative power to the existence of an affirmation option, (2) find that the religious option has no coercive effect upon jurors and witnesses when allowed in conjunction with the affirmation option, and (3) undertake a very basic historical investigation. This section will conduct a more thorough review of the religious oath and its interplay with the nonreligious affirmation, and determine whether these courts and commentators are correct in finding that courtroom oaths pass the various Establishment Clause tests.

A. Revisiting the Oath

The oath’s religious and secular elements originally worked in conjunction with each other to function properly. Their

118. See Zorach v. Clauson, 343 U.S. 306, 312-13 (1952) (noting that the First Amendment “does not say that in every and all respects there shall be a separation of Church and State.”). If the rule were rigid, according to the Court, “so help me God’ in our courtroom oaths . . . and other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment.”).

119. See, e.g., Oliver v. State Tax Comm’n of Mo., 37 S.W.3d 243, 245 (Mo. 2001) (“Because the statute allows [plaintiff] the option to ‘affirm’ rather than to swear . . . the statute is Constitutional.”).

120. See, e.g., Belcher, supra note 72, at 326-27 (“[T]he government cannot compel a witness or juror to swear an oath that refers to God. However, this problem is remedied and no such compulsion is present if a nonreligious affirmation is available as an alternative.”).

121. See, e.g., id. at 297-98 (“The fact that the Constitution repeatedly requires oaths or affirmations indicates that the Framers thought both were constitutional.”).

122. See supra text accompanying notes 39-40.
purposes were intertwined; society believed that truthfulness could only be absolutely guaranteed by a threat of supernatural punishment. This belief changed with the advent of perjury laws and the existence of an affirmation option. No longer did society recognize the religious oath as the sole means of guaranteeing truthfulness. Rather, truthfulness could also be guaranteed by affirmation, temporal punishment, and criminal law:

[Modern legislators, judges, and attorneys think of the oath merely as a form to be gone through by the witness, for the purpose of notifying him that from the moment he subscribes to it his words become of great importance because they are spoken upon a judicial occasion when the rights of others depend upon them – that he is expected to tell the truth without equivocation or concealment – that should he fail to do so, his words will probably be shown to be false by cross-examination and that in case of detection, punishment for perjury awaits him – a promise is also exacted from the witness, to which, if he be an honorable man . . . he will strictly adhere. All this the affirmation accomplishes.

The religious purpose became a separate, distinct element of the oath, to be used at the election of the swearer as a supplemental layer of assurance of the truth of his or her testimony. North Carolina courts recognized, for example, that the law required a two-fold guarantee of truthfulness from a witness: “[H]e must be in the fear of punishment by the laws of man, and he must also be in the fear of punishment by the laws of God, if he states what is false . . . .”

The religious and secular elements of the oath now act as two separate means to achieve the same outcome – ensuring
truthfulness – rather than working together as the sole means of achieving this objective. The necessary starting point for Establishment Clause analysis is to determine whether it is constitutionally permissible to use a religious means to promote the secular purpose of securing truth and fair judgment, when such a purpose is equally achievable by using an affirmation.\(^{127}\)

**B. Purpose Prong: Achieving a Secular Purpose through Religious Means**

In *Abington v. Schempp*,\(^ {128}\) the United States Supreme Court considered a Pennsylvania statute that required daily Bible reading in public schools. Under the statute, ten Bible verses would be read every morning, but individual students could be excused from the exercise with a written request from a parent.\(^ {129}\) The state offered a plethora of secular purposes for the statute, including “the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions, and the teaching of literature.”\(^ {130}\) Thus, the Court was faced with a situation

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\(^{127}\) In the following Establishment Clause discussion, the entanglement analysis (*see supra* text accompanying notes 85-86) is minor and is not dispositive in the case of oath statutes. However, it does merit brief attention. The entanglement at issue here does not involve government acting in conjunction with religious officials; rather, it involves an administrative problem in ensuring that all citizens have the opportunity to swear in the manner they deem most appropriate. *See Lynch v. Donnelly*, 465 U.S. 668, 702 (1984) (Brennan, J., dissenting). If, under the Establishment Clause, a juror or witness must be allowed to select his or her own religious text for the oath ceremony (*see discussion *supra* Parts III.B-C), “non-Christian groups . . . can be expected to press government for inclusion of their symbols, and faced with such requests, government will have to become involved in accommodating the various demands.” *Lynch*, 465 U.S. at 702 (Brennan, J., dissenting). This has already taken place in North Carolina, where the courts have become involved in accommodating (or refusing to accommodate) the demands made by Muslim jurors and witnesses, as well as prominent Islamic groups in the community. *See supra* text accompanying notes 1-3.


\(^{129}\) *Id.* at 205.

\(^{130}\) *Id.* at 223.
in which a state was using a religious means to promote secular goals.

The Court struck down the statute as unconstitutional and in doing so, made three critical findings. First, it found that even if the state’s purpose in passing the statute was not strictly religious, it was accomplished through an instrument of religion.\(^\text{131}\) Second, the state itself recognized that its statute had a pervading religious character because it allowed students to be excused from the exercises with parental consent.\(^\text{132}\) Third, these two facts were inconsistent with the state’s argument that the Bible was used merely for the secular teaching of literature or for nonreligious moral inspiration.\(^\text{133}\) Based on these findings, the Court held that the statute required a religious exercise in violation of the Establishment Clause.\(^\text{134}\) Further, the violation could not be cured merely because students were permitted to be excused from the exercise.\(^\text{135}\) The Constitution thus “enjoins those involvements of religious with secular institutions which . . . use essentially religious means to serve governmental ends where secular means would suffice.”\(^\text{136}\)

There is a striking similarity between the Pennsylvania statute in Abington and statutes that require a religious courtroom oath. If a state’s oath statute were challenged on Establishment Clause grounds, the state would likely assert the secular purpose of ensuring truthfulness and fair judgment. Such an assertion, however, would fail under Abington based on the same three

131. \textit{Id.} at 224.
132. \textit{Id.}
133. \textit{Id.}
134. \textit{Id.}
135. \textit{Id.} at 224-25 (noting that the constitutional violation is not “mitigated by the fact that individual students may absent themselves . . . for that fact furnishes no defense to a claim of unconstitutionality”); \textit{see also} Engel v. Vitale, 370 U.S. 421, 430 (1962) (holding that the fact that participation in a public school prayer is voluntary does not “serve to free it from the limitations of the Establishment Clause,” which “does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not”).
findings the Court found persuasive, as noted above. First, even if the state’s purpose is not strictly religious, it is being accomplished through the use of an instrument of religion. Second, the states which still have oath statutes recognize the religious nature of the swearing ceremony because they all allow the juror or witness to be “excused,” i.e., he or she may affirm rather than swear. Third, these facts are inconsistent with the state’s argument that the Bible is used merely for the secular security of truth and fair judgment. Under Abington, then, it appears that the oath statute requires a religious exercise in violation of the Establishment Clause, and that this violation may not be cured by the existence of an option to affirm.

Indeed, the Abington principle has been held applicable in situations where a statutory scheme provides both a religious and a secular means of achieving the same goal. The Court was presented with such a scheme in Wallace v. Jaffree. Alabama enacted two related statutes concerning a moment of silence in public schools. The first statute authorized a one-minute period of silence for meditation, and the second authorized a period of silence for either meditation or voluntary prayer. While the Court recognized that a student has a right to engage in voluntary prayer at school, it also held that this right was fully protected by the first statute. Further, the second statute served no secular purpose that was not fully served by the first. According to the Court, only two possible conclusions could be drawn from this finding, neither of which were acceptable: either “the statute was enacted to convey a message of state endorsement and promotion of prayer; or [] the statute was enacted for no purpose.”

Likewise, it is difficult to posit a secular purpose served by an oath statute that is not fully served by the affirmation statute. By allowing an affirmation option, a state recognizes that its interests in securing guarantees from jurors and witnesses are

137. See infra note 213 and accompanying text.
139. Id. at 40.
140. Id. at 59.
141. Id.
142. Id.
adequately served by the affirmation statute. Under the reasoning in Wallace, only two conclusions could be drawn from the adjacent oath statute. The first – the statute was enacted for no purpose – is easily disposed, considering the history of oaths and the reasons for their adoption. The remaining conclusion, that the modern purpose of the oath statute is to convey a message of state endorsement and promotion of divine invocation in the courtroom, must therefore be true.

The Supreme Court recently applied this principle in McCreary v. ACLU, which involved two Kentucky counties posting the Ten Commandments in their courthouses. The ACLU filed suit, and the counties responded by posting displays entitled “The Foundations of American Law and Government,” which included the Magna Carta, Declaration of Independence, Bill of Rights, the national motto “In God We Trust,” and a version of the Ten Commandments with more emphasis placed on the religious language contained therein.

In addressing the constitutionality of these displays, the Court conducted a Lemon analysis. It relied on a “reasonable observer” standard to determine whether the government action had a predominantly religious purpose. While the Court noted that the government was owed some deference, its posited secular purpose must nevertheless “be genuine, not a sham, and not merely secondary to a religious objective.” Further, in the companion case to McCreary, the Court stressed that while the Ten Commandments have a clear religious message, this fact is not conclusive. Rather, the message conveyed by the Commandments must be determined by examining context and by evaluating “how the text is used.”

143. See discussion supra Parts II.A and IV.A.
144. 125 S. Ct. 2722 (2005).
145. Id. at 2728.
146. Id. at 2731.
147. Id. at 2732.
149. McCreary, 125 S. Ct. at 2734.
150. Id. at 2735.
The context of the Commandments display suggested that it had been modified by adding other documents only to appease those who found it offensive. As a result, the Court found that the only conclusion to be drawn by the reasonable observer was that the county's purpose was to "emphasize and celebrate the Commandments' religious message," and that the display had been modified only to allow the religious document to remain, while complying with the constitutional requirement of religious neutrality.

In the context of religious oaths, the reasonable observer test appears equally dispositive. While courtroom oaths may originally have had an interwoven secular and religious purpose, the affirmation option makes the oath's religious purpose distinct from its secular one. Thus, where the use of a religious text is justified based on a supposed secular purpose already accomplished through affirmation, "the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view."

ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 595 (1989) ("[T]he question is 'what viewers may fairly understand to be the purpose of the display.' That inquiry, of necessity, turns upon the context in which the contested object appears . . . .") (quoting Lynch, 465 U.S. at 692 (O'Connor, J., concurring)).

152. McCreary, 125 S. Ct. at 2738.
153. Id. at 2741.
154. See supra text accompanying notes 39-40.
156. McCreary, 125 S. Ct. at 2738. Indeed, it has repeatedly been recognized that claiming a chiefly secular purpose for a religious activity is an insult to the individuals to whom the practice – here, swearing in a religious text – is a deeply religious act. See Marsh v. Chambers, 463 U.S. 783, 797-98 (1983) (Brennan, J., dissenting) ("[T]o claim a secular purpose for [legislative] prayer is an insult to the perfectly honorable individuals who instituted and continue the practice."); see also Lee v. Weisman, 505 U.S. 577, 594 (1992) (holding that, in response to a claim that a prayer offered at a high school graduation was merely a minimal religious intrusion, "the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers . . . are of a de minimis character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority.") (emphasis in original). Further, claiming a secular purpose for a Bible oath can be said to degrade religion by allowing a religious call for God to bear witness to be
In *McCreary*, context suggested that the only reasonable explanation of government purpose for the "Foundations of American Law" display was the counties' desire to display religious objects in their courts while still purporting to embrace religious neutrality. Likewise, in taking an oath, a reasonable observer might suspect that a state crafted its oath-or-affirmation statutory solution merely to preserve the use of religious texts in courts while using an "opt-out" to satisfy the constitutional demand of religious neutrality. Under *McCreary*, this constitutes a "sham" purpose to support an oath statute. The religious purpose supersedes the secular purpose, and the statute is unconstitutional.

What, then, are the secular arguments for retaining the oath? One commentator suggests that the oath should remain in effect because statistics show that more people choose to swear an oath than to affirm. However, the coercive effect of the swearing process may be largely accountable for this statistical fact, and an Establishment Clause challenge will not fail merely because a majority of the population engages in the challenged activity. Another argument for retaining the oath is that "removing one of the barriers to falsehood [would] encourage false testimony and tend materially to lessen the confidence of the public in the administration of justice." The existence of perjury penalties weakens this argument, and further, it is nothing more than an unwarranted, albeit expected, fear that naturally arises in response to a proposed change to a long-standing tradition. A final argument for retention of the oath is to appease the "large class of

entangled with a secular call to tell the truth. *See Marsh* 463 U.S. at 808 (1983) (Brennan, J., dissenting) ("Legislative prayer . . . has the potential for degrading religion by allowing a religious call to worship to be intermeshed with a secular call to order."). *But cf.* Belcher, *supra* note 72, at 301 ("The fact that juror oaths may contain the words 'solemnly swear' and 'So help me God' does not amount to a requirement of belief in God.").

157. *See also* Epstein, *supra* note 41, at 2146 (agreeing that a reasonable viewer could only conclude that Bible use in the courtroom signifies the government's support for and approval of the text).


159. *See* discussion *infra* Part IV.C.


161. *Id.*
persons who . . . still believe that there is some special punishment reserved for those who violate an oath, other than that which would be suffered by one who tells an untruth . . . when testifying upon affirmation. While such a class may exist, it would seem fundamentally at odds with the Establishment Clause to allow a state to enact a statute with the purpose of securing an afterlife reward for those who abide by its commands or an afterlife punishment for those who violate them.

It appears uncertain, and perhaps unlikely, that a state could posit a valid secular purpose to support its oath statute. The question remains whether the message actually conveyed by the state could satisfy the second prong of Justice O’Connor’s refined Lemon test.

C. Effects Prong: Coercion in the Swearing Process

John Sidoti knows all too well the problems that can arise out of religious courtroom oaths. His troubles began when he appeared as a defendant in small claims court. The long-time North Carolina resident chose to affirm, rather than to swear, before providing his testimony. Mr. Sidoti recalls the events that followed:

The plaintiff badgered me continuously about not putting my hand on the Bible and swearing before I took the stand. He said I was going to lie and I was afraid of what was going to happen to me as a result. He bragged about how he wasn’t afraid to put his hand on the Bible. I had to keep asking the Magistrate to reprimand him for bringing this issue up, since I had affirmed and the court had accepted this as evidence that I would be telling the truth.

Unfortunately for Mr. Sidoti, this was not merely an isolated incident. He later appeared as a plaintiff in a civil case and again asked to affirm. The judge asked Mr. Sidoti to raise his right

162. Id. at 431-32.
163. The following anecdotes were told to the author in: Email from John Sidoti to Dan Blau (Nov. 7, 2005, 22:52:56 EST) (on file with author).
hand, and he informed the judge that he could not do this as part of his affirmation, as it connoted recognition of a God. The judge “cocked her head to the side and stared at me as if to say I was weird,” Mr. Sidoti recalls. He lost the case and felt that he “might have been discriminated against because I had embarrassed and challenged the judge’s belief system.”

Having concluded that he simply could not be victorious in court if he affirmed, Mr. Sidoti “decided to go against [his] principles and do as everyone else and swear.” He immediately regretted this choice of action. After another appearance in court in which he swore, Mr. Sidoti became upset because “I felt that I was swearing to a god that I did not believe in, and ironically and paradoxically, was swearing that I wouldn’t tell a lie!” Both affirming and swearing were now untenable options.

In the summer of 2005, Mr. Sidoti received a summons for jury duty in Transylvania County, North Carolina. He was honored and excited to perform his civic duty, though he was wary knowing that he would again need to be sworn. At the courthouse, the judge greeted Mr. Sidoti and his fellow potential jurors while the clerk of court began lining up Bibles on the rail at the front of the courtroom. The jury pool was called down to the rail and, one row at a time, swore their juror oath on the Bibles. When Mr. Sidoti’s row was called, he informed the clerk that he wanted to affirm. The clerk turned to the judge and shouted, “[w]e have one who wants to affirm!” The judge shouted back to the clerk, instructing her to swear the others, and to save Mr. Sidoti for last. Once again, Mr. Sidoti was singled out for exercising his right to affirm. He recalls:

On my drive home I was very depressed and embarrassed that I had [been singled out], and that the court had not explained to anyone that affirming, rather than swearing, was an option. In fact, from all appearances, the way the Bibles were methodically laid out as if by rote, [suggested that] this was the only way to become a juror. At least if affirmation were stated by the court as an option, that would have given my act some credibility and [would not have made] me feel like the only outsider
to be on the jury. I began wondering [if the 
other jurors] would be biased against me now 
. . . [and how they] would consider my views in 
a jury room now that [they] knew I was not 
mainstream.

The case never went to trial, so Mr. Sidoti was not able to 
discern the effect his affirmation had on his fellow jurors. His 
experiences, however, demonstrate one of the fundamental 
constitutional difficulties regarding religious courtroom oaths.

To the framers, noncoercion was the cornerstone of the 
notion of separation of church and state. Jefferson's insistence 
that "no man shall be compelled to frequent or support any 
religious worship" has long been celebrated by the Supreme 
Court. In *Lee v. Weisman,* for example, the Court held 
unconstitutional a prayer at a public high school graduation 
ceremony for fear that students would be coerced into participating 
in the prayer. The Court stated that at the very least, the 
Establishment Clause prohibits the government from coercing 
support for, or participation in, any religious exercise. Coercion 
need not be direct in order for a government action to be 
unconstitutional: "When the power, prestige, and financial support 
of government is placed behind a particular religious belief, the 
indirect coercive pressure upon religious minorities to conform to 
the prevailing officially approved religion is plain." 

Courts and scholars who have examined the coercive effects 
of religious courtroom oaths under existing state statutes have 
generally concluded that no coercion exists if a juror or witness is 
allowed to affirm rather than to swear. This is true in the sense

164. *See supra* text accompanying notes 79-80.
165. *See supra* note 79 and accompanying text.
167. *Id.* at 587.
169. *See, e.g., People v. Velarde,* 616 P.2d 104, 106 (Colo. 1980) (en banc) 
("It is not a violation of the first amendment establishment clause to require 
jurors either to take an oath or to affirm.") (emphasis in original); *Pierce v. 
Commonwealth,* 408 S.W.2d 187, 188 (Ky. 1966) (upholding a juror oath 
containing the words “so help me God” because “any person, including a 
juror, has the privilege of substituting an affirmation for an oath.”); *Jones v.*
that, by allowing an affirmation option, the government cannot disqualify or hold in contempt a witness or juror for declining to swear on a religious text. However, this conclusion is too narrow, as it considers only direct compulsion, ignores Lee's charge to examine indirect compulsion and therefore misunderstands the true nature of the coercion at play. A broader analysis reveals the presence of indirectly coercive forces, which are demonstrated by considering the plight of both the non-believing or non-Christian juror and witness.

We begin with the non-believing juror. The juror may simply affirm his or her promise to judge fairly and is not required to swear on a religious text. However, the affirming party is then put in the difficult position of having to "publicly declare her disbelief in front of (and with the likely perception of disapproval of) a judge and her fellow citizens." If he or she chooses to affirm, the government has essentially coerced a "confession of nonbelief" from the party. Rather than endure the actual or perceived disapproval of those present, the juror may instead choose to swear on the Bible and is thus coerced to swear a belief in a God he or she does not worship. This situation is especially likely when judicial officials simply present the juror with a Bible without informing the juror of his or her statutory options. The non-believing juror, not wanting to cause a stir, must make an on-the-spot decision whether to protest or to obey. The state may statutorily allow the juror an "out," but by withholding this information and presenting the juror with a Bible, it substantially burdens the juror's ability to exercise his or her statutory right to affirm.

State, 585 P.2d 1340, 1341 (Nev. 1978) (per curiam) ("Where an affirmation is permitted in lieu of an oath, a juror's freedom of religion is not violated."); Belcher, supra note 72, at 326-27 ("[T]he government cannot compel a witness or juror to swear an oath that refers to God. However, this problem is remedied and no such compulsion is present if a nonreligious affirmation is available as an alternative."); cf. Nicholson v. Bd. of Comm'rs, 338 F. Supp. 48 (M.D. Ala. 1972) (finding unconstitutional a state law that required an oath to include the words "so help me God," but did not permit the option to affirm).

170. Epstein, supra note 41, at 2147.
171. Id.
Even a non-believing juror who may otherwise be willing to reveal his or her non-belief may feel coerced to swear on the Bible for fear that his or her opinion will not be respected by the other jurors. This concern is especially heightened when every other juror takes a Bible oath without apparent reservation, and the nonbeliever must either do the same or be singled out for his or her desire to affirm.

Turning to the non-believing or non-Christian witness, a new set of problems and coercive pressures arise during the oath ceremony. Like the juror, the witness must either publicly reveal his or her non-belief or swear to a God that he or she does not recognize. Just as the juror feels compelled to swear in order to maintain credibility with his or her peers, the witness feels compelled to swear on the Bible so that the jury will believe and give proper weight to his or her testimony. This coercion is especially problematic when a defendant testifies on his or her own behalf, for his or her own fate is at stake when the bailiff approaches with a Bible. If every witness for the prosecution, for example, has sworn on the Bible, the defendant may perceive the need to endure "spiritual pollution" in order to ensure favor with the jury.

The non-believing or non-Christian witness has four equally untenable choices when faced with this type of coercion. First, the witness may affirm and endure the resulting actual or perceived prejudicial effect of this in the minds of the jury. After choosing this option, for example, John Sidoti noted that he "could not help [but] feel that as a result of my action I wouldn't get a fair and impartial hearing. Whether or not this is true or only perceived by me makes no difference . . . ." Second, the non-Christian witness

172. See HALL, supra note 113, at 158 (arguing that "civic religious exercises force religious minorities to sever civil communion to avoid spiritual pollution").

173. See Elizabeth A. Brooks, Note, Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Arguments, 33 GA. L. REV. 1113, 1115-16 (1999) (suggesting that even if a witness or defendant chooses to affirm, he or she may still ingratiate his or herself with the jury simply by carrying a Bible into court).

174. Email from John Sidoti to Dan Blau, supra note 163; see Lee v. Weisman, 505 U.S. 577, 593 (1992) ("[F]or the dissenter . . . who has a
may swear on his or her own religious text and again endure the actual or perceived prejudicial effect of this action in the minds of the jury. This could implicate a criminal defendant’s Sixth Amendment\textsuperscript{175} right to an impartial jury if significant jury bias results. In the post-September 11 world, for example, an Islamic defendant will be acutely aware of the fact that he or she may greatly damage his or her testimony by exercising the right to swear an oath to Allah on the Qu’ran.\textsuperscript{176} Further, religious prejudice in America does not start and end with Islam; any nonconventional religious adherent, such as a Wiccan or Satanist, may face similar difficulties on the witness stand.\textsuperscript{177} The witness’ third option would be to yield to the coercive pressure and swear in on the Bible. Regardless of the state’s actual intent, it impermissibly forces a defendant to choose between ensuring a fair trial and adhering to his or her own non-Christian religious beliefs. As was the case with

reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is . . . real.

175. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . . ”).


177. Even Ms. Rudinger, the executive director of the ACLU-NC, has acknowledged that although a defendant may have a right to swear in on a Satanist text, “[i]f I were an attorney who had a witness who wanted to, I might ask my witness to choose another option.” Radio Interview by Donna Martinez, \textit{supra} note 2. \textit{Cf.}, e.g., Flanagan v. State, 109 Nev. 50 (1993) (holding unconstitutional a prosecutor’s effort to prove a criminal defendant’s bad character by introducing evidence that he was a Satanist, because such beliefs, though offensive to many, were protected by the First Amendment).
John Sidoti, choosing the former option can have deleterious ethical and emotional consequences for the swearing party. Finally, a non-believing witness who does not care whether he or she affirms or swears may recognize that his or her testimony might actually be enhanced by swearing on the Bible, and may "deceptively" swear an oath to a God in which he or she does not believe. The witness is using the oath in a "deliberate attempt[] to destroy the objectivity and impartiality" of juries, causing the 'verdict to be a product of the emotion rather than reflective judgment.'

Skeptics of the coercion argument argue that the types of coercive pressures present in Lee are absent in oath ceremonies. In Lee, the Court found that indirect coercive pressures were at work because of the setting in which the religious exercise took place: a high school graduation ceremony. The Court noted that teenagers, especially sensitive to peer pressure in social situations, were more likely to be coerced into conformity and participation in the religious exercise. In contrast, in Marsh v. Chambers, the Court found that adults are "presumably not readily susceptible to 'religious indoctrination' . . . or peer pressure."

The inquiry, however, cannot end upon such generalized assumptions. A closer reading of Lee suggests that the same factors rendering the graduation prayer coercive also exist in the courtroom context. In Lee, the Court stressed that a dissenter may not be forced to choose between participating in a religious

178. See supra text accompanying note 163.
181. Id.
183. Id. at 792.
184. See id. at 798 (Brennan, J., dissenting). Justice Brennan disagreed with the majority's seemingly per se rule regarding adult coercion, finding "uncertain[ty] as to whether it is even factually correct." Id. at 798 n.5.
185. See Epstein, supra note 41, at 2147.
exercise or protesting. Due to the unique type of peer pressure in a high school setting, a teenage student will be more likely to participate. The government will then have succeeded in using social pressure to indirectly enforce a religious orthodoxy. These concerns are equally present in the courtroom setting. While an adult juror or witness may be less susceptible to religious indoctrination, the pressure to conform is greatly increased when it takes place in a courtroom. For a witness who commands the attention of the judge, court officials, parties to the litigation, the general public, and most importantly, a jury of his or her peers, the social pressure to swear a religious oath may be overwhelming. The power and prestige of the courtroom places the same type of indirect coercive pressure upon jurors and witnesses as does a high school graduation for students.

The Court in _Lee_ undertook this type of contextual analysis when distinguishing the case from _Marsh_. There, the Court upheld a prayer at the beginning of a legislative session, finding that coercive pressures were absent in this long-practiced tradition. _Lee_ distinguished the high school graduation context based on two important findings. First, in the legislature, adults could come and go as they pleased and were not subject to the potential pressures of a fundamentally important graduation ceremony. Thus, "[t]he influence and force of a formal exercise in a school graduation are far greater than the prayer exercise [the Court] condoned in _Marsh_." Second, unlike the legislature in _Marsh_, the school officials at the high school graduation in _Lee_ "retain[ed] a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students. . . . [T]he student was left with no alternative but to submit." These two findings by the Court weigh heavily towards the existence of a coercive pressure in the courtroom. In court,

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186. _Lee_, 505 U.S. at 593.
187. _Id._ at 593-94.
189. _Marsh_, 463 U.S. at 792.
190. _Lee_, 505 U.S. at 597.
191. _Id._
192. _Id._
adults do not enter and leave without comment and for any reason; rather, the entire focus of the court, jury, and observers is on the witness. The court retains a high degree of control over the timing of the proceedings, the content of the litigation, and the decorum of the participants. A trial is thus a formal exercise with more coercive potential than a legislative prayer session, and possesses at least as much potential to coerce as a high school graduation exercise. Jurors and witnesses may perceive that they are left with no alternative but to submit to such coercive pressures.

D. Historical Analysis: A Trend Towards Removal of Religion from Courtrooms

The Supreme Court has held that the Establishment Clause does not erect an impenetrable wall between church and state, as such an interpretation "would undermine the ultimate constitutional objective as illuminated by history." A challenged government action must therefore be examined in light of historical practice and understanding, including long-standing "[g]overnment policies of accommodation, acknowledgment, and support for religion." In Marsh, for example, the Court found that the practice of opening a legislative session with a prayer has survived since colonial times and "has coexisted with the principles of disestablishment and religious freedom." Oaths of office and prayers opening judicial proceedings are also presumed to be constitutional in light of historical tradition.

193. Id.
195. Id. at 673.
198. See, e.g., Sch. Dist. of Abington Twp., Pa., v. Schempp, 374 U.S. 203, 213 (1963). This Note should not be read to suggest that oaths of office fail Establishment Clause analysis. It does not consider this issue in depth, but does note that many of the specific coercive pressures exerted upon jurors and witnesses are not present during a ceremony in which an elected official swears an oath of office. In such situations, the official will presumably exert a certain amount of control over his or her own ceremony. Further, having
At first glance, it would seem reasonable to suggest that religious judicial oaths satisfy the “historical practice” test simply because they were widely accepted and implemented throughout history, including in America at the time of her founding. While a tradition such as the court oath may be entitled to constitutional deference, the Supreme Court has nonetheless made it clear that “no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.”

The Supreme Court recently affirmed that the mere existence of a practice at the time of the founding does not itself render that activity constitutional. The “argument for . . . original understanding,” noted the Court in McCreary, “is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed . . . . The historical record . . . is complicated.” For example, while the recognition of a national day of Thanksgiving to God was first proclaimed by George Washington and continues to be celebrated today, Thomas Jefferson, one of the foremost proponents of religious liberty at the time of the founding, believed that Thanksgiving proclamations were unconstitutional. Based on this and other examples of the Founders’ disagreement over the proper degree of separation between church and state, the McCreary Court concluded that “[t]he fair inference is that there was no common understanding about the limits of the establishment prohibition.”

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already been elected, the swearer's religious beliefs are presumably not subject to the same amount of actual or perceived prejudice by those observing the event.


200. See McCreary County v. ACLU of Ky., 125 S. Ct. at 2722, 2744 (2005).

201. Id. at 2743-44.

202. Id. at 2744 (citing Letter from T. Jefferson to S. Miller (Jan. 23, 1808), in 5 THE FOUNDERS’ CONSTITUTION, at 98 (P. Kurland & R. Lerner eds., 1987)).

203. McCreary, 125 S. Ct. at 2744.
In addition, modern America is a more religiously pluralistic society than it was at the time of the founding. Increased religious diversity raises a need to reevaluate historical practices based on contemporary norms. Even practices that enjoyed the full support of the Founders may be considered offensive and constitutionally unacceptable in modern times.

A number of developments in the past centuries of the Anglo-American legal tradition have changed the nature of the judicial oath and hence, its necessity. First, the advent of perjury laws represented society's recognition that relying on the threat of supernatural punishment for false swearing did not alone guarantee truthfulness. Some imposition of temporal punishment was necessary to secure this guarantee. Various factors may have contributed to this, including recognition that witnesses often lied after swearing their oaths, or doubt that the perjurer would ever receive supernatural punishment. As society's trust in the oath to serve its intended purposes waned, so too did society's belief in its necessity. Further, with the Omichund decision, there came a recognition that the form of the oath, or the God to whom it was directed, was of no import, so long as it impressed upon the witness the duty to tell the truth. Finally, allowing an affirmation option made the oath a purely individual exercise. Those who chose to wager their afterlife on their testimony were free to do so. As for those who did not, society no longer needed to demand this because it had an even greater method of ensuring truthfulness - temporal punishment for perjury. The secular goals of the oath were accomplished in their entirety by the affirmation.

205. Id. at 240-41 (Brennan, J., concurring) (“[O]ur interpretation of the First Amendment must necessarily be responsive to the much more highly charged nature of religious questions in contemporary society.”).
206. White, supra note 21, at 419.
207. Id.
208. Id.
210. White, supra note 21, at 426-27.
Legal scholars have debated the idea that religious oaths are no longer necessary or useful since the start of the nineteenth century.\textsuperscript{211} Trends in the states' oath statutes reflect this debate, specifically regarding both the inclusion of the religious language in such statutes as well as the use of the Bible in administering an oath.\textsuperscript{212} Like North Carolina, every state has a statute or rule allowing a person to affirm rather than to recite a religious oath.\textsuperscript{213} Most states still contain references to God or other religious language in their oath statutes, but for the most part, these are relatively minor, such as using the phrase "so help you God"\textsuperscript{214} as a postscript. Only eight states require the swearer to raise the right hand,\textsuperscript{215} a vestige of the early form of swearing an oath which included raising a hand towards heaven,\textsuperscript{216} and only seven states require as their "default" option that the swearer actually lay his or her hands upon or kiss the Bible.\textsuperscript{217} At least one of these states,

\begin{itemize}
  \item \textsuperscript{211}Id. at 427.
  \item \textsuperscript{212}See, e.g., supra text accompanying notes 45-49 (providing a discussion of the changing language of North Carolina's oath statute).
  \item \textsuperscript{213}See, e.g., N.C. GEN. STAT. § 11-4 ("When a person to be sworn shall have conscientious scruples against taking an oath . . . he shall be permitted to be affirmed . . . [T]he word 'affirm' shall be substituted for the word 'swear' and the words 'so help me God' shall be deleted.").
  \item \textsuperscript{215}See, e.g., CONN. GEN. STAT. § 1-22 (2004) ("The ceremony to be used, by persons to whom an oath is administered, shall be the holding up of the right hand . . . ."). Other states requiring a raised hand include Mass., Mich., Minn., N.H., Or., Wis., and Wyo.
  \item \textsuperscript{216}See supra text accompanying note 34.
  \item \textsuperscript{217}See, e.g., DEL C. tit. 10, § 5321 (2005) ("The usual oath . . . shall be by swearing upon the Holy Evangels of Almighty God."). Other states requiring the use of a Bible include Ark., Kan., N.J., N.C., Pa., and Va. Two additional states, S.C. and Ill., have statutes that suggest that a Bible oath is allowable, but is not required by law. See, e.g., S.C. CODE ANN. § 14-7-1130 (2004) ("[A]ffirmation . . . must be held as valid and effectual as if the person had taken an oath on the Holy Bible.").
\end{itemize}
North Carolina, has recently amended its oath statute by removing some of the religious language present therein.\(^{218}\) It also comes as no surprise that of the seven states that still use Bible swearing, five are among the original thirteen colonies, which were more likely to import this English tradition into their state law. Thus, since the 1790s, the large majority of states have either never required that a Bible be used when administering an oath or have since removed the Bible oath requirement from their statutes. This fact may also be reflective of a larger trend to remove religious objects and references from American courts.\(^{219}\)

**CONCLUSION**

The analysis of Supreme Court precedent indicates that courts and commentators evaluating the constitutionality of religious courtroom oaths consistently commit a three-part analytical error: they (1) assign too much curative power to the existence of an affirmation option, (2) ignore or misunderstand the coercive effect that the religious option has upon jurors and witnesses when allowed in conjunction with the affirmation option, and (3) undertake a one-sided, narrow historical analysis.\(^{220}\)

A more refined analysis demonstrates that religious courtroom oaths raise concerns at each step of the current Establishment Clause analysis. This indicates that a re-evaluation of the constitutionality of religious oath statutes is warranted, with more thoughtful consideration given to the various issues presented by such statutes. Even if the oath were to pass constitutional muster, independent reasons exist to reconsider their use in our judicial system. Some amount of coercion, however minimal, still exists when a non-believing or non-Christian juror or witness is presented with a Christian Bible upon which to swear, after his or

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218. See supra text accompanying notes 48-49.

219. See, e.g., McCreary County v. ACLU of Ky., 125 S. Ct. 2722 (2005) (holding that the placement of a Ten Commandments display in a courtroom was an Establishment Clause violation); Brooks, supra note 172 (describing the ways in which many courts are beginning to limit religious references in oral arguments).

220. See supra text accompanying notes 119-21.
her peers have already done so, and when he or she is not made aware of the legal alternatives. Further, the denial of religious equality to Islamic citizens in North Carolina is an unfortunate example of the results that arise in construing oath statutes in support of Christianity and against other religions.

In 1882, scholar Edward A. Thomas observed a strange phenomenon concerning the use of religious courtroom oaths. On the one hand, non-religious members of society found the religious oath to be wholly inappropriate, while on the other, certain Christians viewed oath-taking as blasphemous. He remarked:

[W]hat benefits can accrue from maintaining a practice which shocks the sensibilities of one class of the community and excites the derision of another? Why would it not be sufficient if the laws provided ample penalties against all who should give false evidence upon the witness stand . . . ? Why not adopt a rule which in this enlightened age will permit all citizens of this great country, [whatever] their beliefs . . . to give their testimony in court . . . under precisely similar forms, without enacting what many seem to be a sacrilege to one and a mummery to another?221

This suggestion remains relevant and applicable today. Tradition alone cannot support a practice that, at worst, is administered in a discriminatory manner by the states at the expense of religious minorities, and at best, treats all religions equally but enforces a religious orthodoxy through either subtle or overt pressure to conform. Additionally, under any circumstance, the religious courtroom oath is a practice that could be set aside with virtually no effect upon either the administration of justice or the free exercise of religion. In our judicial system, all are equal before the law. It is this tradition that is paramount, not the preservation of the religious courtroom oath.

221. White, supra note 21 at 429-30.