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Testimonial Exclusions and Religious Freedom in Early America

JUD CAMPBELL

At the end of his presidency, George Washington published a letter reflecting on the character of the nascent American republic. Later known as his Farewell Address, the letter famously warned against the dangers of domestic political parties and entangling foreign alliances. In addition, Washington extolled the foundations of a virtuous citizenry: “Of all the dispositions and habits, which lead to political prosperity,” he proclaimed, “Religion and morality are indispensable supports.”¹ Washington then offered an example: “Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice?”²

For his eighteenth-century audience, Washington’s reference to the religious content of oaths was straightforward. Testimony under oath could be trusted because witnesses put their souls on the line. As William

1. John C. Patrick, ed., *The Writings of George Washington: From the Original Manuscript Sources, 1745-1799*, 39 vols. (Washington, DC: Government Printing Office, 1931–44), 35:229.

2. *Ibid.* Many of the virtues discussed in Washington’s letter, including religion, were contrasts to events unfolding in France.

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Blackstone explained in his *Commentaries on the Laws of England*, “The belief in a future state of rewards and punishments, the entertaining just ideas of moral attributes of the supreme Being, and a firm persuasion that he superintends and will finally compensate every action in human life . . . are the ground foundations of all judicial oaths.”³ Consequently, prospective witnesses who did not believe in divine punishment were barred from testifying—or, in legal parlance, declared “incompetent” to testify.

Gradually at first, and then with growing speed, the theological underpinnings of oath taking eroded across the United States in the early nineteenth century. Fifty years after Washington’s Farewell Address, the Virginia General Court ruled that the commonwealth’s constitutional guarantee of religious freedom had displaced the outdated doctrine. “The progress of science and civilization, and the demands of commerce,” the court declared, “have led to a relaxation of the [common-law incompetency] rule.”⁴ Ten years later, the North Carolina Supreme Court announced that barring witnesses because of their disbelief in hell was “wholly repugnant to the tolerant and enlightened spirit of our institutions and of the age in which we live.”⁵ And these two states were late converts to what had become a nationwide repudiation of excluding witnesses because of their disbelief in hell. A rule thought essential a half-century earlier had become fundamentally at odds with legal orthodoxy.

The story of this transition illuminates and weaves together several important strands of nineteenth-century social and legal history. Judicial decisions are an obvious centerpiece in this narrative, but the most important catalysts of nineteenth-century reforms, it turns out, had little to do with particular courtroom disputes. Instead, evidence rules came into escalating conflict with American religion, especially after a liberal offshoot of Calvinism began rejecting the existence of hell. The development and rapid growth of this sect, known as Universalism, put tremendous strain on existing law. Not only did the common-law rule bar testimony from otherwise trustworthy witnesses to crimes, wills, and contracts; it imposed a civil disability on an entire group of Christians because of their interpretation of the testimony of Jesus.

By prevailing Founding Era standards, being unable to testify did not impede or punish Universalists’ exercise of religion, thus allowing the common-law rule to survive an initial volley of legal challenges. But

3. William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford: Clarendon Press, 1765–69), 4:44.

4. *Perry v. Commonwealth*, 44 Va. (3 Gratt.) 645, 646 (1846).

5. *Shaw v. Moore*, 49 N.C. (4 Jones) 25, 31 (1856).

Americans are renowned for waging political contests on constitutional terrain, reshaping constitutional meaning as they go. As Universalism grew, constitutional arguments against the restrictive competency rule evolved, and gained salience. In particular, critics began to promote evidentiary reform by invoking a different conception of free exercise: one that rejected any governmental discrimination on the basis of religion, irrespective of whether the government was actually impeding a person's exercise of religion. And this debate spilled well beyond the courtroom doors, commanding substantial attention in newspaper columns, law journals and treatises, religious magazines, legislative sessions, and state constitutional conventions. The shift away from religion-based oaths was therefore important to the development of a neutrality-based view of religious liberty and, more generally, an egalitarian conception of civil privileges.

The early nineteenth-century transformation in religion-based competency rules was one of the most prominent American legal developments of the era, but it is only vaguely appreciated in the existing literature. Historians have observed a lessened "confidence in the power of the oath to assure the legitimacy of verdicts,"⁶ and that "the movement from oath-based to cross-examination-based theories of safeguard in the law of evidence" was premised on "a changed view of what promotes veracity."⁷ But these brief statements—clearly accurate descriptions of wide-ranging transitions in social and legal views—do not purport to explain how changes in religion-based competency rules occurred, nor do they account for the rich debates regarding religious liberty that played a central role in that history. Current scholarship also includes elemental errors suggesting a broad lack of understanding of the timing and mechanics of early nineteenth-century competency reforms.⁸ And nearly all studies addressing this topic have focused on published appellate decisions, describing a doctrinal shift on the bench without illuminating the vibrant reform efforts taking place out of court.⁹

6. George Fisher, "The Jury's Rise as Lie Detector," *Yale Law Journal* 107 (1997): 661.

7. John H. Langbein, Renée Lettow Lerner, and Bruce P. Smith, *History of the Common Law: The Development of the Anglo-American Legal Tradition* (New York: Aspen Publishers, 2009), 453.

8. See, for example, notes 9 and 107.

9. For a concise summary of the doctrinal shift, see Steven K. Green, *The Second Disestablishment: Church and State in Nineteenth-Century America* (Oxford: Oxford University Press, 2010), 178–82, 214–18. Green, however, does not provide evidence to defend his statement that "the effect of the traditional rule requiring a belief in God and in future punishment had been to exclude many Universalists, Catholics, Jews, adherents of other faiths, and skeptics from testifying in court or entering into legal or commercial arrangements requiring an oath." *Ibid.*, 214. The "traditional rule," as will be discussed,

In one of the few exceptions, Ronald Formisano and Stephen Pickering observe “an evolution toward the more inclusive standard” that allowed testimony from all those who believed in divine punishment, regardless of whether they believed that such punishment would occur after death.¹⁰ Yet the primary thesis for Formisano and Pickering is the “retention of the traditional Christian tests of witness competency” in the United States, thus demonstrating “how ‘authority’ and ‘orthodoxy’ kept their hold on courtroom practice.”¹¹ They do not try to explain why competency rules shifted so dramatically in the first half of the nineteenth century.¹²

Beyond its impact on religious liberty, the decline in religion-based competency rules also played a pivotal role in the history of American evidence law. Evidence law scholars have devoted significant attention both to the eighteenth century and to the middle of the nineteenth century, but have given little notice to the interlude.¹³ Yet this largely unexplored period was seminal in the development of modern evidence law principles. Disputes over religion-based competency rules, it turns out, prompted the first widespread reassessment of the foundational premises of American evidence law.

was formulated in the eighteenth century to *allow* testimony from Jewish and other non-Protestant witnesses. See Part I.A.

10. Ronald P. Formisano and Stephen Pickering, “The Christian Nation Debate and Witness Competency,” *Journal of the Early Republic* 29 (2009): 229. Christopher Grasso nicely captures parts of this shift in a brief comparison of an 1803 case with an 1836 journal article. See Christopher Grasso, “The Boundaries of Toleration and Tolerance: Religious Infidelity in the Early American Republic,” in *The First Prejudice: Religious Tolerance and Intolerance in Early America*, ed. Chris Beneke and Christopher S. Grenda (Philadelphia: University of Pennsylvania Press, 2011), 286, 292–95.

11. Formisano and Pickering, “The Christian Nation Debate,” 229. See also *ibid.*, 232 (“Religious tests for witnesses, though diminishing in frequency, persisted well through the nineteenth century”). Older contributions to the literature are almost purely doctrinal and descriptive, making little effort to explain how and why competency rules evolved. See, for example, Thomas Raeburn White, “Oaths in Judicial Proceedings and Their Effect upon the Competency of Witnesses,” *American Law Register* 51 (1903): 373–446.

12. Indeed, their principal question—whether the United States was a “Christian nation”—is quite distinct from my inquiry. Similarly, a Connecticut case study focuses mostly on questions of disestablishment. See Carol Weisbrod, “On Evidences and Intentions: ‘The More Proof, the More Doubt,’” *Connecticut Law Review* 18 (1986): 803.

13. The few exceptions do not delve into religion-based competency cases. See, for example, Renée Lettow Lerner, “The Transformation of the American Civil Trial: The Silent Judge,” *William and Mary Law Review* 42 (2000): 195–264; and John Fabian Witt, “Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903,” *Texas Law Review* 77 (1999): 825–922. Witt briefly discusses religion-based rules.

The evidence law facet of this story raises difficult questions about motives and causes. As nineteenth-century reformers pushed to dismantle religion-based evidentiary rules, they presented a broader challenge to the prevailing system of rigid competency requirements. The notion that juries could be used as capable fact finders was a key facet of this agenda. But reformers often employed jury-based rhetoric only when their other arguments were failing. For the most part, then, the sweeping jury-based rhetoric of reformers was not matched by a strongly held devotion to wide-ranging evidence liberalization. By and large, the people who most wanted Universalists to be able to testify in court apparently lacked the political will to pursue a broader agenda of legal reform.

Nonetheless, the attacks made on religion-based competency rules in the second quarter of the nineteenth century seem to have affected, or at least reflected, how many Americans thought about evidence law. Subsequent discussions about whether atheists should be allowed to testify, for example, are replete with the same rhetorical strategy, relying heavily on the capacity of juries to uncover the truth. Similar language re-emerged in the 1850s and 1860s when a combination of political forces led to an effort to dismantle both Southern competency rules preventing blacks from testifying and Northern competency rules barring the testimony of witnesses (including parties) who had personal interests in the outcomes of cases. The history of the demise of religion-based competency rules thus illuminates not only a lasting shift in views about religious freedom but also the emergence of a broader, and repeatedly successful, rhetorical strategy of evidentiary reform.

I. Common Law

English law has a long history of reliance on oaths. Following the demise of trials by ordeal, judges turned to juries to determine guilt or innocence in criminal trials.¹⁴ Originally, juries seem to have made decisions mostly using prior knowledge, but by the early fourteenth century, witnesses were more regularly being called into court.¹⁵ Each witness and juror

14. Fisher, "The Jury's Rise as Lie Detector," 585–90. Trials by ordeal ended rather quickly after the decree of the Fourth Lateran Council in 1215. *Ibid.*, 585–86; and James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven, CT: Yale University Press, 2008), 126. Juries have existed since at least the twelfth century, but they initially decided only whether individuals should face an ordeal. Whitman, *Origins of Reasonable Doubt*, 133–38.

15. The prevalence of witness testimony in the thirteenth century is unclear. See Fisher, "The Jury's Rise as Lie Detector," 594 n.51. Fisher points out that criminal juries

swore an oath, providing putative assurance that witnesses would speak the truth and that jurors would faithfully evaluate the evidence. Not everyone, however, was allowed to be a witness. Plaintiffs, defendants, financially interested parties, criminals, and “infidels” were among the many classes declared “incompetent” to testify.¹⁶

By the eighteenth century, witness-competency rules served a range of functions in the English legal system. Perhaps most importantly, strict competency requirements reduced the amount of conflicting testimony, helping to maintain the sanctity of oaths and, in turn, the legitimacy of the judicial system. Because oaths were meant to ensure the veracity of evidence, routine testimonial conflicts would have been deeply problematic, exposing the extent to which human judgment rather than abstract truth determined outcomes.¹⁷ Additionally, as James Whitman argues, the common law responded to concerns that jurors put their own souls at risk.¹⁸ Many interpreted the Biblical injunction “Judge not, that ye be not judged” as a warning against unjust condemnation.¹⁹ Given this concern, jurors faced with conflicting evidence were more likely to find defendants not guilty. Strict competency rules therefore helped judicial elites avoid this potential barrier to obtaining guilty verdicts.²⁰

In the early seventeenth century, the common law prohibited non-Christian “infidels” from testifying.²¹ The rule apparently existed for

did not necessarily mimic civil juries, “which almost certainly were self-informing.” *Ibid.*, 593.

16. The general rule against party testimony was subject to some exceptions. See, for example, Zephaniah Swift, *A System of the Laws of the State of Connecticut*, 2 vols. (Windham, CT: John Byrne, 1795–96), 2:238, 242. For a fascinating exploration of common-law treatment of whether children could testify, see Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* (Chapel Hill: University of North Carolina Press, 2005), 155–74. The predominant obstacle to children’s testimony in the late eighteenth century was their inability to appreciate the nature of an oath. *Ibid.*, 158–60.

17. Fisher, “The Jury’s Rise as Lie Detector,” 590; and Charles Donahue, Jr., “Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law,” in *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, ed. Morris S. Arnold, Thomas A. Green, Sally A. Scully, and Stephen D. White (Chapel Hill: University of North Carolina Press, 1981), 131.

18. Whitman, *Origins of Reasonable Doubt*, 186–92.

19. Matthew 7:1 (King James). See also Luke 6:37 (King James).

20. Similarly, strict competency rules helped shield witnesses from facing eternal damnation if they lied based on their temporal interests in the outcome of a case. On the risks faced by witnesses, see Whitman, *Origins of Reasonable Doubt*, ch. 3 and 4. More cynically, competency determinations increased judicial control over trials.

21. As Lord Chief Justice Edward Coke explained in his *Institutes of the Laws of England*, “An Oath is an affirmation or denial by any Christian of any thing lawfull and

two reasons, neither of which was immediately aimed at ensuring the accuracy of testimony. First, England did not tolerate religious dissent, and evidence rules reflected this hostile attitude toward other faiths, including Judaism and Roman Catholicism.²² Second, the particular form of English oath taking was explicitly Christian, with each witness swearing while he “toucheth with his hand some part of the holy Scripture.”²³ Accordingly, non-Christians could not swear an English oath.

Once Judaism was lawful in England, however, the common law slowly adapted. At first, the rigidity of perjury rules (which required proof that the witness had sworn on the Bible) impeded Jewish oath taking.²⁴ In cases of necessity, however, English courts began to accept Jewish testimony. As Lord Chief Justice Matthew Hale explained, “altho the regular oath, as it is allowd by the laws of *England*, is *tactis sacrosanctis Dei evangeliiis*, which supposeth a man to be a christian, yet in cases of necessity, as in forein contracts between merchant and merchant, which are many times transacted by *Jewish* brokers, the testimony of a *Jew tacto libro legis Mosaicae* is not to be rejected, and is used, as I have been informed, among all nations.”²⁵

Under Hale’s interpretation, the English oath remained a conventionally Christian instrument, but it was available to others by the necessity of foreign trade. This view was expanded upon in the 1744–45 English chancery decision of *Omichund v. Barker*.²⁶ Lingering ambiguities in the *Omichund*

honest, . . . calling Almighty God to witness that his testimony is true.” Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and other Pleas of the Crown, and Criminal Causes*, 4th ed. (London: A Crooke et al., 1669), 165.

22. *Calvin’s Case*, 77 Eng. Rep. 377, 398 (K.B. 1608) (“All infidels are in law *perpetui inimici*; for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility”). Along similar lines, Virginia disallowed testimony from “Popish recusants convict,” who were “convicted in a court of law of not attending the service of the church of England.” Blackstone, *Commentaries*, 4:56–57; see Edward I. Devitt, “Catholics in Colonial Virginia,” in *The American Catholic Historical Researches* 25 (1908): 354; and Gerald P. Fogarty, *Commonwealth Catholicism: A History of the Catholic Church in Virginia* (Notre Dame, IN: University of Notre Dame Press, 2001), 17–19.

23. Coke, *The Third Part of the Institutes of the Laws of England*, 165.

24. See F. Ashe Lincoln, “The Non-Christian Oath in English Law,” *The Jewish Historical Society of England: Transactions* 16 (1952): 73–75.

25. Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown*, 2 vols. (London: E. Nutt et al., 1736), 2:279.

26. *Omichund v. Barker*, 2 Eq. Cas. Abr. 397 (High Ct. Ch. 1744/5). This report was published as *A General Abridgment of Cases in Equity Argued and Adjudged in the High Court of Chancery*, 2 vols. (London: Henry Lintot, 1756). Counsel made oral arguments in November 1744, and the justices issued opinions 3 months later on February 23, 1744/5. Until September 1752, England used the Julian calendar, with year changes taking place

opinions later spurred significant debate in American courts, and the case therefore deserves close attention.

A. *Omichund v. Barker*

The dispute in *Omichund* began when Hugh Barker,²⁷ an employee of the East India Company and territorial governor, refused to pay a debt of more than 60,000 rupees²⁸ to an extraordinarily wealthy local merchant named Amirchand (typically listed as Omichund or Omychund in contemporary British records).²⁹ When Amirchand filed suit in Calcutta, Barker quickly absconded on a ship for Europe but died on the journey.

Seeking recovery of the debt, Amirchand's lawyers in England sued Barker's estate in chancery court. Barker's executor then filed a cross-claim requiring a sworn answer. Because Amirchand was not a Christian and therefore could not swear on the Bible, "a Commission went to take his Answer in that Manner in which he was able to give it."³⁰ While in India, the commission also took depositions from several Christian and Hindu witnesses.

When the commission returned to England, Amirchand's lawyers sought to file the answer and to introduce the Hindu witnesses' depositions as evidence, but the attorney for Barker's estate, John Tracy Atkyns, objected to the competency of these deponents on account of their religious beliefs. Atkyns cited Coke for the proposition that only Christians could swear an oath.³¹ Atkyns insisted that the "ignorant, . . . absurd and ridiculous"

in March. For the period between January and March, eighteenth-century Americans often noted both years using a comma, dash, or space to separate the years.

27. Identification of Barker's first name comes from Kirti N. Chaudhuri, *The Trading World of Asia and the English East India Company, 1660–1760* (New York: Cambridge University Press, 1978), 357.

28. The complaint "was brought to have a satisfaction for 67,955 rupees, amounting to about 7,600 £ English money, from the estate of the late Mr. Barker." 1 Atk. 21. In modern purchasing power, that sum would be well over £1,000,000.

29. See Kumkum Chatterjee, "Trade and Darbar Politics in the Bengal Subah, 1733–1757," *Modern Asian Studies* 26 (1992): 243–71; Somendra C. Nandy, "Amir Chand (*d.* 1758)," in *Oxford Dictionary of National Biography*, ed. Henry Colin Gray Matthew and Brian Harrison (Oxford: Oxford University Press, 2004).

30. *Omichund*, 2 Eq. Cas. Abr. 398.

31. *Omychund v. Barker*, 1 Atk. 21, 23, 26 Eng. Rep. 15 (High Ct. Ch. 1744/5). This report was published as John Tracy Atkyns, *Reports of Cases Argued and Determined in the High Court of Chancery in the Time of Lord Chancellor Hardwicke*, 3 vols. (London: J. Worrall & W. Sandby, 1765–68).

religious principles of the Hindu witnesses were insufficient for them to comprehend the sanctity of an oath.³²

Because of Amirchand's financial and political power and the commercial importance of allowing non-Christians—particularly Jewish merchants—to testify in English courts, the case garnered substantial attention. When the dispute reached the High Court of Chancery, Lord Chancellor Philip York, First Earl of Hardwicke, asked for the assistance of three of the country's most eminent jurists: the Lord Chief Justice of England and Wales, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Exchequer.³³ And among the lawyers arguing on behalf of Amirchand were two of England's leading jurists, Attorney General Dudley Ryder and Solicitor General William Murray, soon to become the famous Earl of Mansfield.³⁴

In his argument, Ryder acknowledged Coke's statement about oaths but claimed that the exigencies of foreign commerce necessitated allowing Hindu testimony: "[T]rade requires it, policy requires it, and in dealings of this kind it is of infinite consequence, there should not be a failure of justice."³⁵ Murray articulated an even more liberal rule of evidence. Looking to British history and the experience of other countries, including India, Murray argued that an "oath must be always understood according to the belief of the person who takes it."³⁶ Cognizant of the commercial consequences of excluding Hindu testimony, Murray continued: "Heathens bought the goods, heathens sent them, heathens knew the price, heathens kept the account. Would it do honour then to the Christian religion, to say, that you cannot swear according to our oath, and therefore you shall not be sworn at all? What must the heathen courts

32. *Ibid.*, 24.

33. *Omichund v. Barker*, 2 Eq. Cas. Abr. 407.

34. See Norman S. Poser, *Lord Mansfield: Justice in the Age of Reason* (Montreal: McGill-Queen's University Press, 2013), 86, 98–99 (discussing the lucrative private practice of Murray, including his representation of Amirchand). On Ryder's and Murray's official duties, see James Oldham, "The Work of Ryder and Murray as Law Officers of the Crown," in *Legal Record and Historical Reality*, ed. Thomas G. Watkin (London: The Hambledon Press, 1989), 157.

35. *Omychund v. Barker*, 1 Atk. 30. See also *Omichund v. Barker*, MSS. Misc. 136, Lincoln's Inn Library, London, England (hereafter *Omichund v. Barker*, Lincoln's Inn Manuscript), 1135 ("[T]he Nature of Trade & Commerce require it"). This manuscript, which is part of a five-volume set of English decisions, was written "by an unknown hand." John H. Baker, *English Legal Manuscripts*, 2 vols. (Zug, Switzerland: Inter Documentation Co., 1975–78), 2:99. Pages 1153–68 of the manuscript contain a transcription of Lord Chief Baron Thomas Parker's decision, which the writer notes "was delivered by [Parker] in Court, & which I transcribed from a Copy lent by him to Sir John Strange." *Omichund v. Barker*, Lincoln's Inn Manuscript, 1153.

36. *Omychund v. Barker*, 1 Atk. 33.

think of our proceedings? Will it not destroy all faith and confidence between the contracting parties?"³⁷ Hindus believed in a god, Murray stated, "though they may have subordinate deities, as [do] the papists who worship saints."³⁸

According to custom, the judges gave oral *seriatim* opinions, with each judge speaking for himself. Lord Chief Baron Thomas Parker argued that it was necessary to admit the Hindu deponents' statements. "Upon the whole," he declared, "not to admit these witnesses would be destructive of trade, and subversive of justice, and attended with innumerable inconveniences."³⁹ Lord Chief Justice William Lee and Lord Chancellor Hardwicke concurred. Lee, drawing on the natural-law current of English jurisprudence, stated that "rules of evidence are to be considered as artificial rules, framed by men for convenience in courts of justice, and founded upon good reason: But one rule can never vary, viz. the eternal rule of natural justice."⁴⁰ Hardwicke agreed that the "one general rule of evidence" was to admit "the best [evidence] that the nature of the case will admit."⁴¹ Differences in religious views were no barrier. "All that is necessary to an oath," Hardwicke wrote, "is an appeal to the Supreme Being, as thinking him the rewarder of truth, and avenger of falshood."⁴²

The opinion of Lord Chief Justice John Willes subsequently received the most attention, primarily because later jurists disputed what Willes had said. According to the report of defense attorney John Tracy Atkyns, Willes stated: "I am of opinion that infidels who believe a God, and *future*

37. *Ibid.*, 34. See also *Omichund v. Barker*, Lincoln's Inn Manuscript, 1137 ("Christian Courts must do Justice to the Indians if there is a Commerce between them, otherwise there is no Faith at all & no Jurisd[ictio]n can be exercised").

38. *Omychund v. Barker*, 1 Atk. 34.

39. *Ibid.*, 44. See also *Omichund v. Barker*, Lincoln's Inn Manuscript, 1143 ("The not admitting this Evidence would be destructive of Trade & subversive of Justice and liable to many other Inconveniences"). The transcription of Parker's original manuscript reads: "The rejecting of these Witnesses would be both destructive of Trade & subversive of Justice, & attended with infinite other Inconveniences." *Ibid.*, 1168.

40. *Omychund v. Barker*, 1 Atk. 46. See also *Omichund v. Barker*, Lincoln's Inn Manuscript, 1147 ("The Rules of Evidence are considered as positive artificial Rules formed by Men for their Convenience as to proceedings in Courts of Justice, but there is one Rule which is fixed eternal & immutable, & that is the Rule of natural Justice, & all other Rules must give way to this").

41. *Omychund v. Barker*, 1 Atk. 49. See also *Omichund v. Barker*, Lincoln's Inn Manuscript, 1150 ("[T]here is but one general Rule of Evidence, i.e. that the best Evidence must be received, that the nature of the Case will admit").

42. *Omychund v. Barker*, 1 Atk. 48. See also *Omichund v. Barker*, Lincoln's Inn Manuscript, 1150 ("[A]ll that is necessary is, An Appeal to the Supreme Being, the Witness of the Truth & the Avenger of Perjury").

rewards and punishments in the other world, may be witnesses.”⁴³ As interpreted in later decisions, the requirement of belief in *future* rewards and punishments meant that individuals who did not believe in heaven and hell could not swear an oath.

In 1799, however, English lawyer Charles Durnford published a lengthier—and substantively different—version of the opinion, apparently based on a manuscript in Willes’s papers.⁴⁴ According to Durnford, Willes had written that a witness may be admitted if he “believes a God and that he will reward and punish him in this world, but does not believe a future state.”⁴⁵ But, Willes apparently clarified, “it must be left to the jury what credit must be given to these infidel witnesses. For I do not think that the same credit ought to be given either by a court or a jury to an infidel witness as to a Christian, who is under much stronger obligations to swear nothing but the truth.”⁴⁶

Comparisons of the various *Omychund* reports indicates that Willes, in his oral delivery from the bench, deviated at times from the manuscript version published by Durnford.⁴⁷ But an unpublished manuscript in the

43. *Omychund v. Barker*, 1 Atk. 45 (emphasis added). Willes clarified that evidence of religious belief could still be used to impeach a witness’s credibility. *Ibid.*, 45–46 (“It must be left to the jury or judge what credit they will give. . . . The same credit ought not to be given to the evidence of an infidel, as of a Christian; because [he is] not under the same obligations”). According to a report published in 1756, Willes stated: “I think such Infidels, who believe in God, and that he will punish them if they swear falsely, in some Cases, and under some Circumstances, ought to be admitted as Witnesses in this tho’ a Christian Country, but that one who has not such Belief, cannot be admitted under any Circumstances.” *Omychund v. Barker*, 2 Eq. Cas. Abr. 404–5.

44. *Omychund v. Barker*, 1 Willes 538, 125 Eng. Rep. 1310 (High Ct. Ch. 1744/5). This report was published as Charles Durnford, *Reports of Adjudged Cases in the Court of Common Pleas During the Time Lord Chief Justice Willes Presided in That Court* (London: A. Strahan, 1799). The report was later published in Philadelphia and was widely cited in the United States. For a study of the use of manuscript case notes in eighteenth-century England, see James Oldham, “The Indispensability of Manuscript Case Notes to Eighteenth-Century Barristers and Judges,” in *Making Legal History: Approaches and Methodologies*, ed. Anthony Musson and Chantal Stebbings (Cambridge: Cambridge University Press, 2012), 30–52. For an introduction to eighteenth-century reporting practices, see, for example, James Oldham, “Underreported and Underrated: The Court of Common Pleas in the Eighteenth Century,” in *Law as Culture and Culture as Law: Essays in Honor of John Phillip Reid*, ed. Hendrik Hartog and William E. Nelson (Madison, WI: Madison House Publishers, Inc., 2000), 119–46.

45. *Omychund v. Barker*, 1 Willes 550. See also *ibid.*, 549.

46. *Ibid.*, 550.

47. Some comments, for example, appear in other reports but not in the Durnford report. Compare 1 Atk. 44 (“Lord Coke is a very great lawyer, but our Saviour and St. Peter are in this respect much better authorities”), and 2 Eq. Cas. Abr. 403 (“Coke was certainly a very great Lawyer, but I think our Saviour and St. Peter in these Matters much better

Lincoln's Inn Library seems to confirm the Durnford report's position: that Willes declared all theists as capable of swearing an oath, even if judges sometimes barred their testimony because it was not the "best evidence" available.⁴⁸ Perhaps he was worried that Jewish witnesses might be categorically excluded if the law required belief in rewards and punishments after death.⁴⁹ More importantly, however, the decisions of Willes and his colleagues reflect a transformation of English evidence law from rules

Authorities"), and Lincoln's Inn Manuscript, 1144 ("Now my Lord Coke is a great Authority, but it must be allowed, that Our Saviour & St. Peter are greater"), with 1 Willes 542 ("It is a little mean narrow notion . . ."). Moreover, the 1756 report, the 1765 Atkyns report, and the unpublished manuscript seem to have been independently recorded when the decisions were read, given that some material appears in the Durnford report and only one of the two earlier reports. Compare 1 Willes 541 ("Serjt. Hawkins (though a very learned pains-taking man) is plainly mistaken in his *History of the Pleas of the Crown* . . . where he understands Lord Coke as not excluding the Jews from being witnesses, but only Heathens. . . . I shall therefore take it for granted. . . . [A]lmost ever since the Jews have returned into England, they have been admitted to be sworn as witnesses"), with 1 Atk. 44 ("Serjeant Hawkins in his *Pleas of the Crown*, though a very learned and pains taking man, is mistaken in his notion of lord Coke's opinion; long before his time, and ever since the Jews returned to England, they have been constantly admitted as witnesses"), and 2 Eq. Cas. Abr. 402 ("Hawkins, tho' a very Pains-taking Man, is, I think, plainly mistaken in his [*Pleas of the Crown*] where he understands him otherwise. I shall therefore take this for granted"), and Lincoln's Inn Manuscript, 1144 ("Serj[ean]t Hawkins in his [*Pleas of the Crown*] is mistaken in his Opinion of my Lord Co[ke]. I take it for granted my Lord Coke meant Infidels generally, & that lessens the Authority of what he says, for Jews were admitted before his time & since").

48. See Lincoln's Inn Manuscript, 1146 ("The best Evidence, that the Party can procure must be rece[ive]d; But if better Evidence is produced on the other Side, the first is to be rejected; As if a Copy of a Deed be offered in Evidence & on the other Side the original is produced & differs from the copy. So if an Infidel who believes only a Reward & Punishment in this world be contradicted by a Christian"). For more on the approach to evidence law that led to this view, see notes 60 and 62 and accompanying text.

49. Christians generally interpreted the Old Testament, shared by the Jewish faith, as supporting the existence of a future state; see, for example, *The Religious Magazine or Spirit of the Foreign Theological Journals and Reviews* 2 (1828): 17; and Richard Graves, "A Future State Known to the Jews," in *The Whole Works of Richard Graves*, 4 vols., ed. Richard Hastings Graves (Dublin: William Curry Jr. & Co., 1840), 2:288, but concerns about Jewish beliefs occasionally cropped up. See, for example, Edward Livingston to M[ordecai] M[anuel] Noah, [1825], Edward Livingston Papers, Princeton University ("Does the [Jewish] sect which denied the existence of a future state still subsist? Is it numerous? Are there any congregations of them in the U.S.[?]?"); see also Jacob Rush, "The Nature of an Oath Stated and Explained," in *Charges and Extracts of Charges, on Moral and Religious Subjects; Delivered at Sundry Times, by the Honorable Jacob Rush* (Philadelphia: D. Hogan, 1803), 29 ("the sanction of rewards and punishments is more fully revealed by the Christian religion, and consequently the degree of guilt in transgressing the rules of moral duty, must be greater"). For a discussion of the treatment of Jewish witnesses in English courts after *Omichund*, see Karen A. Macfarlane, "Does He Know the

based on a person's status to ones based on the perceived evidentiary value of the person's testimony.⁵⁰

B. American Reception of the Common Law

Oath requirements in the United States initially followed the rule espoused in Atkyns' report, thus confining testimony to those who believed in heaven and hell.⁵¹ In perhaps the most influential American opinion, the Connecticut Supreme Court of Errors declared in its 1809 decision in *Curtiss v. Strong*:⁵² "Every person who does not believe in the obligation of an oath, and a future state of rewards and punishments, or any accountability after death for his conduct, is by law excluded from being a witness; for to such a person the law presumes no credit is to be given."⁵³ At least as a statement of the "law on the books," this view became axiomatic. Over and over again, Americans observed that oath takers must believe in heaven and hell.⁵⁴

Danger of an Oath? Oaths, Religion, Ethnicity and the Advent of the Adversarial Criminal Trial in the Eighteenth Century," *Immigrants & Minorities* 31 (2013): 334–36.

50. Many scholars have noted this shift in the epistemological underpinnings of English evidence rules. See, for example, Brewer, *By Birth or Consent*, 162–74. The erosion of status-based rules was part of a broader evolution in English law. See, for example, Duncan Kennedy, "The Structure of Blackstone's Commentaries," *Buffalo Law Review* 28 (1979): 299.

51. See Zephaniah Swift, *A Digest of the Law of Evidence, in Civil and Criminal Cases* (Hartford: Oliver D. Cooke, 1810), 47–48; and Note, "An Originalist Analysis of the No Religious Test Clause," *Harvard Law Review* 120 (2007): 1655–56 (quoting several framers' views of oaths). But see James Madison to Edmund Pendleton, October 28, 1787, in *The Papers of James Madison*, 17 vols., ed. William T. Hutchinson and William M. E. Rachal (Chicago: University of Chicago Press, 1962–91), 10:233 ("If the person swearing believes in the supreme being who is invoked, and in the penal consequences of offending him, *either in this or a future world* or both, he will be under the same restraint from perjury as if he had previously subscribed a test requiring this belief" [emphasis added]).

52. *Curtiss v. Strong*, 4 Day 51 (Conn. 1809). This volume of Thomas Day's reports was published in 1813. The case, which involved a disputed will, turned on the admissibility of a witness who apparently "did not . . . believe in the obligation of an oath, and in a future state of rewards and punishments, or any accountability for his conduct after death." *Ibid.*, 52.

53. *Ibid.*, 55.

54. Daniel L. Dreisbach, "The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban," *Journal of Church and State* 38 (1996): 293; Tara E. Strauch, "Taking Oaths and Giving Thanks; Ritual and Religion in Revolutionary America" (PhD diss., University of South Carolina, 2013), 126. See, for example, Rush, "The Nature of an Oath Stated and Explained," 34; *State v. Cooper*, 2 Tenn. (2 Overt.) 96, 97 (1807) (report of the opinion of Campbell, J.); James Madison to Edmund Pendleton, October 28, 1787, in *The Papers of James Madison* 10:223 (noting that oaths were "a religious test" of sorts).

Through a cynical lens, the American reception of the common-law rule might appear as a continuation of the status-based religious discrimination of an earlier time, when Jews and Catholics were barred from testifying because of religious intolerance.⁵⁵ English and American commentators in the early nineteenth century, however, took a far more ecumenical approach. In his 1804 evidence treatise, for example, Thomas Peake explained that the only permissible religious inquiry was whether a witness “believed the sanction of an oath,” meaning “the being of a Deity, and a future state of rewards and punishments.”⁵⁶ Broader religious exclusions, Peake wrote, arose “when a gloomy superstition had obscured all liberal sentiment.”⁵⁷ Connecticut jurist Zephaniah Swift agreed. The solemnity of an oath, he noted, “aris[es] from a belief in the existence of a God, and a future state of rewards and punishments.”⁵⁸ But Swift denounced broader religion-based exclusions as founded on “illiberal sentiments” that were “entertained at an early period, when there was more superstition than true religion.”⁵⁹

Rather than relying on sectarian hostility, Americans in the early nineteenth century justified the common-law rule as being essential to discovering truth, which had become the overwhelming focus of eighteenth-century evidence commentaries.⁶⁰ “You can impose no obligation to tell the truth, on the man who fears not a God, as an avenger of perjury,” one writer remarked. “The tardy and evasive vengeance attached by human laws to perjury, is all that he cares to avoid,” the author continued, “and his asseverations . . . will be as easily swayed by any gust of passion or preponderance of interest, as is the weathercock by the passing breeze.”⁶¹ Early on, Americans seem to have broadly accepted the necessity of religion-based oaths, particularly given the difficulty of proving

55. See note 22.

56. Thomas Peake, *A Compendium of the Law of Evidence*, 2nd ed. (London: Brooke & Clarke, 1804), 141–42.

57. *Ibid.*, 139.

58. Swift, *A Digest of the Law of Evidence*, 47–48.

59. *Ibid.*, 48.

60. See, for example, Geoffrey Gilbert, *The Law of Evidence* (London: Henry Lintot, 1756). See also Barbara J. Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley: University of California Press, 1991), 26–27 (noting the epistemological concerns of eighteenth-century evidence treatise writers, including Gilbert). Notably, the influential epistemological ideas of John Locke included the view that “the social fabric depends on commitments underpinned by the fear of God.” Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke’s Political Thought* (Cambridge: Cambridge University Press, 2002), 223.

61. “Review on the Exclusion of Infidels from Judicial Oaths,” *Christian Spectator*, September 1829, 444.

perjury under an evidence regime that strenuously sought to avoid evidentiary conflicts.⁶² As Sally Gordon explains, “Failure to protect the religious power of oaths would undermine the rule of law altogether, [George] Washington, [James] Kent and others predicted, plunging the nation into self-destructive chaos.”⁶³

But how did courts know which witnesses had the requisite religious beliefs? “It would seem to be incongruous to admit a man to his oath,” the *Curtiss* court observed, “for the purpose of learning from him whether he had the necessary qualifications to be sworn.”⁶⁴ Consequently, American courts limited their review to hearsay evidence; that is, accounts of what prospective witnesses had said to others about their religious views.⁶⁵ Another pressing concern was religious liberty. “A man’s opinions are matters between himself and his God, so long as he does not

62. See Swift, *System of the Laws*, 2:249 (“the law will presume that every body swears the truth, and that no man will be guilty of perjury”). Perjury rules required two witnesses to prove that someone was lying under oath. *Ibid.*, 400; and William Hawkins, *A Treatise of the Pleas of the Crown*, 6th ed. (London: Thomas Leach, 1777), 719. This rule reflected a numerological approach to evidence law. See Fisher, “The Jury’s Rise as Lie Detector,” 653 (“Almost every major treatise suggested that whenever jurors faced the task of choosing between conflicting oaths, they should tend to give more credit to the side that produced the greatest number of witnesses”). For the epistemological foundations of this approach, see Witt, “Making the Fifth,” 850 n. 89. Useful surveys of contemporary treatises can be found in William Twining, *Rethinking Evidence: Exploratory Essays*, 2nd ed. (Cambridge: Cambridge University Press, 2006), 45–55, and in Brewer, *By Birth or Consent*, 369–75.

63. Sarah Barringer Gordon, “Blasphemy and the Law of Religious Liberty in Nineteenth-Century America,” *American Quarterly* 52 (2000): 686. See also James Hutson, *Forgotten Features of the Founding: The Recovery of Religious Themes in the Early American Republic* (Lanham, MD: Lexington Books, 2003), 1–36; Philip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2002), 70; Michael W. McConnell, “The Origins and Historical Understanding of Free Exercise of Religion,” *Harvard Law Review* 103 (1990): 1467; and note 85. For more on English perjury law, see James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill: University of North Carolina Press, 2004), 268–75.

64. *Curtiss v. Strong*, 4 Day 56. Several years before the *Curtiss* decision, Tapping Reeve had endorsed the same procedure: “An atheist is not a good witness, because an oath is not binding. The way to discover their belief is not by appealing to them in Court; but by their avowed declarations out of Court. This is a Com. Law Principle.” Lonson Nash, *Lectures on Various Legal Subjects Delivered in the Litchfield Law School, 1803, 2:736, MS 4004*, Harvard Law School Library. See also *Bow v. Parsons*, 1 Conn. (1 Root) 480, 481 (1792) (“The court admitted parol testimony of particular conversations and declarations to evince his infidelity”).

65. See Wesley J. Campbell, “A New Approach to Nineteenth-Century Religious Exemption Cases,” *Stanford Law Review* 63 (2011): 983 n.50–52 (collecting cases). Occasionally, however, courts did permit direct questioning of witnesses. See, for example, “Want of Religious Belief,” *Niles’ Weekly Register* (Baltimore), October 2, 1830, 103

disclose them,” Zephaniah Swift explained, “and it is wholly inconsistent with the rights of conscience, to compel him to do it.”⁶⁶

To modern sensibilities, discriminating against prospective witnesses based on their religious views would seem to pose at least as great a threat to religious liberty as asking witnesses about those beliefs, but this was not so in the early nineteenth century. Although attentive to the relationship between evidence rules and religious liberty, Swift apparently did not perceive any objection to the exclusion of witnesses based on their beliefs. Similarly, none of the appellate counsel in *Curtiss*—all well-known lawyers and former members of the Connecticut Supreme Court of Errors—suggested that the restrictive common-law rule might violate a witness’s civil rights. Understanding why requires a closer look at contemporary understandings of religious freedom.

C. Equality and Religious Freedom

Religious liberty at the founding was not a one-dimensional concept. Rather, religious freedom encompassed a *collection* of discrete—albeit conceptually related—rights, privileges, and immunities. To use an analogy familiar to students of property law, the eighteenth-century concept of religious liberty was like a “bundle of sticks”: rules that were logically separable, allowing constitutional protection for religious freedom to vary in significant ways from state to state.

Across the board, the heart of every state’s protection for religious liberty was a guarantee of the *natural* and *inalienable* freedom of conscience and worship. Delaware’s 1776 declaration of rights was typical, announcing that “all men have a natural and unalienable right to worship Almighty God according to the dictates of their consciences and understandings.”⁶⁷ This natural-rights formulation is revealing. Upon entering society, the inalienable right to exercise religion remained in force, subject to a bar

(reporting “the late trial of J. F. Knapp, at Salem,” in which a lawyer questioned a witness about his beliefs).

66. Swift, *A Digest of the Law of Evidence*, 49. Although courts usually framed this rule in terms of religious liberty, it also had roots in the general evidentiary rule against asking questions “the direct object and immediate tendency of which are to degrade, disgrace, and disparage the witness, and shew his moral turpitude and infamy.” *Ibid.*, 79–80.

67. Delaware Declaration of Rights of 1776, § 2, in Neil H. Cogan, ed., *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* (New York: Oxford University Press, 1997), 15. See also Wesley J. Campbell, “Religious Neutrality in the Early Republic,” *Regent Law Review* 24 (2012): 319 (collecting provisions from other states).

against unjustly harming others.⁶⁸ All individuals thus had an equal and conditional “right” to believe and practice their faith without interference.⁶⁹

Unlike our widely accepted understanding today, however, free-exercise rights in the Early Republic generally prohibited only direct interference with private liberty, not indirect burdens created by the withdrawal of civil privileges. This explains why, for example, states could guarantee freedom of conscience while simultaneously imposing religious tests for officeholders.⁷⁰ A religious test, Justice Samuel Wilde of Massachusetts explained in 1821, “does not interfere with the rights of conscience.— No person has any conscience about becoming a Legislator. He is not obliged to accept of office, and he has no right to claim it.”⁷¹ According to this view, religious discrimination was permitted as long as individuals

68. See, for example, Philip A. Hamburger, “Natural Rights, Natural Law, and American Constitutions,” *Yale Law Journal* 102 (1993): 922–30.

69. Americans in the Founding Era and Early Republic often spoke of “rights,” but this language did not necessarily contemplate judicial definition and enforcement. See Jack Rakove, *Original Meanings* (New York: Knopf, 1996), 288–338; and Jud Campbell, “Judicial Review and the Enumeration of Rights,” *Georgetown Journal of Law and Public Policy* 15 (2017): 569–92. See generally Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

70. See Campbell, “Religious Neutrality,” 336; Saul Cornell, “Moving Beyond the Canon of Traditional Constitutional History: Anti-Federalists, the Bill of Rights, and the Promise of Post-Modern Historiography,” *Law and History Review* 12 (1994): 27; and Dreisbach, “The Constitution’s Forgotten Religion Clause,” 286–88. See generally Hamburger, “Natural Rights.” This point is often lost among even the most sophisticated modern observers. See, for example, Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1986), 196 (describing as “contradictory sentiments” an eighteenth-century endorsement of freedom of conscience alongside support for test oaths).

71. *Journal of Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts* (Boston: Daily Advertiser, 1821), 90. Along similar lines, Zephaniah Swift defended the consistency of free-exercise rights and state-imposed religious assessments, arguing that “[a] Jew, a Mehometan, or a Bramin, may practice all the rites and ceremonies of their religion, without interruption, or danger of incurring any punishment,” and that “[e]very Christian may believe, worship, and support in such manner as he thinks right, and if he does not feel disposed to join public worship, he may stay at home and believe as he pleases.” Swift, *System of the Laws*, 1:146. See also David Daggett, *Count the Cost* (Hartford: Hundson and Goodwin, 1804), 5–6 (“Our laws permit every man to worship God when, where, and in the manner most agreeable to his principles or to his inclination; and not the least restraint is imposed; all ideas of dictating to the conscience are discarded”); and Thomas Jefferson, *Notes on the State of Virginia* (London: John Stockdale, 1787), 265 (“[I]t does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg. If it be said, his testimony in a court of justice cannot be relied on, reject it then, and be the stigma on him”).

were free to practice their religion without being compelled to violate their conscience.⁷²

Beyond the core protection for free exercise, the bundle of rights, privileges, and immunities often known collectively as “religious liberty” varied considerably among states. Some constitutions authorized qualified religious establishments,⁷³ whereas others banned them.⁷⁴ In states that levied assessments used for building churches or supporting ministers, state constitutions often exempted religious dissenters.⁷⁵ And, most relevant here, many states guaranteed some form of civil equality among sects, beyond the equality of their inalienable free-exercise rights.

Equality provisions varied among states. New Jersey’s 1776 Constitution, for example, guaranteed that “no Protestant Inhabitant of this Colony shall be denied the Enjoyment of any civil Right merely on Account of his religious principles.”⁷⁶ Delaware extended this protection to “all persons professing the Christian religion,”⁷⁷ whereas Virginia magnanimously declared in its 1786 bill for religious freedom that the religious views of individuals “shall in nowise diminish, enlarge, or affect their civil capacities.”⁷⁸ But many states did not prohibit discrimination in civil rights and privileges on account of religious belief. Massachusetts and New Hampshire provided only that Christians would be “equally under the protection of the law,”⁷⁹ a phrasing that, as Philip Hamburger has explained, “permitted inequalities in rights not existing in the state of nature.”⁸⁰

72. In combination with subpoena requirements, traditional oaths required Quakers and some other Christian sects to violate their religious duties. See notes 87–91 and accompanying text.

73. See, for example, Massachusetts Constitution of 1780, Part I, art. III, in Cogan, *Complete Bill of Rights*, 21. Five of fourteen states “made provision for tax support of ministers, and those five plus seven others continued religious tests for public office.” Mark A. Noll, *The Old Religion in a New World: The History of North American Christianity* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 2002), 72.

74. See, for example, New Jersey Constitution of 1776, § XIX, in Cogan, *Complete Bill of Rights*, 25; North Carolina Constitution of 1776, § XXXIV, in *ibid.*, 30; Pennsylvania Constitution of 1790, § III, in *ibid.*, 33.

75. See, for example, New Jersey Constitution of 1776, § XIX, in *ibid.*, 25; North Carolina Constitution of 1776, § XXXIV, in *ibid.*, 31.

76. New Jersey Constitution of 1776, § XIX, in *ibid.*, 25. See also Vermont Constitution of 1777, § 3, in *ibid.*, 41.

77. Delaware Declaration of Rights of 1776, § 2, in *ibid.*, 15.

78. Bill for Religious Freedom, in *ibid.*, 52.

79. See Massachusetts Constitution of 1780, Part I, art. III, in *ibid.*, 21; New Hampshire Constitution of 1783, Part I, art. V, in *ibid.*, 23.

80. Philip A. Hamburger, “Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights,” *Supreme Court Review* 8 (1992): 299. For a more complete explanation, see *ibid.*, 317–36; and Bernadette Meyler, “The Equal Protection of

Because the imagined “state of nature” lacked courts, testifying was a “civil” rather than “natural” right.

The Founding Era distinction between natural free-exercise rights and positive-law guarantees of civil nondiscrimination came to the fore in 1820, when New York’s highest court confronted a novel challenge to religion-based competency rules. In *Jackson v. Gridley*,⁸¹ the defendant claimed that excluding a witness because of his faith offended the state constitution’s free-exercise clause. The witness reportedly had denied any belief in God and punishment after death, although he later claimed that “he had formerly embraced the principles of *Universalists*, and rather believed *it was right*.”⁸² While acknowledging that witnesses who did not believe in hell were incompetent at common law, the defense lawyer wanted to introduce the witness’s own testimony regarding his recently converted beliefs. Opposing counsel objected, arguing that “the Court should require the strongest and best evidence of the witness’s sincere recantation of his abominable creed.”⁸³

Writing for the court, Chief Justice Ambrose Spencer ruled that the contested witness should not have been admitted to testify. He cited Chief Justice Willes’s decision in *Omichund* without mentioning ambiguities in the various English reports.⁸⁴ Spencer’s opinion, however, includes a revealing passage about religious freedom:

Religion is a subject on which every man has a right to think according to the dictates of his understanding. It is a solemn concern between his conscience and his God, with which no human tribunal has a right to meddle. But in the development of facts, and the ascertainment of truth, human tribunals have a right to interfere. They are bound to see that no man’s rights are impaired or taken away, but through the medium of testimony entitled to belief; and no testimony is entitled to credit, unless delivered under the solemnity of an oath, which comes home to the conscience of the witness, and will create a tie arising from his belief that false swearing would expose him to

Free Exercise: Two Approaches and their History,” *Boston College Law Review* 47 (2006): 293–311. Meyler briefly discusses religion-based competency cases. *Ibid.*, 295–96. Interestingly, Connecticut’s laws barring Christians from openly avowing atheism, polytheism, Unitarianism, and apostasy were enforced through a denial of civil privileges on the first offense and denial of protection of law on the second offense. See Swift, *System of the Laws*, 2:321.

81. *Jackson ex dem. Tuttle v. Gridley*, 18 Johns. 98 (N.Y. 1820). In 1820, the Supreme Court was New York’s highest court of law, with appeals running only to the quasi-legislative Court for the Trial of Impeachment and Correction of Errors. See Albert M. Rosenblatt, “The New York Court of Appeals,” *Green Bag 2d* 11 (2008): 469.

82. *Jackson v. Gridley*, 18 Johns. 99.

83. *Ibid.*, 102.

84. *Ibid.*, 103. Spencer’s citation to *Omichund* may have been based on his reading of *Curtiss v. Strong* or Swift’s *Law of Evidence* rather than on his own reading of the Willes or Atkyns reports. *Ibid.*, 103–4.

punishment in the life to come. On this great principle rest all our institutions, and especially the distribution of justice between man and man.⁸⁵

The constitutional concern for Spencer, it bears emphasis, was the *inquiry* into a person's religious beliefs, not governmental *discrimination* based on those views. A witness's religious faith was "a solemn concern between his conscience and his God," shielding him against direct questioning.⁸⁶ But once those religious views were known, religion-based exclusions did not infringe on New York's constitutional guarantee of free exercise. Simply put, prospective witnesses were free to practice their religion regardless of their competency to testify.

By contrast, conventional oath requirements did conflict with free-exercise principles in a way that was unrelated to disbelief in God or hell. Witnesses, jurors, and public officials were ordinarily required to swear oaths, but Quakers, along with a few other Protestant sects, refused to take public oaths based on a literal interpretation of Christ's injunction, "Swear not at all."⁸⁷ By the end of the eighteenth century, nearly every American state had passed statutes or constitutional provisions allowing Quakers, and sometimes other religious objectors, to affirm in at least some cases.⁸⁸ But affirmations were *not* a generally available alternative to oath taking. Rather, affirmations were available only to members of denominations whose religious tenets prohibited swearing.⁸⁹ Prospective

85. *Ibid.*, 106. Defenses of oaths often appeared in other contemporary religious liberty cases. See, for example, *Commonwealth v. Wolf*, 3 Serg. & Rawle 48, 51 (Pa. 1817) ("Laws cannot be administered in any civilized government unless the people are taught to revere the sanctity of an oath, and look to a future state of rewards and punishments for the deeds of this life"); *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 407 (Pa. 1824) (impugning Christianity would "weaken the confidence in human veracity, so essential to the purposes of society, and without which no question of property could be decided, and no criminal brought to justice; an oath in the common form, on a discredited book, would be a most idle ceremony").

86. *Jackson v. Gridley*, 18 Johns. 106.

87. Matthew 5:34 (King James).

88. McConnell, "The Origins and Historical Understanding of Free Exercise," 1467–68.

89. See, for example, Swift, *A Digest of the Law of Evidence*, 51; Q.E.D., "Messrs. Editors," *Albany Argus*, December 25, 1821; "Report Relating to Incompetency of Witnesses on Account of Religious Belief," Massachusetts Senate Report Number 22 (Boston: Charles Hudson, 1838), 8; and Campbell, "A New Approach," 978–80, 984–86. For the rule that the availability of affirmations required religious scruples, see, for example, *Lewis v. Maris*, 1 U.S. (1 Dall.) 278, 285 (Pa. 1788); and *State v. Putnam*, 1 N.J. L. 260 (1794). Some states codified this rule. See, for example, "An Act Concerning Oaths," § 16 (April 2, 1801), in *Laws of the State of New York*, 2 vols. (Albany, NY: Charles R. Webster and George Webster, 1802), 405 ("[E]very person believing in the existence of a Supreme Being, and a future state of rewards and punishments, who shall have conscientious scruples against taking an oath, shall [affirm in lieu of swearing]"); and "An Act for

witnesses who did not believe in God or hell were not allowed to affirm in place of swearing.⁹⁰ In short, nonbelievers in God or hell were unaccommodated in all types of public oath taking.⁹¹

II. Universalism

Among Christians, belief in future rewards and punishments was widespread and uncontroversial throughout most of the eighteenth century.

reducing into one, the several Acts prescribing the Oath of Fidelity and Oaths of Public Officers,” § 8 (December 22, 1792), in *A Collection of All Such Acts of the General Assembly of Virginia . . .* (Richmond: Samuel Pleasants, Jr. and Henry Pace, 1803), 55 (affirmations available to “[a]ny person refusing to take an oath, and declaring religious scruples to be the true and only reason of such refusal”). For the rule that religious scruples had to be shown by evidence of denominational membership, see, for example, *Bryan’s Case*, 1 D.C. (1 Cranch C.C.) 151 (C.C.D.C. 1804).

90. Later on, however, reformers occasionally argued that affirmations demonstrated that oaths were unnecessary. See note 225.

91. As it turned out, nearly all nineteenth-century controversies about oath taking involved putative witnesses—not jurors or public officials—in part because direct questioning of oath takers was usually prohibited, see note 65, and in part because nobody outside of the courtroom could object, see Stewart Rapalje, *A Treatise on the Law of Witnesses* (Albany, NY: Banks & Brothers, 1887), 14–15 n.2. Still, some people may have felt unable to take public oaths because of their beliefs. See Bernard Whitman, “Letter II [November 1830],” in *Two Letters to the Reverend Moses Stuart: On the Subject of Religious Liberty*, 2nd ed. (Boston: Gray & Bowen, 1831), 148 (observing that religious barriers to oath taking meant that “universalists . . . must be excluded from every office of honor, trust, or emolument . . . where an oath of fidelity or allegiance is required” because they “will not act the part of hypocrites”); “Religious Test Applied to Witnesses,” *Rhode-Island American* [Providence], November 20, 1827 (religious premise of oath taking “takes from him one of his dearest privileges, the right of holding any office, or exercising any right to which is attached the sanction of an oath”). Some writers, however, thought that competency rules did not apply to other types of oaths. In 1839, for example, a Boston trial court—recognizing as “very doubtful” that jurors and public officials could be prevented from swearing on account of their religious beliefs—explained that, in contrast to oaths taken by witnesses, the oaths of jurors and public officials were “promissory” and not subject to perjury penalties. *Commonwealth v. Gates* (Boston Police Ct. 1839) (Rogers, J.), reported in “Religious Belief of Witnesses,” *Washington National Intelligencer*, July 2, 1839. See also Caleb Cushing, *The Right of Universalists to Testify in a Court of Justice Vindicated* (Boston: Bowles and Dearborn, 1828), 20. “[I]t is well settled that the principles of law respecting the oath of a witness in a court of justice, are wholly inapplicable to an oath of office” (citing *Omichund v. Barker*, 1 Wille 538, 548 [High Ct. Ch. 1744/5]). Cushing’s authorship is confirmed in Claude M. Fuess, *The Life of Caleb Cushing*, 2 vols. (New York: Harcourt, Bruce & Co., 1923), 1:81. Cushing was stretching Willes’s point, which was simply that the rule “that an oath cannot be altered, nor a new one imposed, but by authority of parliament relates only to promissory oath or oaths of office.” *Omichund*, 1 Wille 548.

Not surprisingly, therefore, very few reported cases in the years immediately following *Curtiss v. Strong* involved challenges to the restrictive common-law rule.⁹² But theological developments soon undermined this stability.

Around the time of the American Revolution, a group of liberal theologians centered in New England began rethinking Christ's redemption of human sin. Building on Calvinism, which one scholar has noted "still dominated American theology in the eighteenth century,"⁹³ several Massachusetts ministers began teaching that Christ's death had ensured salvation to all humanity.⁹⁴ Based on their belief in universal salvation, these religious reformers called themselves Universalists.

Initially, Universalists retained belief that God would punish sin after death, although only temporarily.⁹⁵ But church doctrine continued to evolve in ways that created an escalating conflict with common-law competency rules. In the first edition of his *Treatise of Atonement* (1805), Universalist minister Hosea Ballou argued that God's love was unchanging, and that, therefore, atonement was designed for the benefit of the individual, without being required for divine salvation.⁹⁶ By the third edition of his *Treatise* in 1812, Ballou expressed doubt in the existence of *any* future punishment, and shortly thereafter he openly denied punishment after death.⁹⁷

Ballou's teachings were controversial, even among fellow Universalists.⁹⁸ Denying all forms of punishment after death, many

92. In 1817, newspapers across the nation reported that North Carolina Chief Justice John Louis Taylor had refused to admit a witness on account of his supposed belief that there was not "either a heaven or a hell! Nor any future rewards or punishment!" See, for example, "Important Judicial Decision," *Connecticut Journal*, April 22, 1817; and "Important Judicial Decision," *Vermont Intelligencer*, May 5, 1817. Although little can be gleaned from the short newspaper reports, the disputed legal issue seems to have been whether the witness could testify as to his own religious beliefs, not whether such a witness would be competent if he disbelieved in future punishment.

93. E. Brooks Holifield, *Theology in America: Christian Thought from the Age of the Puritans to the Civil War* (New Haven, CT: Yale University Press, 2003), 221.

94. *Ibid.*, 221–26.

95. *Ibid.*, 226–27. Even this position sometimes led to accusations that Universalist belief "destroys both the solemnity and validity of an oath, which are predicated upon the certain future punishment of perjury." Richard Eddy, *Universalism in Gloucester, Mass.* (Gloucester, MA: Procter Brothers, 1892), 175–76 (reprinting a public letter by residents of Gloucester dated October 1785); see Kathryn Gin Lum, *Damned Nation: Hell in America from the Revolution to Reconstruction* (Oxford: Oxford University Press, 2014), 31–32.

96. Holifield, *Theology in America*, 228–29.

97. *Ibid.*, 230. See also *Curtiss v. Strong*, 4 Day 54 (referring to "Universalists, who believe there is no punishment after death").

98. Ann Lee Bressler, *The Universalist Movement in America, 1770–1880* (Oxford: Oxford University Press, 2001), 16.

believed, would lead to the proliferation of sin. As Seth Cowell wrote in 1821: “If wicked men are made to believe . . . that salvation is infallibly certain, they will have no motive sufficiently powerful to induce them to oppose the corrupt propensities of their nature.”⁹⁹ Some Universalists shared similar concerns about discouraging good behavior, and many moderated their views, although remaining committed to the idea of universal salvation. By the 1850s, Ann Bressler writes, “most Universalists were rejecting an ultra-Universalist position in favor of a belief in some form of limited future punishment.”¹⁰⁰ Ballou’s teachings, however, drew thousands of followers. And although Universalism represented the theological extreme, other Christian sects also rejected or de-emphasized the importance of eternal damnation.¹⁰¹

These changes had a transformative effect on oath taking. In the late eighteenth century, oaths were understood as implicit acknowledgments that forsaken sinners went to hell, creating a strong presumption in favor of trusting sworn testimony. Theological shifts, however, weakened the religious underpinnings of oaths in two ways. First, the declining importance of hell in American religion lessened the perceived effectiveness of oaths as a deterrent against lying.¹⁰² Second, the advent of Universalism created a significant conflict between mainstream religious views and existing competency rules. The common-law rule had not changed, but neither had it previously excluded an entire sect of faithful Christians.¹⁰³

99. *Ibid.*, 166 n. 45 (quoting Seth Crowell, *Strictures on the Doctrine of Universal Salvation: Wherein the Doctrine Is Disproved on the Principle of the Moral Government of God* [New York: Holt & Bolmore, 1821], 114).

100. *Ibid.*, 46.

101. *Ibid.*, 126–27. See, for example, William Rounseville Alger, *A Critical History of the Doctrine of a Future Life with a Complete Bibliography of the Subject* (Philadelphia: G.W. Childs 1864), 537; Thomas L. Nichols, *Religions of the World: An Impartial History of Religious Creeds, Forms of Worship, Sects, Controversies, and Manifestations, from the Earliest Period to the Present Time* (Cincinnati: Valentine Nicholson & Co., 1855), 67; see also Lum, *Damned Nation*, 125 (noting “a wider backlash against the idea of damnation”); Nathan O. Hatch, *The Democratization of American Christianity* (New Haven, CT: Yale University Press, 1989), 170–74 (noting that many sects rejected Calvinist emphasis on formal doctrine); James D. Bratt, “The Reorientation of American Protestantism, 1835–1845,” *Church History* 67 (1998): 69 (stating that many sects focused on personal relationships with God rather than “seeking, finding, and losing salvation”); and David Hempton, *Methodism: Empire of the Spirit* (New Haven, CT: Yale University Press, 2005), 25, 75 (arguing that Methodist teachings focused on God’s love rather than the prospect of damnation).

102. Many Americans began to doubt the duration of punishment after death (see note 95) and even among believers in eternal punishment, damnation was less central in their religious thinking (see note 101).

103. Quakers were only excluded because of *their own* refusal to swear (see notes 87–91) not because the law barred them from swearing. Christopher Grasso has discovered one

A. Ignoring the Common Law

Confronted with the collision between Universalist faith and competency rules, nineteenth-century judges occasionally ignored or overlooked the common law. In the Massachusetts case of *Hunscow v. Hunscow* (1818),¹⁰⁴ for example, the short report of the decision states, in full:

This was a libel for divorce *a vinculo*. On the trial a witness being offered to prove the adultery, *Wilson*, for the respondent, objected to his being sworn; and founded his objection to the competency of the witness, upon his professed disbelief of a future state of existence, and offered to prove his repeated declarations of such disbelief. But *the Court* admitted him to be sworn, and said the objection went only to his credibility.¹⁰⁵

This brief, and frequently misunderstood, report seems to be the earliest published account of someone who lacked a belief in future punishment being held admissible as a witness.¹⁰⁶

instance in which the testimony of an outspoken deist was rejected on account of his religious views. See Grasso, “The Boundaries of Toleration and Tolerance,” 292–93; see also Henry Pattillo, “An Address to the Deists,” in *Sermons, &c* (Wilmington, DE: James Adams, 1788), 273 (“[A]n oath is an act of worship The absurdity, the impiety of this act of religious worship, in the mouth of a *Deist*, must strike every person present with a degree of horror”).

104. *Hunscow v. Hunscow*, 15 Mass. (14 Tyng.) 184 (1818). For this session, Tyng’s reports note: “The reporter was not present at this term, and is indebted to the minutes of a highly respected friend at the bar, for the arguments of the counsel, and in some instance for the decision of the court, in the cases here reported.” Dudley Atkins Tyng, *Reports of Cases, Argued and Determined in the Supreme Judicial Court of the Commonwealth of Massachusetts* (Boston: Cummings and Hilliard, 1819), 15:178. The original case records and case file do not provide any insights regarding the excluded witness. See Hancock County, Maine, Supreme Judicial Court Records, 4:203, Maine State Archives; and Hancock County, Maine, Supreme Judicial Court Case Files, Castine sitting, June 1818, *Hunscow v. Hunscow*, case no. 13, Maine State Archives.

105. *Hunscow*, 15 Mass. 184 (italics in the original). The punctuation tracks the published 1819 report. In an 1851 edition, lawyer Benjamin Rand added a footnote citing subsequent cases. See Dudley Atkins Tyng, *Reports of Cases Argued and Determined in the Supreme Judicial Court of the Commonwealth of Massachusetts*, ed. Benjamin Rand (Boston: Charles C. Little and James Brown, 1851), 15:172.

106. In *Rutherford v. Moore*, 1 D.C. (1 Cranch C.C.) 404 (C.C.D.C. 1807), lawyer Francis Scott Key (soon to be famous for other reasons) objected to a witness who had purportedly “declared his disbelief in a future state of rewards and punishments.” Key cited English authorities, including the *Omichund* decision, in favor of his objection. Chief Judge William Cranch stated that he was “inclined to think” that the objection “ought to go rather to the credit” of the witness instead of his competency, “[b]ut Mr. Key waived the question as to the competency, and examined his witnesses as to the credibility.” *Ibid.*

Scholars often misinterpret *Hunscom* as a precedential decision that atheists could testify.¹⁰⁷ The decision, however, had nothing to do with atheists, as contemporaries widely recognized.¹⁰⁸ *Hunscom*'s supposed precedential status is also questionable. The evidentiary decision was a trial-level ruling, issued when a panel of the Supreme Judicial Court was riding circuit in the district of Maine, and the judges did not control which decisions were reported. Indeed, observers sometimes viewed the *Hunscom* report with a skeptical eye.¹⁰⁹ Nonetheless, its publication seems to have influenced Massachusetts law.¹¹⁰

Universalist competency to testify soon followed in other states. The Illinois Supreme Court permitted the introduction of a Universalist's

107. For example, John Witt remarks that "the Supreme Judicial Court abolished the disqualification of atheists in 1818." John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, MA: Harvard University Press, 2004), 57. See also Michael S. Ariens and Robert A. Destro, *Religious Liberty in a Pluralistic Society* (Durham, NC: Carolina Academic Press, 2002), 105 ("In Massachusetts . . . a witness's lack of religious belief initially went only to credibility, not competence"). Compare with Fisher, "The Jury's Rise as Lie Detector," 678 n.481 (describing *Hunscom*, without suggesting any precedential status, as "holding that a witness's atheism went only to credibility, not to competency").

108. See S. G., "Exclusion of Witnesses for Unbelief," 1:349 n.1; Cushing, *The Right of Universalists to Testify*, 10; Samuel Howe, *The Practice in Civil Actions and Proceedings at Law, in Massachusetts* (Boston: Hilliard, Gray, & Co. 1834), 254; Theron Metcalf, *Digest of the Cases Decided in the Supreme Judicial Court of Massachusetts* (Boston: Richard & Lord, 1825), 132; and Joseph Story, "Evidence," in *Encyclopaedia Americana: A Popular Dictionary of Arts, Sciences, Literature, History, Politics and Biography*, vol. 5, ed. Francis Lieber (Philadelphia: Carey & Lea, 1831), 9. See also *Thurston v. Whitney*, 56 Mass. (2 Cush.) 104 (1848) (rejecting atheist testimony); and *Commonwealth v. Wyman & Robinson*, Thacher Cr. 432 (Boston Mun. Ct. 1836) (same).

109. At the outset of his illustrious legal career, John Appleton of Maine—who staunchly supported allowing Universalists and atheists as witnesses—explained that the court in *Hunscom* "consider[ed] a disbelief in a future state of existence as an objection to the credibility—but the question was not decided on argument, and is contrary to the decisions in England and New-York, and most other States in this country." John Appleton, "On the Admissibility of Atheists as Witnesses," *The Yankee; and Boston Literary Gazette* (Boston), June 11, 1829, 188. The editors of the *Christian Spectator* noted, albeit without attribution, that they were "permitted, on the highest authority, to say that the Judges of the Supreme Court of Massachusetts do not consider that note [of the *Hunscom* ruling] as the record of a decision by which they feel themselves to be bound. The note was made by the Reporter himself, and no written decision was given in that case by the court." "Review on the Exclusion of Infidels from Judicial Oaths," 440 n.3.

110. See "Report Relating to Incompetency of Witnesses on Account of Religious Belief," 6 ("No person is rejected as an incompetent witness, who believes in a God who will punish perjury, if he is otherwise competent. This has been the doctrine of our courts since 1818").

testimony in 1822, although its reasoning was no more elaborate than the *de minimis* treatment in *Hunscow*.¹¹¹ The same year, a county court in Maryland allowed a Universalist to testify.¹¹² The court admitted the witness after learning that he “always appealed to [the scriptures] as the bulwark of his faith.”¹¹³ Compared with other published decisions, these rulings were scattered and isolated. But early nineteenth-century reporting was limited, so the decisions could be the tip of a broader, unrecorded shift in judicial behavior. At a minimum, they highlight the agency that judges sometimes exhibited in eschewing the usual religious prerequisites for oath taking.

Judges also used ambiguities in Universalist doctrine to avoid strict adherence to competency rules. Having decided *Jackson v. Gridley* in 1820, the New York Supreme Court re-examined witness exclusion a few years later in *Butts v. Swartwood*.¹¹⁴ A witness had apparently announced “that he did not believe in the bible more than in any other history . . . but he at the same time declared that he believed in the Deity, and in the doctrine of universal salvation.”¹¹⁵ Without conclusive evidence of disqualifying beliefs, the trial judge allowed him to testify. The state’s highest court affirmed, finding “no evidence in this case, to shew what precise creed is embraced in the doctrine of universal salvation.” The court noted that not “all those who hold that doctrine. . . deny all future punishment. Some only deny the duration of those punishments to be eternal.”¹¹⁶ Indeed, there was a lively debate within Universalist circles as to whether God temporarily punished sin.¹¹⁷

B. Reinterpreting the Common Law

In 1824, only a year after *Butts v. Swartwood*, a New York lower court issued the first reported decision directly rejecting the authority of Atkyns’s report of *Omichund*. In a criminal trial for perjury, the prosecutor, Raymond Williams, took the stand as a government witness. The defendant objected to Williams’s competency and offered a witness who “testified

111. *Noble v. People*, 1 Ill. 54 (1822). On a separate issue, the court revealed a strikingly liberal interpretation of competency requirements. *Ibid.*, 56 (“If the witness be manifestly biased by his interest, the jury can detect him”).

112. “An Extract from a Letter, dated Elkton, 4th April, 1822,” in *The Philadelphia Universalist Magazine and Christian Messenger*, 2 vols., ed. Abner Kneeland (Philadelphia: J. Young, 1822), 1:287.

113. *Ibid.*

114. *Butts v. Swartwood*, 2 Cow. 431 (N.Y. 1823).

115. *Ibid.*, 432.

116. *Ibid.*

117. Bressler, *The Universalist Movement in America*, 46.

that he had frequently heard the prosecutor declare, that *he did not believe in any future punishment, after this life.*"¹¹⁸ Judge Reuben Hyde Walworth—who 4 years later became chancellor, one of New York's highest judicial officers—held that Williams should be allowed to testify:

If he does not believe in the existence of a God; or if he believes in no punishment except by human laws, no obligation or tie can have any binding force upon his conscience. But if he believes that he will be punished by his God even in this world, if he swears falsely, there is a binding tie upon the conscience of the witness and he must be sworn; and the strength or weakness of that tie is only proper to be taken into consideration in deciding upon the degree of credit which is to be given to his testimony.¹¹⁹

The New York Supreme Court's earlier decision in *Jackson v. Gridley* had gone awry, Walworth argued, based on "the misreporting of the opinion of Chief Justice Willes as delivered in the case of *Omichund v. Barker.*"¹²⁰

In 1827, a lower court in western South Carolina adopted and expanded upon Judge Walworth's reasoning. Drawing on nearly all available sources, Chancellor Henry William DeSaussure found the common law to be indeterminate based on the conflicting reports of *Omichund* and the lack of a majority opinion in the earlier South Carolina decision of *State v. Petty.*¹²¹ DeSaussure therefore returned to first principles. "It is clear that the object of all evidence is the attainment of truth," he wrote, also noting that, "in modern times, the disposition of the Courts of Justice has been to narrow the ground of incompetency, and to leave objections to operate on the credit of the witnesses."¹²² Because the contested witness believed in divine punishment, DeSaussure stated, "[i]t does appear to me that this is a sufficient sanction to guarantee the attainment

118. *People v. Matteson*, 2 Cow. 433, 433 (N.Y. Ct. Oyer & Terminer 1824) (italics in the original).

119. *Ibid.*, 433.

120. *Ibid.*, 434. Judge Williams issued a similar opinion in an unnamed case. See 2 Cow. 572 (N.Y. Cir. Ct. 1824).

121. *Farnandis v. Henderson*, 1 Car. L.J. 210. In *Petty*, two of the five justices of South Carolina's Constitutional Court had articulated the "well settled" common-law rule: "If one called as a witness, does not believe in God, and a future state of rewards and punishments, he cannot be sworn." *State v. Petty*, 16 S.C.L. (Harp.) 59, 62 (1823) (Colcock, J.). In *Petty*, the attorney for the state had argued that "the rule must be considered abrogated, by that part of the constitution which guarantees the liberty of conscience." *Ibid.* Justice Charles Colcock summarily dismissed this argument, stating: "I have always regarded that as a wise provision in the constitution; and shall never believe that it was intended to banish all religion; nor can I permit myself to enter seriously into any arguments on a question which I most earnestly hope will never be seriously entertained in these United States." *Ibid.*, 62–63.

122. *Farnandis v. Henderson*, 1 Car. L.J. 204, 206.

of truth from a witness.”¹²³ But “those who deny wholly the existence of a God or Providence, or punishments in this or another world,” DeSaussure emphasized, should not be admitted.¹²⁴

The more pathbreaking aspect of DeSaussure’s opinion, however, was his assessment of religious freedom. South Carolina’s constitution, like New York’s, barred only “discrimination or preference” in the “[t]he free exercise and enjoyment of religious profession and worship”; it did not expressly prohibit legal disabilities imposed on account of religious views.¹²⁵ Opposing counsel therefore argued that “the inquiry into [the witness’s] religious opinions did not contravene . . . the Constitution [because] he might still enjoy his religious profession, and worship notwithstanding such exclusion, and that the exclusion would merely operate on his civil and not his religious rights.”¹²⁶ DeSaussure eloquently replied:

If a man’s religious opinions are made a ground to exclude him from the enjoyment of civil rights, then he does not enjoy the freedom of his religious profession and worship. His exclusion from being a witness in Courts of Justice is a serious injury to him; it is also degrading to him and others who think with him. . . . It would seem to me to be a mockery to say to men, you may enjoy the freedom of your religious professions and worship; but if you differ from us in certain dogmas and points of belief, you shall be disqualified and deprived of the rights of a citizen, to which you would be entitled but for those differences of religious opinion.¹²⁷

Drawing on a sense of social progress, DeSaussure concluded: “I feel strength in the view of the case by the growing liberality of the age, in the respect shewn to the tenderness of conscience.”¹²⁸ The decision was appealed to the South Carolina Court of Appeals and affirmed without comment.¹²⁹

DeSaussure’s opinion was pioneering as a judicial pronouncement, but similar expositions of religious freedom were increasingly common in the public sphere. For decades, many Americans opposed religious tests

123. *Ibid.*, 210.

124. *Ibid.*, 211.

125. S.C. Constitution of 1790, art. VIII, § 1.

126. *Ibid.*, 212. For the opposing counsel’s argument, see “Mr. Chestney’s Speech Before the Hon. Chancellor Desaussure,” *South Carolina State Gazette* (Columbia), May 24 and 31, 1828.

127. *Farnandis v. Henderson*, 1 Car. L.J. 212.

128. *Ibid.*, 213 (citing, although not by name, *People v. Philips* (N.Y. Ct. Gen. Sess. 1813), in William Sampson, *The Catholic Question in America* [New York: Edward Gillespy, 1813]). See also Walter J. Walsh, “The First Free Exercise Case,” *George Washington Law Review* 73 (2004): 41.

129. *Farnandis v. Henderson*, 1 Car. L.J. 214.

for officeholders on the basis that burdensome civil incapacities prevented the practice of religion from being truly “free.”¹³⁰ And politicians were beginning to make similar arguments against the common-law competency rule. At the 1821 state constitutional convention in Albany, following shortly after the New York Supreme Court’s decision in *Jackson v. Gridley*, state legislator Erastus Root proposed that courts should not “exclude any witness on account of his religious faith.”¹³¹ Root instead “wished for freedom of conscience,” disallowing witnesses from being “interrogated and catechised as to their articles of faith.”¹³² Root’s idea, however, garnered almost no support.¹³³ It is worth noting that much of the public commentary following *Gridley* defended the ruling, including Spencer’s reliance on the Atkyns report in *Omichund*.¹³⁴

Following the 1821 convention, citizens in several New York localities petitioned for legislative change. An assembly in Whitesborough, for example, adopted resolutions claiming that the *Gridley* decision had unconstitutionally endorsed sectarian doctrine.¹³⁵ The citizens proposed that “the right of testifying in courts of justice is one of the most important

130. See, for example, Oliver Ellsworth, “To the Landholders and Farmers, Number VII,” *Connecticut Courant* (Hartford), December 17, 1787, 1 (arguing that “a good and peaceable citizen” should be “liable to no penalties or incapacities on account of his religious sentiments”); and *Journal of Debates and Proceedings in the Convention of Delegates Chosen to Revise the Constitution of Massachusetts* (Boston: Daily Advertiser, 1821), 83 (remarks of James Prince) (arguing that natural liberty is abridged whenever “the consciences of men are in any wise shackled by forms or qualifications”).

131. Nathaniel H. Carter, William L. Stone, and Marcus T.C. Gould, eds., *Reports of the Proceedings and Debates of the Convention of 1821, Assembled for the Purpose of Amending the Constitution of the State of New York* (Albany, NY: E. & E. Hosford, 1821), 462.

132. *Ibid.*, 463.

133. Root quickly withdrew his first proposal, see *ibid.*, 464, and the following day, he proposed that “no witness shall be questioned as to his religious faith.” *Ibid.*, 465. Root seems to have been worried about competency and credibility challenges. See *ibid.* (arguing against the rule that a witness “must agree to some particular tenets, otherwise he is excluded from being a witness, or the jury are informed, that he is an incredible witness, and his testimony is not to be believed”). The delegates defeated the proposal by a vote of 94 to 8 after Chancellor Kent deemed it to be “unworthy of notice.” *Ibid.*, 466.

134. See, for example, Q.E.D., “To the Editors of the Argus,” *Albany Argus*, January 8, 1822, 3; and Q.E.D., “Messrs. Editors,” *Albany Argus*, December 25, 1821, 2. See also William Craig Brownlee, *A Dissertation on the Nature, Obligations, and Form of a Civil Oath* (New York: Wilder & Campbell, 1825), 18.

135. “Meeting at Whitesborough” [Jan. 24, 1822], in Thomas Herttell, *The Demurrer: Or, Proofs of Error in the Decision of the Supreme Court of the State of New York, Requiring Faith in Particular Religious Doctrines as a Legal Qualification of Witnesses; Thence Establishing by Law a Religious Test and a Religious Creed* (New York: E. Conrad, 1828), 145–46.

civil rights of the citizens of this state; and that no citizen can be deprived of this right, unless by the law of the land on the judgment of his peers.”¹³⁶ At least one New York legislator agreed. Thomas Herttell, a legislative champion of many liberal causes, wrote in his 156 page attack on *Gridley* that the judges “have discriminated between the religious tenets of different individuals of the community, and imposed disabilities on those whose opinions they have undertaken to proscribe by law.”¹³⁷ Notably, Herttell did not argue that juries should be allowed to assess a witness’s credibility based on his religious views. The pursuit of truth, Herttell argued, “was no justification for the court, *nor would it be for any jury* to intermeddle in a concern in which the court admitted . . . that ‘no human tribunal had a right to interfere.’”¹³⁸

C. Defending Incompetency

As the 1820s progressed, reports of testimonial exclusions became increasingly common, and notably more controversial. At the fore of these developments was a trio of rulings in Rhode Island, Connecticut, and New York. These three decisions, along with the debates that erupted in their aftermaths, expose both the escalating importance of religion-based competency rules as a salient public issue and the ways that reformers were adapting their arguments.

In 1827, the Circuit Court of the United States for the First Circuit, sitting as a trial court in Providence, Rhode Island, considered an objection to two plaintiff’s witnesses—father and son Joseph and John Richardson—on the basis of religious defect. A defense witness testified “that he knew the [Richardsons] well, that he had often heard the son say, that he did not believe in the existence of a God, or of a future state,”¹³⁹ and that the father had declared “that he did not believe in a future state; that he had read *Tom Paine’s* works; and did not know, whether he (the father) believed any thing.” Supreme Court Justice Joseph Story—who was riding circuit—announced the court’s ruling: “We think these persons are not competent witnesses. Persons who do not believe in the existence of a God, or of a future state, or who have no religious belief, are not entitled to be sworn

136. *Ibid.*, 146. See also “Report of the Judiciary Committee, on Petition from Monroe County,” *Watch-Tower* (Cooperstown, NY), June 9, 1823, 2.

137. Herttell, *The Demurrer*, 6 (emphasis omitted).

138. *Ibid.*, 84 (emphasis added).

139. *Wakefield v. Ross*, 5 Mason 16, 18n*, 28 F. Cas. 1346, 1347n2 (C.C.D.R.I. 1827) (No. 17,050). Mason’s report was published in 1831 and was the most frequently cited report of the case.

as witnesses.”¹⁴⁰ In light of existing authority, Story’s decision was unsurprising.

One year later in *Atwood v. Welton*,¹⁴¹ the Supreme Court of Errors of Connecticut held a Universalist incompetent to testify in the most erudite opinion of its kind. Canvassing most of the appellate case law, Justice David Daggett—who had argued as counsel in *Curtiss v. Strong*—mentioned the ambiguity in the *Omichund* opinions but stated confidence in Atkyns’s report.¹⁴² The rule requiring belief in future rewards and punishments, he asserted on behalf of the majority, “is the rule of common law; and there is no adjudged case, nor hardly a *dictum* in the *English* books against it.”¹⁴³

Daggett acknowledged that “a man ought not to be questioned respecting his religious opinions, as the enquiry may subject him to reproach, if he should confess his infidelity.”¹⁴⁴ Admitting prior out-of-court statements, however, obviated religious-liberty concerns. “[I]t is not easy to see how there is any interference with religious faith,” he wrote, “in deciding a person professing certain opinions to be unfit to be sworn.”¹⁴⁵ Excluding a witness from testifying, he stated, “has no possible bearing” on his belief or worship. Restating and responding to the rights-based argument, Daggett continued: “But his rights are infringed, or he is disturbed in the exercise and enjoyment of them. What right? Doubtless the right of giving testimony. This is a new right, privilege or franchise, unknown, and therefore, undefined, and I may add, unheard of before, by any lawyer or judge. . . . The party [in the suit] may be injured . . . but it is incomprehensible how the proposed witnesses can be, in any way affected.”¹⁴⁶

140. *Ibid.* Justice Story continued: “The administration of an oath supposes, that a moral and religious accountability is felt to a Supreme Being, and is the sanction which the law requires upon the conscience of a person, before it admits him to testify.” *Ibid.* After the decision, there was some debate about whether Story thought the witnesses were incompetent as *atheists*, or as *Universalists*. See, for example, “Litchfield Decision,” *Trumpet and Universalist Magazine*, October 18, 1828, 1 (“The public mind was much agitated about the close of the year 1827, by a misreport of a decision . . . by Mr. Justice Story. It was at first supposed that the two witnesses, father and son, were rejected for want of belief in the doctrine of future rewards and punishments”); and “Competency of Witnesses,” *Trumpet and Universalist Magazine*, September 14, 1833, 2 (“Judge Story, we believe, is misrepresented. It was an atheist to who he objected”).

141. *Atwood v. Welton*, 7 Conn. 66 (1828).

142. *Ibid.*, 75 (“*Atkyns* furnished the case from the judges themselves, and when the decision was pronounced. With his accuracy as a reporter, it is not credible, that he should have omitted what is now deemed important in the opinion of *Willes*”).

143. *Ibid.*, 74.

144. *Ibid.*, 73.

145. *Ibid.*, 77.

146. *Ibid.*, 78.

Anticipating the logical conclusion of the rights-based argument, Daggett asserted that “if the witness who denies all future punishment, cannot be excluded, without a violation of the constitution, neither can the *Atheist*.”¹⁴⁷

One of the many interesting features of *Atwood* is the creative theological arguments made on both sides. Responding to the plaintiff’s contention that the common-law rule would exclude a Calvinist who was “*fully assured* of his own election to eternal life,” Daggett embraced the point, stating that “if it should be proved respecting any person offered as a witness, that he believed his own happiness secure at death *regardless of his conduct in this life*, he ought not to be sworn.”¹⁴⁸ But Daggett did not directly respond to the plaintiff’s argument that courts always accepted testimony from Jews, “whose ideas of a future state are known to be very indistinct and loose.”¹⁴⁹ Aside from this remark, the potential tension between Jewish theology and the strict common-law rule played almost no role in the legal and political debates about witness competency.¹⁵⁰ Advocates of reform more frequently mentioned the Catholic belief in absolution, which they argued exposed the hypocrisy of religious-based tests. “What credit will be given, by a *Protestant*,” Justice John Thompson Peters asked in dissent in *Atwood*, “to the testimony of a *Catholic* with an indulgence in his pocket?”¹⁵¹

147. *Ibid.*

148. *Ibid.*, 76. For similar arguments, see Bernard Whitman, “Letter II [November 1830],” in *Two Letters to the Reverend Moses Stuart: On the Subject of Religious Liberty*, 2nd ed. (Boston: Gray & Bowen, 1831), 148–49; and J. F., “Dr. Ely—Orthodox Party—Oaths,” *Trumpet and Universalist Magazine*, April 24, 1830, 1.

149. *Atwood v. Welton*, 7 Conn. 69.

150. See note 49.

151. *Atwood v. Welton*, 7 Conn. 85 (Peters, J., dissenting). See also *Farnandis v. Henderson*, 1 Car. L.J. 211 (noting that strict application of the common-law rule “may exclude Roman Catholics, who believe that punishments in another world may be avoided altogether by absolution, or diminished by masses and prayer”); St. George Tucker, *Appendix to Volume First, Part Second, of Blackstone’s Commentaries* (Philadelphia: William Young Birch and Abraham Small, 1803), 9 (“Atheism destroys the sacredness and obligation of an oath. But is there not also a religion (so called) which does this, by teaching, that there is a power which can dispense with the obligations of oaths; that *pious* frauds are right, and that faith is not to be kept with heretics”). Interestingly, DeSaussure faced bitter criticism from the Catholic Bishop of Charleston for misrepresenting Catholic doctrine. John England, Bishop of Charleston, “Mistakes: To the Hon. Chancellor Desaussure,” *Baltimore Gazette and Daily Advertiser*, December 24, 1827, 2. Arguments about Jewish and Catholic theology were nearly always made in favor of reform, not in favor of excluding Jews or Catholics. But see *ibid.* (noting an unsuccessful attempt in York District, South Carolina, “to invalidate the testimony of the principal witness for the prosecution, upon the ground that he was *suspected of being a Roman catholic*”); and *Commonwealth v. Buzzell*, 16 Pick. 153, 156 (Mass. 1834) (argument of counsel,

Another prominent witness-competency controversy arose in the late 1820s in New York. The episode stemmed from the 1826 kidnapping and apparent murder of William Morgan by a group of Masons in retaliation for his plan to reveal secrets of the Masonic order. At the August 1828 trial of several of Morgan's alleged captors, the prosecution—led by Ambrose Spencer's son, John C. Spencer—planned to rely heavily on the testimony of Edward Giddins (often reported as Giddings),¹⁵² but the defense produced witnesses who said that Giddins “believed that conscience alone controlled the actions of honest men, and denied the existence of any being to whom man will be every accountable for his conduct.”¹⁵³ Consequently, Judge Nathaniel Howell barred Giddins from testifying, undercutting several of the prosecutions.¹⁵⁴ Journalist William Leete Stone later reported to John Quincy Adams, “The rejection of Giddings as a witness, was a sore disappointment to the people. It was known . . . that his testimony, if received, would be of the highest importance.”¹⁵⁵

Tellingly, reactions to the trio of decisions in the late 1820s—*Wakefield v. Ross*, *Atwood v. Welton*, and the William Morgan ruling—were far more hostile than the responses to *Jackson v. Gridley* less than a decade earlier. According to the *Boston Patriot*: “The decision of the Supreme Court of Errors of Connecticut . . . has called forth remarks of disapprobation from almost every quarter. . . . Good will come out of this decision, however, as it will probably lead to the passage of a law to prevent the judiciary

rejected by the court, that “confession and absolution being parts of the Roman Catholic faith, a witness belonging to that sect might testify what was not true, in the expectation of afterwards obtaining absolution”).

152. The Giddins family seems to have used both spellings. See Edward Giddins to Henry Giddings, January 28, 1824, Papers of Victory Birdseye, Livingston Masonic Library, New York, NY.

153. Testimony of David Morisson, quoted in “Anti-Masonic Almanacs—Concluded,” *Republican Compiler* (Gettysburg, PA), June 22, 1830, 2. This episode is summarized in Ronald P. Formisano, *For the People: American Populist Movements from the Revolution to the 1850s* (Chapel Hill: University of North Carolina Press, 2008), 136–39. At the later trial in 1831, Judge Samuel Nelson permitted Giddins to testify based on prosecution witnesses who testified that he believed in God. *Trial of Parkhurst [sic] Whitney, Timothy Shaw, Noah Beach, William Miller, and Samuel M. Chubbuck; for a Conspiracy; the Abduction, False Imprisonment, and Assault and Battery of William Morgan: Had at a Special Circuit Court, Held at Lockport, Niagara County, Feb. 1831* (Lockport, NY: Balance Office, [1831]), 24 (hereafter *Trial of Parkhurst Whitney*).

154. William Leete Stone, *Letters on Masonry and Anti-Masonry: Addressed to the Hon. John Quincy Adams* (New York: O. Halsted, 1832), 344. Morgan testified to the grand jury but was “excluded from testifying on the trials of some of the parties implicated.” John C. Spencer, *Report of the Special Counsel on the Subject of the Abduction of William Morgan*, N.Y. Senate Report No. 67 (1830), 18.

155. *Ibid.*, 347.

from acting as inquisitors upon men's religious belief, when summoned as witnesses."¹⁵⁶ Indeed, pressure for legislative change was mounting.

Reform efforts within and across state lines seem to have been mostly uncoordinated.¹⁵⁷ Universalist magazines were the only steady, far-reaching voice in favor of reform, although newspapers and law magazines gave the issue considerable cross-state attention as well. This fragmented effort, however, should not distract from well-defined trends in public debate and lawmaking. Published cases, treatises, editorials, and legislative debates all facilitated, and provide evidence of, fairly consistent patterns in reformist rhetoric and goals.

Yet again, religious freedom was the most prevalent argument against the common-law competency rule. That rule, one editorial in Rhode

156. "Intolerance," *Boston Patriot & Mercantile Advertiser*, July 15, 1828, 2. Commentators were sometimes simultaneously critical of the common-law rule but not the judicial decisions themselves. See "Religious Test Applied to Witnesses," *Rhode-Island American* (Providence), November 20, 1827, 2 ("rejecting a witness for not believing in future rewards and punishments, is undoubtedly correct according to the absurd doctrines of the common law"); and *Norwich Courier* (CT), July 16, 1828, 2 (stating that the holding of *Atwood v. Welton* "is not, we understand, a new point, which was adjudged" but "has been settled law in Connecticut, for very many years").

157. My search has been mostly unavailing. The papers of two leading reformers reveal almost no discussion of efforts to eliminate testimonial exclusions. From 1827 through 1832—a period inclusive of his most active reform efforts—Millard Fillmore's unpublished papers show only two letters discussing testimonial exclusions. In the first letter, a constituent lauded Fillmore for proposing that "professed atheism apply to only the credibility of witnesses in our courts of justice, & not to their competency." Exclusion of atheists, he wrote, "is now unfortunately connected with political considerations that will prove an obstacle to its dispassionate consideration." A. B. Johnson to Millard Fillmore, January 29, 1831, Microfilm Edition of the Millard Fillmore Papers, Series 1, Reel 1. In another letter, Philo C. Fuller—a New York legislator and later congressman—wrote to Fillmore: "I get your Essays on abolishing the religious test—and regularly read, cut out & preserve them: a compliment I have paid to very few productions which have come to hand this winter." P. C. Fuller to Millard Fillmore, February 26, 1832, Microfilm Edition of the Millard Fillmore Papers, Series 1, Reel 2. Gideon Welles's papers from 1827 through 1830 reveal almost no discussion of witness-competency rules despite his introduction of a reform bill in the Connecticut legislature. One correspondent wrote: "I am not a universalist in faith or profession, but in the doctrine of evidence lately recognized I see much to alarm the people of this state. As a lawyer I approve the doctrine—as an advocate for the rights & liberty of man, nay as a christian I see in it much to deplore—But all things work for good. The promulgation of the doctrine here has (I speak within bounds) added thirty substantial names to the Jackson cause." Asa Child to Gideon Welles, July 9, 1828, Gideon Welles Papers, Library of Congress. A few months later, one of Welles's Jacksonian correspondents reiterated the decision's political usefulness: "The Litchfield decision has been particularly beneficial." Andrew T. Judson to Gideon Welles, October 11, 1828, Gideon Welles Papers, Library of Congress. Welles's correspondence, including the collection in the New York Public Library, does not illuminate his subsequent efforts to reform the law.

Island stated, “seems to be requiring of the witness that he shall believe in certain prescribed doctrines, in other words a direct attempt to set up a religious test.”¹⁵⁸ Countless others made the same point.¹⁵⁹

Although this argument easily resonates with modern readers, it is important to recognize its contestability at the time.¹⁶⁰ Legal equality had long been one of many facets of religious freedom that could *supplement* the natural right of free exercise, but reformers in the 1820s and 1830s were, perhaps unwittingly, collapsing these concepts into an undifferentiated whole. To put the point another way, the struggle over competency rules was pulling the right of free exercise away from its originally more limited focus on liberty. Reformers were equating the denial of legal privileges with the deprivation of natural rights.

In states that recognized civil equality, much of the debate focused on whether testifying was a civil right. Judicial decisions and early commentary were generally hostile to the idea. In 1828, for example, Massachusetts legislator and future United States Attorney General Caleb Cushing wrote:

[T]he phrase ‘civil capacities’ in the [religious freedom] act, has no application . . . to the qualifications of a witness. These qualifications are a matter of *adversary* right. Every party to a cause has a right to demand a trial by the established rules of evidence. . . . The court cannot, for the purpose of protecting the reputation or saving the feelings of the witness, deny to the defendant the exercise of this right.¹⁶¹

158. “Religious Test Applied to Witnesses,” *Rhode-Island American* (Providence), November 20, 1827, 2.

159. See, for example, D. Pickering, “Reply to Mr. Cowell’s ‘Card,’” *Providence Patriot*, December 1, 1827, 2 (“[D]oes not a witness *suffer*, by being *proscribed* as *unworthy* of credit, merely because he cannot *conscientiously* subscribe to a *certain religious tenet* . . . ?”); J. F., “Dr. Ely—Orthodox Party—Oaths,” *Trumpet and Universalist Magazine*, April 24, 1830, 1 (“[T]o guarantee to one man the privilege of being a witness under oath, while you withhold it from another whose moral character is equally good, creates an inequality, and gives one a legal pre-eminence over the other”); and Appleton, “On the Admissibility of Atheists as Witnesses,” 188 (“Government has no right to interfere with the religions of its citizens—it is entirely a question between them and their God”). These arguments were often explicitly pitched in constitutional terms. See, for example, “Senate,” *Connecticut Courant* (Hartford), June 8, 1830, 2 (remarks of Samuel Hart and Lorrain Pease) (criticizing *Atwood* as “unconstitutional”).

160. See, for example, “Review of the Controversy, respecting Judge Story’s Late Decision,” *Rhode-Island Religious Messenger* (Providence), December 7, 1827, 3 (denouncing the view that because individuals “are at liberty to exercise [religion], without encroaching the province of our neighbors, . . . [and] believe as they choose, that, ergo, all opinions are equally good, by the laws of both God and man”).

161. Cushing, *The Right of Universalists to Testify*, 21. See also “For the Courier,” *Norwich Courier* (CT), July 16, 1828, 2–3; “Of the Controversy Respecting Judge Story’s Late Decision,” 142. Similarly, William Leete Stone wrote to John Quincy

For Cushing, the only rights at stake were those of the competing parties, not prospective witnesses, and the rules of evidence defined those rights. A review in the *Christian Spectator* agreed, noting that “[a] man can be wronged only by being deprived on some *right*. But the right to offer testimony in a given case, belongs to the *contending parties*, and to no one else.” Witnesses had “obviously no rights.”¹⁶²

These arguments, however, had started to lose their persuasiveness.¹⁶³ The law, many now thought, was demeaning people based solely on their religious beliefs, placing honest men “on a level with a man convicted of forgery or any infamous crime.”¹⁶⁴ Depriving Universalists of otherwise available civil rights, Bernard Whitman wrote in 1830, constituted a form of “punishment” that was “wholly subversive of religious liberty.”¹⁶⁵ Indeed, rejected witnesses did not take kindly to their exclusions. Still bitter about being rejected in 1828 “for exercising a privilege guaranteed by the constitutions of our country,” Edward Giddins asked the New York prosecutor not to call upon him again. “To again suffer my feelings to be wantonly sported with, without a prospect of being able to benefit the public with my testimony,” Giddins wrote, “is more than I think that public ought to ask, and more than I can persuade myself to submit to.”¹⁶⁶

Reformers also increasingly realized that denying the testimony of certain groups could, in effect, place those groups beyond the “protection of the law,” leaving them without effective recourse to infringements of their

Adams that “the court were clearly right in rejecting [Giddins], both by the principles of the constitution and the common law.” Stone, *Letters on Masonry and Anti-Masonry*, 348. In support, Stone cited *Jackson v. Gridley* and the subsequent debates in New York’s 1821 convention. *Ibid.*, 348–49. Adams surely agreed, explaining in a floor debate in Congress in 1840 that “it is a well known principle of the common law that a man who avows his own disbelief of this responsibility, who denies the existence of a God, or his own liability to account in a future world for any falsehood of his oath before a court of justice on earth, thereby becomes incompetent to testify in courts of law.” “House of Representatives,” *Daily National Intelligencer*, June 16, 1840, 2.

162. “Review on the Exclusion of Infidels from Judicial Oaths,” *Christian Spectator*, September 1829, 447. Later, the reviewer explained: “Every man in a court of justice has a right to be tried by those rules, strike where they may. Nor can courts deprive him of the exercise of this right, by the consideration that in so doing, they may affect the reputation of any third person who is offered as a witness.” *Ibid.*, 451.

163. See, for example, notes 158, 159, 177, 230, 274, and 275.

164. “Religious Test Applied to Witnesses,” *Rhode-Island American* (Providence), November 20, 1827, 2.

165. Bernard Whitman, “Letter II [November 1830],” in *Two Letters to the Reverend Moses Stuart: On the Subject of Religious Liberty*, 2nd ed. (Boston: Gray & Bowen, 1831), 151.

166. Edward Giddins to Victory Birdseye, June 16, 1830, Papers of Victory Birdseye.

private rights.¹⁶⁷ Even Cushing, who had defended the judges, noted that “[i]t would afford just ground of reproach against the law . . . if a numerous and respectable body of Christians were, by law, incompetent to give evidence in a court of justice.”¹⁶⁸ Notably, however, these claims about the “protection of the law” were tied to the inability of atheists to vindicate their other rights in court; they do not necessarily suggest an incipient principle against class-based legislation.¹⁶⁹

In addition to making constitutional arguments, many writers questioned the evidentiary value of excluding Universalists from testifying. The *Universalist Magazine* proclaimed that requiring belief in future rewards and punishments “involves the revolting notion that the more unmerciful and cruel we believe our Maker to be, the more likely we shall be to speak the truth in evidence.”¹⁷⁰ A letter to the *American Mercury* echoed this sentiment: “He, whose soul needs to be grasped with the terrors of hell, before he can tell the truth, is surely so abandoned, that hell itself could not prevent his perjury.”¹⁷¹

The backlash to *Wakefield v. Ross*, *Atwood v. Welton* and the William Morgan affair in New York exposed increasing public disillusionment with the propriety and constitutionality of the common-law rule. The *Atwood* decision, one Connecticut legislator declared, “had produced

167. See, for example, Herttell, *The Demurrer*, 24–25 (“By being thus deprived of the right or privilege of taking an oath, he is debarred the means of personal safety placed out of the pale of legal protection . . . as if proceedings and judgment of outlawry were had and given against him”); J. F., “Dr. Ely—Orthodox Party—Oaths,” *Trumpet and Universalist Magazine*, April 24, 1830, 1 (“[Y]ou cannot more seriously molest a man, than by depriving him of the dearest privilege of a freeman, and placing him beyond the protection of the laws”); and “Connecticut Legislature,” *Connecticut Journal*, June 15, 1830, 2 (remarks of John Gray) (“[T]he penalty, by a recent decision, is no less than disfranchisement, and outlawry for difference in opinion in religious matters”).

168. Cushing, *The Right of Universalists to Testify*, 3. In later prosecutions relating to the William Morgan affair, and after New York changed its law, Judge Samuel Nelson apparently stated that because a competency objection “was in its nature penal as to the witness, . . . it ought most clearly to be made out.” *Trial of Parkhurst Whitney*, 24.

169. For a historical defense of the view that the Equal Protection Clause originally forbade all sorts of improper classifications, see Melissa L. Saunders, “Equal Protection, Class Legislation, and Colorblindness,” *Michigan Law Review* 96 (1997): 245–337. For a rebuttal of this argument and defense of the view that the Equal Protection Clause originally guaranteed only equal governmental protection of private rights, see Christopher R. Green, “The Original Sense of the (Equal) Protection Clause: Pre-Enactment History,” *Civil Rights Law Journal* 19 (2008): 45–71.

170. “For the Universalist Magazine,” *Universalist Magazine* (Boston), March 15, 1828, 1.

171. “Review on the Exclusion of Infidels from Judicial Oaths,” *American Mercury* (Hartford, CT), December 8, 1829, 3.

astonishment and regret throughout the community.”¹⁷² This comment is borne out by the rapid success of legislative reform efforts.¹⁷³ Spurred by public outcry, Rhode Island, Connecticut, and New York all quickly enacted legislation amending their competency requirements. In Rhode Island, a bill allowing both Universalists and atheists to testify passed hastily with only five dissenting votes.¹⁷⁴ This result is not surprising given the state’s long-standing history of broad religious freedom without an established church and the lack of any noticeable public opposition to the legislative change.¹⁷⁵ A less drastic reform proved more controversial in Connecticut.

Debates in the Connecticut House of Representatives were well recorded and expose persistent divisions over the meaning and importance of oath requirements and their constitutionality. When considering a bill on religious freedom, Andrew T. Judson “offered an amendment declaratory of the spirit of the constitution, and providing that no person’s religious belief shall affect his admissibility to an oath, or his credibility as a witness.”¹⁷⁶

172. “Connecticut Legislature,” *The Hartford Times*, June 8, 1829, 3 (remarks of Samuel Hart).

173. See, for example, *ibid.* (remarks of Robert Fairchild (“[T]he Legislature should settle the question. The public mind was greatly agitated”). See also note 156.

174. The act, passed on January 19, 1828, and entitled “An act declaratory of the laws of this State, relating to freedom of opinion in matters of religion,” provided:

Be it enacted, by the General Assembly, and by authority thereof it is enacted, That by the law of this state, “all men are free to profess, and by argument to maintain, their opinions in matters of religion; and that the same do not in any wise diminish, enlarge or affect their civil rights or capacities;” and that no man’s opinions, in matters of religion, his belief or disbelief, can be legally inquired into, or be made a subject of investigation, with a view to his qualifications to hold office or give testimony, by any man or men, acting judicially or legislatively. (Public Laws Of the State of Rhode-Island and Providence Plantations, passed since the session of the General Assembly, in January, A. D. 1827 [Providence, RI, 1829], 668–69).

The vote total is reported in “General Assembly,” *Rhode-Island Republican* (Newport), January 24, 1828, 1.

175. One writer expressed concern at the “vulgar and personal abuse” against Justice Story stemming from a “hyper-zeal for the integrity of our religious freedom.” “Of the Controversy Respecting Judge Story’s Late Decision,” *Rhode-Island Religious Messenger*, December 7, 1827, 3. But newspaper commentary in Rhode Island was overwhelmingly hostile to the decision.

176. “Connecticut Legislature,” *The Hartford Times*, June 8, 1829, 2 (remarks of Andrew T. Judson); see also *ibid.* (remarks of Samuel Hart) (“The Constitution admitted of no ambiguity in regard to religious rights; but that instrument in his opinion had been misconstrued by three of the Judges of the highest Court of Judicature in the State; and it was the duty of the Legislature to interfere”); and *ibid.* (remarks of Robert Fairchild) (arguing that the common-law rule was unconstitutional, and mentioning Chancellor DeSausurre’s decision in South Carolina). Judson remarked that “[t]he original bill had regard to the right of *questioning* a witness as to his religious belief.” *Ibid.*

The *Atwood* court's denial that religious rights were at stake was "delusive," Judson asserted. "If you exclude one *christian sect*, and take from them their civil rights, as such, the other sects are of course preferred."¹⁷⁷

Many Connecticut representatives defended the constitutionality and efficacy of the existing rules. Edmond Fanton stated that the common-law rule "gave no preference to one sect over another; it had reference solely to individual disabilities. The oath of a witness was founded on a belief in future rewards and punishments; and a contrary decision would destroy the obligation of an oath."¹⁷⁸ Others warned that the bill would allow atheists to testify,¹⁷⁹ an argument that led at least two representatives to deny that any atheists lived in Connecticut.¹⁸⁰

A resolution was reached with an amendment to allow testimony from "every one, and give it that credibility which was due to it."¹⁸¹ By implication, the responsibility for determining a witness's credibility would be in the hands of the jury. As Samuel Church argued, "The object of law should be to elicit and elucidate truth, which cannot be done by rejecting testimony. Every one should be allowed to tell his story, and the Court and Jury permitted to inquire into his religious belief and place their own estimate upon his credibility."¹⁸² In response, future Connecticut Governor

177. *Ibid.* (remarks of Andrew T. Judson). Chauncey Cleaveland, who opposed "that any Court should reject a Universalist, or a man of any other denomination, on account of his religious opinions," speculated that the common-law rule might "exclude an eighth or a fourth part of the community." *Ibid.*

178. *Ibid.* (remarks of Edmond Fanton). See also *ibid.* (remarks of Jared Griswold) ("The Constitution did not compel any man to worship God contrary to the dictates of his conscience. He may belong to what denomination he chooses; but it recognizes the God of Christians; and the oath of a witness is an appeal to that Being").

179. *Ibid.* (remarks of Jared Griswold, David S. Boardman, and Samuel Church).

180. *Ibid.* (remarks of Asa Wilcox and Chauncey Cleaveland). Erastus Root made a similar remark at the 1821 convention in New York, see *Reports of the Proceedings and Debates of the Convention of 1821*, 465, and the same argument reappeared in Connecticut the following year, see "Senate," *Connecticut Courant* (Hartford), June 8, 1830, 2 (remarks of Elisha Haley).

181. "Connecticut Legislature," *The Hartford Times*, June 8, 1829, 2 (remarks of Samuel Church). The amendment passed narrowly by a vote of 95 to 80. *Ibid.*; and "Connecticut Legislature," *Connecticut Courant* (Hartford), June 9, 1829, 1. The final bill passed by a vote of 114 to 66. *Ibid.* The *Times* reported 65 votes against, and the *Courant* reported 67 votes against. The individual votes add up to 66.

182. "Connecticut Legislature," *The Hartford Times*, June 8, 1829, 2 (remarks of Samuel Church).

Chauncey Cleaveland protested that allowing credibility inquiries “would permit one party to array the prejudices of a Jury against a witness, by an inquiry into his religious opinions.”¹⁸³ The bill was stalled in the Senate,¹⁸⁴ but just a year later the General Assembly passed a law providing: “No person, who believes in the existence of a Supreme Being, shall, on account of his religious opinions, be adjudged an incompetent witness by any court of judicature in this State.”¹⁸⁵ The bill passed overwhelmingly, with some supporters of reform evidently voting “nay” because its protections did not extend to atheists.¹⁸⁶

These debates reflect unmistakable changes in popular opinion. In 1809, the restrictive decision of the Connecticut Supreme Court of Errors in *Curtiss v. Strong* had elicited little public comment. And following *Jackson v. Gridley*, a reform effort in the 1821 New York constitutional convention went nowhere.¹⁸⁷ By the end of that decade, however, the legislatures in both Connecticut and New York voted to eliminate Universalist incompetency.¹⁸⁸ Legislative records in Connecticut show

183. *Ibid.* (remarks of Chauncey Cleaveland). See also *Atwood v. Welton*, 7 Conn. 85 (Peters, J., dissenting) (“The jury have none but their own sectarian prejudices”).

184. “Religious Freedom,” *The Hartford Times*, November 2, 1829, 2.

185. “An Act to Secure to the Citizens of this State Freedom of Opinion in Matters of Religion,” in *The Public Statute Laws of the State of Connecticut: Compiled in Obedience to a Resolve of the General Assembly, Passed May, Eighteen Hundred and Thirty-Eight* (Hartford: John L. Boswell, 1839), 502. The bill passed in the Senate by a vote of 14 to 6, after the Senate rejected by a vote of 14 to 5 a motion to strike the words “who believes in the existence of a Supreme Being.” See “Senate,” *Connecticut Courant* (Hartford), June 8, 1830, 2; and *Religious Inquirer* (Hartford), June 5, 1830, 125.

186. “Connecticut Legislature,” *Connecticut Journal* (New Haven), June 15, 1830, 2. Some votes are not reported in the newspaper but are recorded in the journal of House of Representatives at the Connecticut State Archives. Proponents of reform who voted against the bill included John Gray, Thomas Mussey, and Gideon Welles.

187. See note 133.

188. For the Connecticut law, see note 185. For the New York law, see “Of the Administration of Oaths and Affirmations,” in *The Revised Statutes of the State of New-York, Passed During the Years One Thousand Eight Hundred and Twenty-Seven, and One Thousand Eight Hundred and Twenty-Eight*, 3 vols. (Albany, NY: Packard & Van Benthuysen, 1829), 2:407–8. Unfortunately, a lack of recorded debates in New York limits an opportunity to tell a detailed story of that state’s transition to a more liberal competency regime, an effort spearheaded by John C. Spencer, the special prosecutor in the William Morgan trials. But there are snippets of useful information. On October 9, 1828, for example—just 1 month after the first round of William Morgan trials—the New York House of Representatives considered a bill passed by the Senate allowing atheists to testify. *Journal of the Assembly of the State of New-York, at their Fifty-first Session, Second Meeting* (Albany, NY: E. Crosswell, 1828), 34. By a margin of 44 to 33, the House voted to replace this provision with one providing that “Every person believing in the existence of a Supreme Being who will punish false swearing, shall be admitted to be sworn, if otherwise competent.” *Ibid.* See also Formisano, *For the People*, 136–38; and John C. Spencer, *Notes on*

that many opponents of reform in 1829 switched their votes just a year later.¹⁸⁹

Changing views about theology, religious freedom, and evidence law had thus collided, with lasting consequences for American law. In fact, *Wakefield v. Ross* and *Atwood v. Welton* proved to be the last formally reported decisions that excluded Universalist witnesses because of their religious beliefs.¹⁹⁰

Behind these developments were broader shifts in the relationship of government and religion, and particularly the formal disestablishment of state-sponsored religion across the United States. Examining that transition in any depth is beyond the scope of this article, but attitudes about how governments should promote or draw upon religion were surely influential in shaping the perspectives of the judges, legislators, and other public commentators. Although reformers did not highlight disestablishment as a free-standing reason to eliminate religion-based competency rules—that is,

the Revised Statutes of the State of New York . . . (Albany, NY: Websters and Skinners, 1830), 167–68 (noting the reform, without comment).

189. Out of fourteen representatives who voted “nay” in 1829 who also cast a vote in 1830, half of them switched their votes.

190. For cases allowing Universalist testimony, see, for example, *United States v. Kennedy*, 3 McLean 175, 26 F.Cas. 761 (C.C.D. Ill. 1843) (No. 15,524); and *Blocker v. Burness*, 2 Ala. 354 (1841). An 1835 committee report reveals that competency requirements evolved similarly in Vermont, notwithstanding the lack of reported cases. *Journal of the General Assembly of the State of Vermont at Their Session Begun and Holden at Montpelier, in the County of Washington, on Thursday, October 8, 1835* (Middlebury: Knapp & Jewett, 1835), 207. In a brief opinion, the Delaware Supreme Court of Errors and Appeals stated that “there can be no sanction for an oath without a belief in a future state,” but the excluded witness was an atheist. *Perry v. Stewart*, 2 Del. (2 Harr.) 37 (1835). One later decision in New Jersey required belief in a state of future punishments in order to admit a dying declaration, but that case was about the rationale of a hearsay exception, not the requirements of judicial oaths. *Donnelly v. State*, 26 N.J.L. 463 (1857). In 1841, a Georgia trial court excluded three Universalist witnesses, explaining that it “did not exclude the witnesses on the ground of their being Universalists, but on the principle of the common law, that makes the belief in a future state of *rewards and punishments* the test as to the competency of witness objected to on the ground of religious belief.” “Judge Andrews’ Decision in the Case of the State v. D. Patton, in Oglethorpe Superior Court, April Term, 1841,” *Macon Weekly Telegraph*, August 3, 1841, 2. The judge firmly denied that any civil rights were at issue, explaining that “[t]he witnesses were not proposing to take an oath to interpose a claim, to qualify themselves to hold an office, or to assert any other of their civil rights,” and that “[i]f a duty which a man may be compelled to form, and which he cannot perform, unless permitted, regardless of his wishes, be his right, then is the English language incapable of representing distinct ideas.” *Ibid.* Interestingly, Andrews also quoted a Georgia statute that governed the competency of witnesses “on the trial of slaves or free persons of color, which declares that ‘any witness shall be sworn, who believes in a God and a future state of *rewards and punishments*.’” *Ibid.*

religion-based competency rules apparently did not “establish” a state religion—they often referred to notions of progress and generational exceptionalism that echoed antiestablishment principles. Chancellor DeSaussure’s appeal to “the growing liberality of the age,” for instance, drew upon broader changes in the role of religion in American public life.¹⁹¹

Partisan politics, too, influenced the reform efforts. The ruling in the William Morgan case, for example, took on a partisan valence because of the bitter, even violent, hostility between Masons and Anti-Masons. In this instance, the Anti-Masonic opponents of religion-based exclusions were allied with the Whigs.¹⁹² In other states, however, the Jacksonian Democrats—the party that tended to have the support of Universalists—were more supportive of removing religion-based competency rules.¹⁹³ In Connecticut, for example, Democrats saw the fight against religion-based exclusions as a wedge political issue that played in their favor.¹⁹⁴ But although parties facilitated the ability of religious minorities to achieve legislative reforms in particular states, religion-based competency rules never became a national political issue.

Although historians often point to the interests of lawyers when accounting for various elements of early nineteenth-century legal reform,¹⁹⁵ these interests do not seem to have directly caused changes in religion-based competency rules. In court, lawyers argued in favor of whatever rule benefited their clients, and competency rules provided one of many avenues for demonstrating their adversarial skill.¹⁹⁶ In fact, the rise of lawyers may have *increased* the use of competency rules.¹⁹⁷

191. *Farnandis v. Henderson*, 1 Car. L.J. 213. See also, for example, “Connecticut Legislature,” *The Hartford Times*, June 8, 1829, 2 (remarks of Robert Fairchild) (“[M]en at the present day were growing more liberal in their sentiments”); and Thomas Cooper, *A Treatise on the Law of Libel and the Liberty of the Press: Showing the Origin, Use, and Abuse of the Law of Libel* (New York: G. F. Hopkins & Son, 1830), xvii (“All such laws and decisions as cast a stigma of reproach or disability on any man for his opinions on theological subjects . . . are laws and decision in favor of the alliance of church and state”).

192. See Formisano, *For the People*, 136–38.

193. For Universalist political views, see Bressler, *The Universalist Movement*, 164 n.25. It is worth emphasizing that these partisan trends were not uniform.

194. See note 157.

195. See, for example, Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877* (New Haven, CT: Yale University Press, 2017), 9–10 (discussing this scholarly view).

196. The experience of New York lawyer Henry Vanderlyn provides a particularly rich example. See note 267.

197. For one example of a lawyer identifying a competency problem unknown to the judge, see note 106. Along the same lines, Kessler notes a “new and apparently lawyer-

Out of court, too, attorney interests do not seem to have spurred reform efforts. Lawyers, it turns out, were active voices on both sides of the issue. In 1829, for example, a small minority of lawyers in the Connecticut House of Representatives dominated debates over evidentiary reform.¹⁹⁸ But these ten attorneys divided their support equally. The bill ended up passing 114 to 65, but the vote among lawyers was 11 in favor and 13 against. Information about partisan affiliation is unavailable, but county-level and town-level data suggest that being a lawyer did not have much, if any, effect on whether a Connecticut legislator favored evidence-law reform.¹⁹⁹

In an indirect way, however, partisan developments and the assertion of lawyers' professional interests probably created a more hospitable political environment for changing the common law. As John Witt has noted, "reform in the law of evidence was linked to antebellum law reform generally, and codification in particular."²⁰⁰ Indeed, reformers took full

driven focus on the admissibility of evidence, both oral and written," in the second quarter of the nineteenth century. Kessler, *Inventing American Exceptionalism*, 94.

198. About 70% of the speakers were lawyers. For the debates, see "Connecticut Legislature," *The Hartford Times*, June 8, 1829, 2. Lists of lawyers in Connecticut appear in the five initial volumes of *State Register of Civil, Judicial, Military, and Other Officers in Connecticut* (Hartford: John Russell, 1827–1830; H. & F. J. Huntington, 1831). Overall, 31 of the 208 representatives in 1829 were lawyers. The lawyers who spoke were David S. Boardman, Samuel Church, Chauncey F. Cleaveland, Robert Fairchild, Jared Griswold, Charles Hawley, Andrew T. Judson, Phineas Miner, Timothy Pitkin, and Ansel Sterling.

199. Lawyers were roughly the same proportion of each county's delegation: Fairfield (17%), Hartford (18%), Litchfield (16%), Middlesex (21%), New Haven (11%), New London (12%), Tolland (5%), and Windham (19%). The data come from thirteen towns with a lawyer and non-lawyer each voting. Of these, both representatives voted "yea" in six instances (Berlin, Canterbury, Killingly, Newton, Salisbury, and Sharon), both representatives voted "nay" in six instances (Enfield, Guilford, Litchfield, New Milford, Somers, and Winchester), and the lawyer voted "nay" and non-lawyer voted "yea" in three instances (Cheshire, Colchester, and Lyme). No firm conclusions can be drawn, but these data do not support an argument that lawyers disproportionately favored evidence-law reform. The following year, thirteen of fifteen voting lawyers in the House of Representatives supported allowing Universalists to testify, but by that time reform was overwhelmingly popular, with a substantial portion of "nay" votes coming from proponents of reform who thought that the bill did not go far enough. See note 186. Of the nine individuals who spoke during the legislative debates in 1830, three were lawyers: Thaddeus Betts, John Holbrook, and Romeo Lowrey. Voting patterns in the Senate were similar. See *Religious Inquirer* (Hartford), June 5, 1830. The bill passed by a vote of 14 to 6, with at least five of the chamber's eight lawyers voting in favor. Two of the Senators, including lawyer Lorrain Pease, voted "nay" because the bill was not liberal enough. See *ibid.*; and "Senate," *Connecticut Courant* (Hartford), June 8, 1830, 2.

200. Witt, "Making the Fifth," 864 n.145. For a broader view of the codification movement and its ties to the views of, and about, lawyers, see Norman W. Spaulding, "The Luxury of the Law: The Codification Movement and the Right to Counsel," *Fordham*

advantage of contemporary suspicion of the common law. An editorial in New York, for example, bemoaned that courts felt “bound, according to ‘common law,’ (i. e. unjust decisions,) to reject [an atheist’s] evidence.” The common-law rule, the editorial explained, pitted “justice . . . in these days of freedom” against “the fanaticism of our fathers, which ought to have died with them.”²⁰¹ This refrain about the “illiberality of the old English common law” was repeated by many American reformers in their efforts to change American law.²⁰²

III. Atheism

Allowing Universalists to testify was a substantial shift, but oaths nonetheless remained explicitly religious. The exclusion of atheists, Tapping Reeve explained to his students in 1812, was “an unyielding rule of Law.”²⁰³ An 1828 treatise on oath requirements similarly declared that the rule was “laid down without any qualification in all the books of evidence, and is admitted in all the adjudged cases, where any question is raised concerning the religious belief of a witness.”²⁰⁴ In fact, that year Rhode Island became the first state to allow atheists to testify,²⁰⁵ but it was the exception to an otherwise uniform rule.²⁰⁶

Efforts to relax oath requirements, however, did not stop with Universalist testimony. Gradually, states loosened their competency rules even further. In doing so, the original definition of oath taking grew more distant.

Religious upheaval became rampant in the second quarter of the nineteenth century, fueled largely by theological challenges from

Law Review 73 (2004): 984–91; and Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (Westport, CT: Greenwood Press, 1981).

201. “Progress of Liberal Principles,” *The Correspondent*, February 29, 1828, in George Houston, *The Correspondent, from January 26, 1828, to July 19, 1828* (New York: Houston & Co., 1828), 3:90.

202. See, for example, John A. Bolles, “Qualifications of Witnesses,” *Christian Review* 4 (1836): 481 (“Now if an affirmation is as efficacious as an oath, in any case, why not adopt it universally?”). See also, for example, “Connecticut Legislature,” *Connecticut Journal* (New Haven), June 15, 1830, 2 (remarks of John Gray) (denouncing the “precedents of a barbarous age”). For identification, see Formisano and Pickering, “The Christian Nation Debate and Witness Competency,” 244.

203. Samuel Cheever, Lectures of Reeve and Gould, Litchfield Law School, 1812, 2:252, MS 4010, Harvard Law School Library.

204. Cushing, *The Right of Universalists to Testify*, 9.

205. For the Rhode Island statute, see note 174.

206. See, for example, *Norton v. Ladd*, 4 N.H. 444 (1828).

Universalists, increasing democratic individualism, widespread immigration and migration, cheaper publishing, and cyclical depressions.²⁰⁷ In turn, many Americans became openly skeptical of established church doctrine. According to Christopher Grasso: “In the eighteenth century, the rare religious skeptic tended to be a bewigged gentleman, often socially conservative, who was content to let the rabble have their superstition if it helped them behave. In the 1820s and 1830s, by contrast, religious skepticism was being fused to radical social reform movements, and it threatened to become prominent among the urban working class.”²⁰⁸ Reverend Lyman Beecher declared in 1830 that religious skepticism “is now the epidemic of the world, as superstition was in the dark ages.”²⁰⁹

Skeptics were particularly doubtful of eschatology and beliefs in the afterlife. Views about life after death were especially susceptible to doubt, they thought, because those beliefs were not founded on reason.²¹⁰ Like the development of Universalism decades earlier, increasing religious skepticism and disbelief put considerable strain on existing competency rules.

A. Public Debate and Legal Reform

The new wave of reform efforts in the 1830s relied on familiar arguments, such as constitutional principles of religious liberty. Accordingly, reformers initially sought to prohibit the introduction of *any* evidence of religious belief, even to attack an atheist witness’s credibility. But whereas Universalists were organized, numerous, and often (at least by the 1820s) respected as fellow Christians within their communities, atheists lacked public sympathy.²¹¹ “The Atheist is not only a fool, but a madman,”

207. Christopher Grasso, “Skepticism and American Faith: Infidels, Converts, and Religious Doubt in the Early Nineteenth Century,” *Journal of the Early Republic* 22 (2002): 480; and Bratt, “The Reorientation of American Protestantism,” 52–53. See also Grasso, “The Boundaries of Toleration and Tolerance,” 286–302.

208. Grasso, “Skepticism and American Faith,” 480.

209. *Ibid.*, 486 (quoting Lyman Beecher, *Lectures on Scepticism, Delivered in Park Street Church, Boston, and in the Second Presbyterian Church, Cincinnati* [Cincinnati: Corey & Fairbank, 1835], 86).

210. *Ibid.*, 508. Universalists vigorously opposed this view, arguing that their belief in universal salvation was based on rational premises.

211. By the mid-1830s, there were likely hundreds of thousands of Universalists in the United States, albeit still heavily concentrated in New England and New York. See John Hayward, *The Religious Creeds and Statistics of Every Christian Denomination in the United States and British Provinces* (Boston: Jonathan Howe, 1836), 151. In a scholarly assessment, Russell Miller describes the contemporary Universalist population statistics as likely exaggerated, but Universalism was nonetheless steadily growing and was already

one New York legislator declared. “Would you permit such a creature as this to testify?”²¹² Reformers therefore subtly changed their strategy. As efforts to allow atheist testimony faltered, they increasingly argued that juries were capable of evaluating the credibility of testimony in light of a witness’s religious views, subtly shifting the debate to one about juries rather than about atheists.

Following their earlier successes, reformers continued to emphasize religious freedom. Millard Fillmore, then a young lawyer and staunch Anti-Masonic legislator from Buffalo, argued that excluding atheists was “inconsistent with the constitution of the State; and is at war with some of the most valued and most sacred principles, embodied in that charter of our liberties and civil rights.”²¹³ John Bolles, a Democratic lawyer from Boston, noted that “[t]he law affixes a penalty,—and a very severe and odious penalty,—upon certain opinions in regard to religious matters, and it must, therefore, by the advocates of toleration and religious liberty, be regarded with abhorrence.”²¹⁴ Religion-based exclusions, Bolles argued, were “a violation of the freedom of conscience.”²¹⁵ Reformers’ views of free exercise, these arguments illustrate, were becoming even more disjoined from natural-rights principles; atheists, after all, had no “religion” to practice.

perhaps the sixth most populous American religious sect by the mid-1830s. Russell E. Miller, *The Larger Hope: The First Century of the Universalist Church in America, 1770–1870* (Boston: Unitarian Universalist Association, 1979), 161–62.

212. “Sketch of the Remarks of Mr. C. Rogers of Washington County, in Committee of the Whole, on the Bill Introduced by Mr. Hertell, in Relation to the Rights and Competency of Witnesses,” *Albany Evening Journal*, March 30, 1837, 2. See also “Report Relating to Incompetency of Witnesses on Account of Religious Belief,” 19 (“In its moral influence, nothing can be more pernicious than atheism. It is the bane and pest of society, the grave of every virtuous sentiment”). But see “An Atheist,” *Boston Recorder*, July 3, 1835, 107 (“It was given in evidence for the government, that [Enoch] Winkley,” an atheist barred from testifying, “was a man of respectability, wealth and influence, and that he was often entrusted with important town offices in Amesbury”).

213. Millard Fillmore, “An Examination of the Question, ‘Is it Right to Require Any Religious Test as a Qualification to be a Witness in a Court of Justice?’” *Publications of the Buffalo Historical Society* 10 (Buffalo: Buffalo Historical Society, 1907): 77. Fillmore published the pamphlet under the pseudonym “Juridicus” in 1832.

214. Bolles, “Qualifications of Witnesses,” 488.

215. *Ibid.* See also Edward Livingston, “Introductory Report to the Code of Evidence,” in *A System of Penal Law for the State of Louisiana* (Philadelphia: James Kay, Jun. & Co., 1833), 286 (“[T]he right of appearing as a witness against one who has committed a crime affecting the party, is a civil and temporal right; to deprive him of it, for want of uniformity of faith in any one point with the rest of the community, is to deprive him of it for a difference in religious belief, which is contrary to the constitution and laws”). Debates in Connecticut in 1830 reflected similar views.

Reformers also launched a frontal attack on the epistemological underpinnings of religion-based competency rules. According to New York lawyer Elisha P. Hurlbut, “the notion that religious faith is necessary in order to ensure a proper regard for truth . . . is unphilosophical and opposed to the experience of practical men. The religious sentiments are independent of that faculty of the mind which respects the truth.”²¹⁶ Moreover, atheists had similar incentives to tell the truth. “The dread of shame and infamy that necessarily attaches to the man who gives false testimony,” Fillmore wrote, “has the same influence upon the atheist as the believer.” Positive inducements to truth telling such as respect for justice and morality, he insisted, “all operate with the same force upon the atheist as upon any other individual.”²¹⁷ Other commentators went even further, noting that atheists and skeptics may actually prove themselves *more* trustworthy by openly declaring their dissenting views.²¹⁸

Reformers also highlighted the ineffectiveness of oaths to generate truth telling in court. “The fear of *future* punishment, has probably less weight than is generally imagined,” wrote John Appleton. “Those who would disregard the present motives to truth, would regard little a future punishment, which by its very remoteness, loses its effect.”²¹⁹ Bolles agreed: “[T]he mass of witnesses . . . care vastly more for what is present, tangible, real, than for all that is spiritual, invisible and remote. To refine with such persons upon the duties growing out of an oath, is to cast pearls before the swine.”²²⁰ “All must concede,” argued Fillmore in a similar vein, “that the fear of future punishment with the great majority of witnesses, is not half as powerful to prevent perjury, as the fear of punishment inflicted

216. Elisha P. Hurlbut, *Essays on Human Rights and their Political Guaranties* (New York: Greeley & McElrath, 1845), 79–80. See also John Appleton, “Of Incompetency of Witnesses on Account of Religious Opinion,” *American Jurist & Law Magazine* (1830), 4:288; and Bolles, “Qualifications of Witnesses,” 498.

217. Fillmore, “An Examination of the Question,” 75. See also Timothy Walker, *Introduction to American Law, Designed as a First Book for Students* (Philadelphia: P.H. Nicklin & T. Johnson, 1837), 544.

218. See, for example, Livingston, “Introductory Report to the Code of Evidence,” 285 (avowed atheism “requires some courage” and “must add to his credit”); “Catechising Witnesses,” *Gospel Anchor* (Troy, NY), March 16, 1833, 301 (“Under the present prejudices entertained by the public, a man who declares himself an Atheist, must be a fearless and honest truth teller”); and Bolles, “Qualifications of Witnesses,” 490 (noting that skeptics may be “frank and honest” for declaring their views). Compare “An Atheist,” *Boston Recorder*, July 3, 1835, 107 (“For our part, we should place much more confidence in the testimony of a witness, who should honestly avow himself an atheist, and on that ground refuse to swear, than of one who should swear by a being, whose existence he disbelieves”).

219. Appleton, “Of Incompetency,” 289–90.

220. Bolles, “Qualifications of Witnesses,” 486.

by human laws.”²²¹ Although made by reformers, these comments illustrate a declining sense that oaths actually triggered a fear of divine punishment. Many people continued to believe in hell, but the primacy of eternal damnation in American religious thought had been eroding for years.²²²

In response, arguments in favor of the restrictive common-law rule became increasingly tautological. Rather than defending the effectiveness of oaths, proponents of testimonial exclusion simply assumed that oaths were necessary and then exposed the incongruity of an atheist invoking divine punishment.²²³ In response, one reformer observed that the absurdity of administering a divine sanction to an atheist was a product of the legal meaning of an oath rather than its practical import. “Were the witness to testify under the pains and penalties of perjury,” the reformer succinctly explained, “the absurdity above supposed, would at once vanish.”²²⁴ Others suggested that, although administering an oath to atheists would be a “mere mockery,” atheists should nonetheless be able to give testimony under penalty of perjury, “the jury being left, of course, to judge how much it is worth.”²²⁵

221. Fillmore, “An Examination of the Question,” 76. See also “Religious Test for Oaths,” *Universalist Watchman, Repository and Chronicle* (Montpelier, VT), November 15, 1845, 5 (“[The oath] does not seem to inspire the witness with any degree of sacredness, reverence or awe—with any sense of God or fear of divine retribution”); Titus, “Exclusion of Witnesses for Unbelief,” *Law Reporter* (August 1839), 2:98–99 (“There is not one case in a hundred where the individual taking the oath considers himself as invoking the vengeance of the Deity upon him if he speaks falsely”); and “On Judicial Oaths,” *American Jurist and Law Magazine* 19 (1838): 78 (“Many men . . . take the oath, without understanding the peculiar obligations which they assume, or the force of the imprecations which they invoke upon themselves”).

222. See note 101.

223. An 1843 article in the *Methodist Quarterly Review* is illustrative. While acknowledging that atheists could be trustworthy, the writer emphatically denied that this fact bore on their capacity to testify. “The truth principle upon which the law rests,” the author argued, “is simply this: that belief in the existence of a supreme Being, who will punish false swearing, is necessary to a feeling of the moral obligation of an oath.” “Review of Thomas Herttell, Rights of Conscience Defended” [1835], *Methodist Quarterly Review* 25 (1843): 15.

224. Appleton, “Of Incompetency,” 290.

225. “An Atheist,” *Boston Recorder*, July 3, 1835, 107. This argument was common. See, for example, D. Pickering, “Reply to Mr. Cowell’s ‘Card,’” *Providence Patriot*, December 1, 1827, 2 (“An Atheist cannot swear by the Deity, because he does not believe in his existence; yet he may affirm, and his evidence appreciated according to his weight of character for truth and veracity”); “Testimony of Universalists,” *Western Recorder* (Utica, NY), July 6, 1830, 1 (asserting that “administering of oaths” to atheists and Universalists is “mere mockery,” but arguing that “every man, who passes among his neighbours as a man of truth,” should be allowed to “tell his story, and let the jury value it at what [it] is worth”); Bolles, “Qualifications of Witnesses,” 484 (“Now if an affirmation is as efficacious

Reform efforts did not meet with immediate success, but over the course of the 1830s and 1840s several states adopted competency rules that allowed atheists to testify. Reformers' rhetorical and legislative strategies, however, shifted over this period. Initially, they sought to preclude all evidence of religious belief. But in the second phase of legislative reform, reformers pursued more modest goals, seeking to liberalize competency rules while allowing juries to weigh the credibility of testimony based on a witness's religious views.²²⁶

As described earlier, efforts to exclude all evidence of religious belief were common in the 1820s and early 1830s. Erastus Root led the unsuccessful charge in the 1821 New York ratifying convention, arguing against using religious views to attack a witness's credibility.²²⁷ At the end of that decade, similar legislative proposals were offered—and defeated—in Connecticut and New York.²²⁸ Reform efforts came closer to fruition in the 1830s, gaining the approval of a special legislative committee in Vermont and the House of Representatives in Massachusetts.²²⁹ According to the Vermont committee, the state constitution barred efforts “to pry into the religious sentiments of citizens, and to deprive them of

as an oath, in any case, why not adopt it universally?”); *Public Ledger* (Philadelphia), February 2, 1837, 2 (“The best rule would be to put no questions about religious belief, but to dispense with oaths where witnesses require it, to hold them under the penalties of perjury, and to increase the severity of these penalties”); and “Religious Test for Oaths,” *Universalist Watchman, Repository and Chronicle* (Montpelier, VT), November 15, 1845, 5 (“To us, it appears worse that useless, for an atheist . . . to swear by a God whose very existence he disbelieves. . . . We would have every individual allowed to testify in our courts under the pains and penalties of perjury, . . . and let the jury judge of the probability of his story and take into consider his general character as a religious and moral man”).

226. In most states, credibility evidence regarding religious beliefs was still proved by other witnesses, not the witness whose religious beliefs were at issue. But see *Stanbro v. Hopkins*, 28 Barb. 265, 269 (N.Y. 1858).

227. See note 132.

228. In 1829, reformers in the Connecticut House of Representatives proposed a measure stating that “no person’s religious belief shall affect his admissibility to an oath, or his credibility as a witness.” See note 176. The final bill allowed credibility assessments. See note 185. Reformers in New York proposed a sweeping bill that would have precluded *any* testimony—including credibility evidence—respecting a witness’s religious beliefs or lack thereof. “An Act Relative to the Competency of Witnesses,” in Fillmore, “An Examination of the Question,” 71. The primary sponsor of this bill apparently continued to introduce it annually without success. “Sketch of the Remarks of Mr. C. Rogers of Washington County, in Committee of the Whole, on the Bill Introduced by Mr. Herttell in Relation to the Rights and Competency of Witnesses,” *Albany Evening Journal*, March 30, 1837, 2.

229. *Journal of the General Assembly of the State of Vermont*, 209; *Age* (Augusta, ME), February 8, 1837, 3. See also Formisano and Pickering, “The Christian Nation Debate and Witness Competency,” 243.

their right to testify, on account of their supposed heresies.”²³⁰ In both states, however, the full legislatures declined to take action. A senate committee report in Massachusetts chastised the lower chamber’s flirtations with allowing atheist testimony.²³¹ With the exception of a single legislative victory in Maine, reformers were unable to pass measures that barred credibility challenges based on religious beliefs, and even Maine allowed atheism-based challenges.²³²

Reform efforts in the 1820s and early 1830s thus demonstrate a consistent desire to preclude competency *and* credibility challenges based on religious views. When these proposals were defeated, however, reformers narrowed their attacks, arguing that atheists should be allowed to testify, but that evidence of religious belief could be admitted to impeach their credibility. One of the principal arguments used in this new strategy was that jurors were capable lie detectors and could adequately weigh the effect of a witness’s religious views. Courts had occasionally made this argument in the 1820s when they allowed credibility evidence against Universalist witnesses.²³³ Nevertheless, references to juries were largely absent during the earlier legislative debates.

When efforts to exclude all evidence of belief faltered, reformers became effusive in praise of juries and their ability to uncover the truth. According to John Bolles:

230. *Journal of the General Assembly of the State of Vermont*, 207. On November 4, 1845, the Vermont House passed a bill modeled after the Rhode Island statute abolishing competency rules based on religious belief. See *The Journal of the House of Representatives of the State of Vermont, October Session, 1845* (Windsor: Bishop & Tracy, 1846), 209–10. The bill failed in the Senate the following day. See *The Journal of the Senate of the State of Vermont, October Session, 1845* (Windsor: Bishop & Tracy, 1846), 131.

231. “Report Relating to Incompetency of Witnesses on Account of Religious Belief,” 8. Three years earlier, the Massachusetts Supreme Judicial Court eliminated inquiries regarding particular theistic beliefs, remarking that “the religious faith of witnesses is not a subject for argument or proof.” Otherwise, the court stated, “if the witness belongs to a sect which holds that the duration or extent of future punishment will be less than it will be according to the tenets of a different sect, you might argue that his testimony is not entitled to so much confidence as it would be if he belonged to the latter sect.” *Commonwealth v. Buzzell*, 33 Mass. (16 Pick.) 153, 156 (1834), also reported in *Trial of John R. Buzzell Before the Supreme Judicial Court of Massachusetts* (Boston: Russell, Odiome, & Metcalf, 1834), 55.

232. This law, passed in 1833, provided: “No person who believes in the existence of a supreme being, shall be adjudged an incompetent or incredible witness in any judicial court, or in the course of judicial proceedings, on account of his opinions in matters of religion; nor shall such opinions be made a subject of investigation or inquiry.” *The Revised Statutes of the State of Maine*, 2nd ed. (Hallowell: Glazier, Masters & Smith, 1847), 505.

233. Compare note 111.

Very few instances can occur, in which a witness is desirous of testifying falsely, without any discovery to the jury of that disposition. The very manner of the man becomes a language, more eloquent than words. . . . Rarely, very rarely, does it happen, that an important witness can lean to the one hand or the other, unobserved; and still more rarely can such a witness perjure himself, without detection by the cross-examining counsel. . . . That the proposed change [to allow atheists] would more fully meet the ends of justice in all cases, is clear; for jurors could vary the rule, according to the circumstances of the case, awarding to each witness, and each fact, its due value and importance.²³⁴

“Whatever may be urged against any witness, as affecting character,” another jurist stated, “should be urged against his credit and not his competency. . . . In every case of conflicting testimony, it is a question of comparison, weighing the different characters and motives of witnesses, as to their effect on testimony, and after this comparison, believing or disbelieving their statements.”²³⁵ A Wisconsin newspaper took the point a step further, arguing that “[t]he jury are the ones who, *by right*, should determine from [the witness’s] mouth, or from his character proved by other witnesses, whether he is entitled to credit or not.”²³⁶

By framing the issue in terms of juries and witness credibility, reformers advocated change without impugning the logic of the common-law competency rules. Prospective witnesses who did not believe in God or hell would receive only whatever credit their testimony was due—no more and no less—leaving juries free to discount or disregard atheist testimony. As Universalist minister Abel Thomas argued: “Hundreds of profane swearers, drunkards, gamblers, and other vile persons are annually permitted to testify in our courts . . . and though respectable citizens may be summoned to testify that they would not accredit such persons under oath, this

234. Bolles, “Qualifications of Witnesses,” 496–97.

235. Appleton, “Of Incompetency,” 288–89. See also, for example, Walker, *Introduction to American Law*, 544 (“[T]he want of religious belief ought not to render a witness incompetent, though the jury may properly take it into consideration in weighing his credibility”); Titus, “Exclusion of Witnesses for Unbelief,” 2:98 (“[T]he witness can be cross-examined by the opposite party, and the accuracy of his knowledge, and his disposition to tell the truth fully tested—because the jury can observe his appearance upon the stand, and his manner of testifying, and thus judge of the truth of what he is saying, and because he testifies under the pains and penalties of perjury”). But see *Public Ledger* (Philadelphia), February 14, 1837, 2 (arguing that oaths and all inquiries into religious belief should be abolished and replaced with more stringent perjury laws).

236. “Oaths in Court,” *Oshkosh Democrat* (WI), August 22, 1851, 2 (emphasis added); see also “Rejection of a Witness,” *Spectator* (New York, NY), June 5, 1847, 1 (“The jury might disregard his evidence, for the reason that they doubt his sincerity [regarding his changed religious faith], but we conceive that question to be one exclusively for the decision of the jury”).

does not affect their *competency*, but merely their *credibility*.”²³⁷ Jurors were, after all, capable of deciding what was true. Using this argument, reformists transformed the debate into one about juror capacity rather than about the sense of solemn obligation among atheists. In light of the relative popularity of juries and atheists, this strategy made good political sense.

Debates at the 1846 constitutional convention in New York illustrate the effectiveness of this strategy. One of the Whig delegates, Moses Taggart, moved for a constitutional provision that “no man shall be deprived of any right or rendered incompetent to be a witness on account of his opinions or religious belief.”²³⁸ According to Taggart, “[i]f there was anything in [a witness’s religious beliefs] thus affecting his credibility let it go to the jury. Let it go to his credit and not to his competency.”²³⁹ The discussion that followed showed the usual diversity of views on atheists’ competency to testify. One delegate analogized the practice of excluding atheists to the Southern practice of excluding blacks from testifying.²⁴⁰ Another seemed to agree that competency was best left to the jury but opposed the proposal because “[b]y putting the question, we imply a doubt of the existence of the Deity.”²⁴¹ When the convention voted on Taggart’s motion, the measure passed comfortably by a vote of 63 to 46.²⁴²

237. Abel C. Thomas, *Strictures on Religious Tests, with Special Reference to the Late Reform Convention* (Philadelphia: J. Richards, 1838), 10. Thomas was a Universalist minister in Philadelphia, Lowell, Brooklyn, and Cincinnati. James Grant Wilson and John Fiske, eds., *Appleton’s Cyclopaedia of American Biography*, 6 vols. (New York: D. Appleton & Co., 1888–89), 6:77.

238. *Debates and Proceedings in the New-York State Convention for the Revision of the Constitution* (Albany, NY: Albany Argus, 1846), 807–8. Earlier in the convention, Taggart had proposed similar language that “no person shall be deprived of any right or provision, or rendered incompetent as a witness, on account of his religious belief or unbelief.” Taggart explained “that his main object was to abolish the law which declared persons holding certain opinions from being a witness.—He desired to see such objections apply to the credibility, not the competency of the witness.” *Ibid.*, 430 (remarks of Mr. Taggart).

239. *Ibid.*, 809 (remarks of Mr. Taggart). The delegates voted down by a vote of 92 to 12 an amendment that “evidence may be given as to the belief or disbelief of the witness in the obligation of an oath, and of the ground of such belief or disbelief, in order to enable the jury to judge of his credibility.” *Ibid.* The language of Taggart’s motion, however, specifically went only toward the witness’s competency, and immediately before the vote, Taggart had clarified that evidence could still be offered to impeach a witness’s credibility. *Ibid.*

240. *Ibid.*, 808 (remarks of Mr. Loomis) (stating that atheist incompetency “was analogous [*sic*] to a custom in certain parts of this country, where testimony was excluded because the witness was a man of color or a slave, however true it might be”).

241. *Ibid.* (remarks of Mr. Stow).

242. *Ibid.*, 809.

After New York's Constitutional Convention voted to allow atheist testimony, the rule quickly spread west. With New York's Constitution often used as a model, similar provisions appeared in the constitutions of Wisconsin (1848),²⁴³ California (1849),²⁴⁴ Indiana (1851),²⁴⁵ Ohio (1851),²⁴⁶ Iowa (1857),²⁴⁷ Minnesota (1857),²⁴⁸ Oregon (1857),²⁴⁹ and Kansas (1859).²⁵⁰ Other states, along with the District of Columbia, passed legislation allowing both atheist testimony and credibility evidence respecting religious views.²⁵¹

Although religion-based competency rules were changing in the 1830s and 1840s, reform in some states lagged behind. At Pennsylvania's 1838 Constitutional Convention, delegates voted down a proposal to allow Universalist testimony.²⁵² Debates at the convention, however, were muddled. Some delegates remarked that the common law was already understood to admit Universalists as witnesses.²⁵³ (Indeed, the Pennsylvania Supreme Court held Universalist testimony to be admissible just 3 years

243. Wisconsin Constitution of 1848, art. 1, § 19.

244. California Constitution of 1849, art. 1, § 4.

245. Indiana Constitution of 1851, art. 1, § 7.

246. Ohio Constitution of 1851, art. 1, § 7.

247. Iowa Constitution of 1857, art. 1, § 4.

248. Minnesota Constitution of 1857, art. 1, § 17.

249. Oregon Constitution of 1857, art. 1, § 6.

250. Kansas Constitution of 1859, Bill of Rights, § 7. See also Michigan Constitution of 1835, art. XII, § 1 ("no other oath, declaration, or test shall be required as a qualification for any office or public trust"). At the convention, the delegates briefly debated a motion to include a provision specifically addressing witness incompetency, but delegates rejected the motion after someone noted that "the subject was already provided for in the bill of rights." Harold M. Dorr, ed., *The Michigan Constitutional Conventions of 1835–36: Debates and Proceedings* (Ann Arbor: University of Michigan Press, 1940) (remarks of Mr. McClelland).

251. Title IV, ch. 115, §§ 5–6, in *Revised Code of the District of Columbia* (Washington: A. O. P. Nicholson, 1857), 439. See, for example, "An Act Concerning Witnesses," § 18, in *Revised Statutes of the State of Missouri* (St. Louis: Argus, 1835), 623. But see "An Act Relating to the Rights and Competency of Witnesses," § 1, in *The Acts and Resolves of the State of Vermont, at the October Session, 1851* (Montpelier: E. P. Walton & Son, 1851), 9 ("No person shall be deemed to be incompetent . . . on account of his opinions on matters of religious belief; nor shall any witness be questioned, nor any testimony be taken or received, in relation thereto").

252. John Agg, ed., *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania to Propose Amendments to the Constitution*, 14 vols. (Harrisburg: Packer, Barrett, & Parke, 1838), 11:227–49.

253. *Ibid.*, 240 (remarks of Mr. Porter) (citing Judge Cowan's Reports, which presumably meant *Butts v. Swartwood* and *People v. Matteson*), and *ibid.*, 248 (remarks of Mr. Dickey) (stating that he did not think excluding witnesses based on disbelief in rewards and punishments was the rule of evidence).

later.)²⁵⁴ Others thought that broader protections should be pursued in the legislature rather than cluttering the constitution with minutiae.²⁵⁵ In 1851, a similar constitutional proposal barely passed at a convention in Maryland.²⁵⁶ The closeness of the vote seems odd given that Universalists (and even atheists) were allowed to testify in other states. Nevertheless, the lack of prior controversy may have left reformers unprepared to frame the debate in the most favorable light.²⁵⁷ In neither state did they emphasize the role of juries in evaluating witness credibility.²⁵⁸

B. Atheists in Court

In states without laws to permit atheist testimony, some parties nonetheless asserted in court that atheists should be allowed to testify. These legal claims, however, were far more problematic than arguments in favor of admitting Universalist witnesses. No ambiguities in the common law left the door cracked for atheist testimony. And constitutionally protected religious liberty usually extended only to people with theistic beliefs.

In 1836, for example, Judge Peter Thacher of the Boston municipal court—who had admitted Universalist testimony in 1829 partly on religious-freedom grounds²⁵⁹—firmly denounced the idea that atheists deserved the same treatment: “That this fair world is without an intelligent creator . . . [is] absurd and absolutely incomprehensible. . . . While men yield to such delusions, the law refuses to them some of its privileges; and admonishes them, in that mild way, to correct their dangerous errors,

254. *Cubbison v. M’Creary*, 2 Watts & Serg. 262 (Pa. 1841).

255. Agg, *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania*, 11:239.

256. The Maryland convention voted on several measures, finally adopting a provision, by a vote of 42 to 27, stating that a witness or juror would not be disqualified so long as he believed “in the existence of a God, and that under his dispensation such person will be held morally accountable for his acts, and will be rewarded or punished therefor, either in this world or in the world to come.” *Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution*, 2 vols. (Annapolis: William M’Neir, 1851), 1:214, 216.

257. Changes in views of divine punishment and damnation may also have lagged in Maryland, where the Roman Catholic Church was especially strong.

258. A reformer in Pennsylvania made one attempt to frame the issue in terms of juror competence. See *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania*, 11:245 (remarks of A.H. Read) (noting that “jurors have sense and intelligence enough to discriminate”).

259. *Commonwealth v. Batchelder*, Thacher Cr. 191, 196 (Boston Mun. Ct. 1829) (“To withhold equal civil privileges from any of our citizens, however they may differ in their speculative views of religious faith, seems to me to be against the spirit of our institutions”).

before she will confide in their integrity or intelligence, to dispose of the rights of others in a court of justice.”²⁶⁰

Twelve years later, the Massachusetts Supreme Judicial Court followed suit, holding that the constitutional provision that “no subject shall be hurt, molested, or restrained in his person, or estate . . . for his religious professions or sentiments” was inapplicable to atheists because “disbelief in the existence of any God, is not a religious, but an anti-religious, sentiment.”²⁶¹

In some states, however, judges loosened competency rules by generously stretching the meaning of the common law. In 1833, for example, the Supreme Court of Ohio allowed a witness to testify who “said he saw God in trees, bushes, herbage, and everything he saw” and that “he did anything wrong he was condemned in his conscience.”²⁶² The court

260. *Commonwealth v. Wyman & Robinson*, Thacher Cr. 432, 437 (Boston Mun. Ct. 1836).

261. *Thurston v. Whitney*, 56 Mass. (2 Cush.) 104, 110 (1848). The court also stated that even if atheists had a right to religious freedom, “the rejection of a witness for such a disbelief or sentiment, as incompetent, would be no violation of this article of the constitution. It is not within its words or meaning. It would not hurt, molest, or restrain him, in his person, liberty, or estate.” *Ibid.* See also *Scott v. Hooper*, 14 Vt. 535, 539 (1842) (“It would, indeed, be worse than solemn mockery to be engaged in administering an oath to him who can feel no religious obligation”); *Commonwealth v. Moody* (Mass. Ct. Com. Pl. 1835) (holding that a materialist who “does not believe in a Supreme, Intelligent Ruler of the Universe” was not competent to testify), reported in “Interesting Decision,” *Salem Gazette*, June 23, 1835, 2; “An Atheist,” *Boston Recorder*, July 3, 1835, 107 (reporting the decision of Judge Strong that a government witness named Enoch Winkley was incompetent to testify, notwithstanding his asserted belief in God, because he was “a materialist; one of a sect that has grown up within a few years, and who do not believe in a Supreme intelligent Being, who governs all events”); “Incompetency of an Infidel Witness,” in *Hazard’s United States Commercial and Statistical Register*, ed. Samuel Hazard (Philadelphia: Wm. F. Geddes, 1840), 1:87 (“Judge [Ross] Wilkins, in the United States Court at Detroit, has decided that the testimony of an atheist is not admissible”); and *Commonwealth v. Gates* (Boston Police Ct. 1839) (Rogers, J.), reported in “Religious Belief of Witnesses,” *Washington National Intelligencer*, July 2, 1839, 2 (if “a witness believes in the existence of no other God, except Nature or the Material World, he does not . . . believe in the existence of a God”).

262. *Easterday v. Kilborn*, 1 Wright 346 (Ohio 1833). Justice John Wright argued that the common-law rule was invalid based on the Ohio constitutional provision that “no human authority can, in any case whatever, control or interfere with the rights of conscience.” *Ibid.*, 346–47. This was a striking shift from the same court’s ruling just years earlier in *Newbury v. Lingo* (1827), which had unanimously reversed a lower court’s decision to allow a witness who did not “believe in the existence of a God, or a future state of rewards and punishments.” One of the judges “stated that all nations had some form of an oath, in order to impose a religious obligation upon the conscience—but no such obligation could be imposed upon the conscience of a person who disbelieved it.” The panel declined a motion to refer the matter to the full court, explaining that “in this case the court could

ruled that the witness's testimony was admissible because he saw God "in all created nature."²⁶³ As a committee of the Ohio House of Representatives gingerly described a few years later, "The *test* here accepted by the court was certainly not a very rigid one."²⁶⁴

Other judges made it harder to prove that witnesses had disqualifying beliefs. In 1841, for example, the Maine Supreme Judicial Court—although openly skeptical of the common-law rule²⁶⁵—emphasized that "courts ought to require clear, open, deliberate, avowals of the disbelief on the part of the proposed witness."²⁶⁶ In his diary, New York lawyer Henry Vanderlyn expressed frustration when judges employed this strict approach:

The first witness called was Newell Evans... We objected to his Competency because He was an Atheist, & proved that He had been an Atheist for the past 10 or 12 years by 5 Witnesses. To disprove this, He offered 3 witnesses who had heard him say since the filling of this indict [men]t that He believed in God. It appeared from these 3 witnesses that Evans had been cautioned to express himself in favor of a God to avoid the effect on his evidence of his disbelief. Notwithstanding the undoubted proof of his Atheism, the Court composed of Judge Monell, York, & Lamb – 3 locos Focos (Politics have entered largely into the prosecution, Evans being loco & Owen a conspicuous Whig of Bainbridge) decided He was admissible – a shameful decision.²⁶⁷

not for a moment entertain a *doubt*" about its decision. "Law of Ohio," *Niles' Weekly Register* (Baltimore), November 8, 1828, 166.

263. *Easterday v. Kilborn*, 1 Wright 347. See also *Halley v. Webster*, 21 Me. 461, 461–62 (1842) (rejecting an effort to discredit a witness based on his prior statement that he "had lost his devotion; that he intended now to serve the devil as long as he had served the Lord; that he had a pack of cards with him which he carried about in his pocket, and called them his bible").

264. *Journal of the House of Representatives of the State of Ohio, Being the First Session of the Thirty-Sixth General Assembly* (Columbus: Samuel Medary, 1837–38), 106. The committee declined to recommend any further liberalization of the common-law rule, explaining that "[i]t must be very rare indeed that injustice would result from the inforcement of a rule so relaxed as in its judicial interpretation, as that now under review." *Ibid.*

265. *Smith v. Coffin*, 18 Me. 157, 163 (1841). Concurring, Justice Nicholas Emery was contemptuous of the law proscribing atheist testimony: "I can frankly declare, that a much more appropriate title to the [witness competency] act would be, 'An act to deprive witnesses of freedom of opinion in matters of religion, and to jeopardize the rights of innocent people.'" *Ibid.*, 165 (emphasis omitted).

266. *Ibid.*, 164.

267. Entry of April 14, 1840, Henry Vanderlyn Diary, 7 vols. (April 1827–March 1857), New York Historical Society, 4:278–79. I thank Amalia Kessler for pointing me to this source.

Vanderlyn attributed the judges' decision to politics—and of course he may have been correct—but similar episodes were fairly common.²⁶⁸

In 1846, the General Court of Virginia issued the first reported opinion holding that any exclusions based on religious belief were unconstitutional infringements of religious liberty. In *Perry v. Commonwealth*,²⁶⁹ a murder suspect had objected to one of the prosecution witnesses based on defect of religious principle.²⁷⁰ On appeal, Judge John Scott wrote that the common-law doctrine had been framed “according to the spirit of the age in which the rule was introduced. England was a Christian country.”²⁷¹ Scott continued:

The progress of science and civilization, and the demands of commerce, have led to a relaxation of the rule [preventing non-Christians from testifying]; but it still retains a portion of its intolerant spirit; and the Courts of Justice in England, and in some of our sister States, have exercised an inquisitorial power over the religious belief of witnesses. In some of the States it has been relaxed or annulled by statutory and constitutional provisions. In Virginia, it was wholly abrogated by our Bill of Rights, and the act for security religious freedom, subsequently engrafted in the amended Constitution.²⁷²

The state's 1830 constitution, Scott declared, put “all religions on a footing of perfect equality; protecting all; imposing neither burdens nor civil incapacities upon any.”²⁷³ Barring the testimony of certain individuals because of their religious views, by contrast, stigmatized those persons as being

268. The most famous example, stemming from the William Morgan affair, was Judge Samuel Nelson's decision to allow Edward Giddins—whom another trial judge had excluded as a witness in 1828—to testify in related trials in 1831. Nelson explained that evidence of Giddin's beliefs was “contradictory” and “apparently irreconcilable,” and that “[t]he witness was presumed in the first instance, to be competent, and . . . he should always hold the party objecting, to make out a clear and undoubted case of disqualification, before he would exclude.” Nelson noted that “the objection was in its nature penal as to the witness.” Reported in *Trial of Parkhurst Whitney*, 24.

269. *Perry v. Commonwealth*, 44 Va. (3 Gratt.) 645 (1846).

270. The witness seems to have been a Universalist, see *ibid.*, 647, but the implication of the decision seems clear: Defect of religious principle was no longer grounds for incompetency in Virginia. See *ibid.*, 655 (stating that the constitution proclaimed “to all our citizens that henceforth their religious thoughts and conversations shall be as free as the air they breathe”). See also I. T., “Religious Belief as Qualification of Witness,” in *The Lawyers Reports Annotated, Book XLII*, ed. Burdett A. Rich (Rochester, NY: The Lawyers' Co-Operative Publishing Co., 1905), 568 (“The *dicta* of the case show that no religious opinion is there required”).

271. *Perry v. Commonwealth*, 44 Va. 652.

272. *Ibid.*, 654.

273. *Ibid.*, 654–55. An isolated statement at Virginia's Constitutional Convention reveals one delegate's view that oath taking required belief in God and a future state of rewards and punishments, and that this rule was “not contradicted by” the declaration of religious

“unworthy of belief” and placed their security and their property at risk because they might become victims of crime without legal recourse.²⁷⁴ The declared incompetency of an entire group, in other words, might put that group beyond the protection of law.²⁷⁵

IV. Conclusion

By the mid-nineteenth century, Americans had abandoned the religious exclusivity of swearing. Universalists and others who disavowed hell were allowed to testify in courts across the United States, and in most states juries were left to determine how witnesses’ religious views should affect their credibility. By 1860, even atheists were allowed to testify in at least fifteen of the thirty-four states, plus in the District of Columbia.²⁷⁶ Belief in atheist incompetency lingered well into the twentieth century in some areas,²⁷⁷ but the religious premises of oath taking had already substantially eroded.²⁷⁸

Theological changes fueled these developments. For one, oaths provided weaker assurance of truthfulness once eternal damnation became less central in religious life. The advent of Universalism and growth of atheism also confronted courts and legislatures with a choice between relaxing oath requirements and excluding witnesses based on their religious views.

Given these religious developments, legal change became necessary. Excluding a witness here or there did not pose a serious threat to the

freedom. See *Proceedings and Debates of the Virginia State Convention of 1829–30* (Richmond: Samuel Shepherd & Co. 1830), 457 (remarks of William H. Brodnax).

274. *Perry*, 44 Va. 657, 658.

275. Ten years later, the North Carolina Supreme Court similarly lambasted the idea that “to be sworn as a witness is *no privilege*—the person loses nothing by being incompetent.” Such a view, the Court ruled, was “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. (4 Jones) 25, 30–31 (1856).

276. Those states that allowed atheist testimony were: California, Indiana, Iowa, Maine, Massachusetts, Michigan, Missouri, New York, Ohio, Oregon, Rhode Island, Vermont, Virginia, and Wisconsin. Kansas, which had written its constitution in 1859, was in the process of becoming a state. An 1877 decision in Ohio, however, called into question the prevailing rule in that state. See I. T., “Religious Belief as Qualification of Witness,” 563.

277. For a helpful discussion of these laws, see Paul W. Kaufman, “Disbelieving Nonbelievers: Atheism, Competence, and Credibility in the Turn of the Century American Courtroom,” *Yale Journal of Law and the Humanities* 15 (2003): 395–433; and Frank Swancara, “Non-Religious Witnesses,” *Wisconsin Law Review* 8 (1932): 49–66. For a thorough review of pertinent nineteenth-century cases, statutes, and constitutional provisions, see I. T., “Religious Belief as Qualification of Witness,” 553–68.

278. See note 101.

rule of law, but strict enforcement of competency rules would have proved crippling once large segments of the population began disavowing God and hell. Indeed, President Washington sought to drive home a similar point in his Farewell Address, insisting that widespread religious belief was needed to ensure the proper functioning of the legal system. When those beliefs were no longer present, with religious dissent and disbelief coming forcefully into the open, the existing system clearly had to change.

How or when this reform would occur, however, was hardly obvious or inevitable. Social and legal pressures were building, but it remained up to individuals to harness those pressures. And the way that this story unfolded offers useful insights into early nineteenth-century legal culture. When pushing for a more liberal evidence regime, reformers deployed a range of new arguments. In particular, they simultaneously promoted and drew upon novel understandings of religious freedom, civil rights, and jury capacity—shifts that each had enduring significance for American legal history.

At the outset of the nineteenth century, judges were generally unconcerned with guaranteeing government neutrality toward religious beliefs: the core principle of modern free-exercise jurisprudence.²⁷⁹ Instead, decisions emphasized that the natural right of conscience protected the autonomy to practice religion without governmental interference. That rule barred intrusive courtroom inquiries into the beliefs of prospective witnesses, but it did not forbid imposing a civil disability on individuals whose beliefs were publicly known.²⁸⁰

As equality became “a staple in American political rhetoric,”²⁸¹ however, opponents of existing evidence rules increasingly insisted that governmental discrimination in civil privileges on the basis of religious beliefs was unconstitutional. At first, reform arguments remained tethered to an older view of free exercise, positing that religious practice would be burdened only when individuals were deprived of civil privileges on account of their faith. But as time passed, free-exercise arguments

279. See, for example, *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 877–79 (1990); see also Michael W. McConnell, “Neutrality Under the Religion Clauses,” *Northwestern University Law Review* 81 (1986): 146–67.

280. For evidence of this view in other nineteenth-century free-exercise controversies, see Campbell, “Religious Neutrality,” 333–47. For earlier debates about religious freedom and equality of civil privileges, see Hamburger, “Equality and Diversity,” 295–392.

281. William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, MA: Harvard University Press, 1998), 14. See also Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1993): 29 (courts in Jacksonian era began “to emphasize the illegitimacy of so-called unequal, partial, class, or special legislation; that is, legislation which advanced the interests of only a part of the community”).

transitioned into freestanding attacks on any discrimination among religious *groups*, without regard to the effect of testimonial exclusion on particular adherents. By the outset of the Civil War, many jurists viewed witness incompetency as akin to punishment: a government-imposed stigma with tangible and symbolic consequences for the excluded groups.²⁸²

In this way, religion-based competency reforms helped pave the way for removals of other competency rules.²⁸³ Put simply, evidence rules came to have newfound social and political meaning. In earlier judicial discussions of competency rules, parties were the sole bearers of courtroom rights, and witnesses were merely cogs in the judicial process.²⁸⁴ Judges had occasionally mentioned witness interests, or stated that being eligible to testify was “one of the distinguishing rights of a free citizen,” but even these sporadic comments did not describe a *constitutional* right that reigned supreme over existing evidentiary rules.²⁸⁵ In contemporary parlance, the language of “civil rights” usually referred to *all* legal rights and privileges, and not merely those placed beyond legislative reach.²⁸⁶

The notion that certain groups could be excluded from testifying, however, took on far greater social and legal importance in the second quarter of the nineteenth century. And this shift was soon manifest beyond religion-based competency debates. In 1840, for example, a brief political firestorm erupted when a court martial in Florida allowed several black Navy stewards to testify against a white lieutenant named George M. Hooe. “In all the States of our Union there is a marked *distinction*, in legal and political rights, between the free white person and the free colored person of African blood,” Hooe protested, “and in all they are of

282. See, for example, Committee on Slavery and the Treatment of Freedmen, “To Secure Equality Before the Law in Courts of the United States,” S. Rep. No. 99 (February 29, 1864), in *The Reports of Committees of the Senate of the United States, for the First Session of the Thirty-Eighth Congress* (Washington, DC: Government Printing Office, 1864), 12 (describing exclusions founded on race as “something more than a rule of evidence, from which justice may suffer,” finding their “most perfect parallel” in the Indian caste system, and decrying their use as “despoil[ing] the colored person of his right to testify”); see also Green, “The Original Sense of the (Equal) Protection Clause,” 68.

283. See, for example, *Congressional Globe*, 38th Cong., 1st Sess. 837 (1864) (remarks of Senator Collamer) (arguing that liberal reforms with respect to religion-based competency rules militated in favor of broader competency reforms).

284. See, for example, notes 161 and 162.

285. *Den v. Vanclève*, 5 N.J.L. (2 South.) 652 (1819) (noting that the “personal privilege” or “right” of being a witness did not overcome the “want of religious principle and belief, as in the case of those who do not believe in the being, perfections and providence of God, nor in a future state of rewards and punishments”).

286. See Hamburger, “Equality and Diversity,” 229 n.9.

inferior rank and condition in society.” Even where free blacks were “viewed in the light of citizens,” he continued, “they are still a degraded class, by the many disabilities which the laws of those States have proscribed.”²⁸⁷ Northerners sometimes harnessed the same rhetoric to support the opposite agenda. In the 1846 Constitutional Convention in New York, for example, a delegate argued that making all atheists incompetent to testify “was analagous [*sic*] to a custom in certain parts of this country, where testimony was excluded because the witness was a man of color or a slave.”²⁸⁸ Similar comparisons appeared in the Congressional debates in the 1860s when Charles Sumner, among others, sought to eliminate race-based competency rules in federal courts.²⁸⁹

The nineteenth-century breakdown in religion-based competency rules further illuminates a crucial but largely unexplored transition in the history of evidence law. Scholars have highlighted the early nineteenth-century writings of, among others, Jeremy Bentham and John Appleton, who advocated for wide-ranging evidentiary reform.²⁹⁰ They have also given considerable attention to the flurry of statutes in the 1850s and 1860s allowing civil parties and criminal defendants to testify.²⁹¹ But scholars have yet to study how shifting ideas about jury capacity facilitated efforts to reform competency rules from the 1820s through the 1840s.

Untangling the causes of religion-based competency liberalization is tricky. Theological developments, combined with changing notions of religious liberty, seem to have triggered the first wave of reform, although many reformers were also concerned that excluding evidence would improperly skew the outcomes of cases. These legal developments did

287. *House Documents, Otherwise Published as Executive Documents: 13th Congress, 26th Cong., 1st Sess., vol. 7, no. 244, 45.* For discussions of race-based incompetency rules, see Ariela J. Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton, NJ: Princeton University Press, 2000), 61–66; and Thomas D. Morris, *Southern Slavery and the Law, 1619–1860* (Chapel Hill: University of North Carolina Press, 1996), 229–48.

288. See note 240.

289. See note 282.

290. See, for example, Witt, “Making the Fifth,” 864–65; and Twining, *Rethinking Evidence*, 41–45, 54–55. Having completed the research for this article, I still have very little appreciation for how much Appleton, Bentham, or others, such as Edward Livingston, influenced the American reform effort. John Witt argues that “Bentham’s role appears to have been to supply a rhetoric that could be put to use in promoting an independently existing opposition to the disqualification rules.” Witt, “Making the Fifth,” 865. That may be right, but my view is that we do not have enough information to know whether evidentiary reform in America would have been any different without Bentham and his followers.

291. Fisher, “The Jury’s Rise as Lie Detector,” 671–97; Joel N. Bodansky, “The Abolition of the Party-Witness Disqualification: An Historical Survey,” *Kentucky Law Journal* 71 (1981): 91–130.

not depend on arguments about the jury being uniquely competent to evaluate evidence. In fact, legislative efforts in the 1820s and early 1830s often focused on excluding *any* evidence of witnesses' religious views, even if directed at their credibility. Some legislators were openly skeptical that juries could fairly evaluate such evidence.²⁹²

Reform efforts in the 1830s and 1840s, however, are more difficult to assess. Apparently learning from their earlier failures, reformers argued that rejecting atheists was counterproductive because juries were capable of evaluating witness veracity. Framing the debate in these terms was prudent; reformers were far more persuasive when emphasizing juror capacity rather than atheist truthfulness. At the same time, however, the success of the jury-oriented rhetoric may indicate broader public support for jury fact finding, setting the groundwork for the rhetorical strategy employed in the later movements in the 1850s and 1860s that successfully extended evidence liberalization to other excluded groups.²⁹³ After all, Charles Sumner's Senate committee reported in 1864, "testimony is submitted to the scrutiny of a jury" and could "have no effect whatever except through the assent of their judgment."²⁹⁴

By the middle of the nineteenth century, countless Americans were contesting the religious principles that President Washington had declared essential to a well-ordered legal system. Yet the United States had avoided the godless pandemonium of revolutionary France that Washington so feared. Instead, judges and politicians accounted for theological changes by redrawing evidentiary rules. And in doing so, they harnessed novel understandings of free exercise, civil rights, and the role of juries that continue to shape American law.

292. See note 183.

293. See, for example, *Congressional Globe*, 37th Cong., 2nd Sess. 3355 (1862) (remarks of Senator Wilkinson) ("Leave that to the jury. . . . "[L]et the jury and court determine as to the credibility of the witness"); and "To Secure Equality Before the Law," 11 ("[T]he plain tendency of recent legislation, and also of judicial decisions in England and in the United States, has been to limit objections to the capacity of witnesses, and to allow the court and jury on hearing their testimony to estimate its weight and value").

294. "To Secure Equality Before the Law," 16.