
AN ORIGINALIST ANALYSIS OF THE NO RELIGIOUS TEST CLAUSE

Few issues provoke more impassioned debate in America than the relationship between church and state. Until recently, however, this debate lacked any extended discussion of the original Constitution's only provision addressing that relationship: the No Religious Test Clause of Article VI. This largely ignored or forgotten provision of the Constitution attracted attention during recent judicial confirmation hearings when certain members of the Senate Judiciary Committee were accused of violating the provision by "establishing a litmus test that would exclude people of orthodox religious beliefs — Jew, Christian, and Muslim alike — from the courts."¹ Other commentators suggested that President George W. Bush violated the provision when he selected judicial nominees or allowed hiring decisions for federally funded jobs to be made on the basis of religion under his faith-based initiatives.² Some commentators have even suggested that certain members of the House of Representatives violated the No Religious Test Clause when the House passed over a Catholic cleric for its chaplain.³

Through a textual and historical analysis of the No Religious Test Clause, this Note argues that the clause prohibits only a government-imposed requirement that an individual seeking public office bind himself, through an oath or affirmation, to adhere to a particular religious belief or to celebrate a particular religious sacrament. Beyond this limitation, it does not forbid officials — or the general citizenry — from considering or even inquiring into an individual's religious beliefs when deciding whether to nominate, confirm, or vote for the individual. Thus, many — though not all — of the recent allegations of No Religious Test Clause violations are misguided.

This Note proceeds in three parts. Part I discusses the text and the pre-ratification history of the No Religious Test Clause, the debates

¹ Byron York, *Catholics Need Not Apply?*, NAT'L REV. ONLINE, July 30, 2003, <http://www.nationalreview.com/york/yorko73003.asp> (quoting e-mail from Committee for Justice to supporters and the press).

² See, e.g., Joel Lanceta, *Illinois Senator Durbin Elaborates on Religious Freedom*, CHI. MAROON, Nov. 25, 2003, http://maroon.uchicago.edu/news/articles/2003/11/25/illinois_senator_dur.php (discussing hiring decisions for faith-based jobs funded by the federal government and stating that Senator Richard Durbin "summ[ed] up the provision [allowing those hiring decisions to be made] as a religious test, [which] Durbin called . . . a direct violation of the Constitution"); Press Release, Am. Humanist Ass'n, *Humanists Suspect Use of Religious Litmus Test* (July 20, 2005), <http://www.americanhumanist.org/press/Roberts.php> ("President Bush said in 2002 that he intended to use a religious litmus test for judicial nominations despite Article VI of the U.S. Constitution's clear wording on the subject . . .").

³ See Editorial, *A Catholic Chaplain*, PITTSBURGH POST-GAZETTE, Mar. 31, 2000, at A-22.

concerning its ratification, and judicial interpretations of the clause. Part II examines whether recent congressional and presidential actions violate the clause. Part III concludes.

I. THE TEXT AND HISTORY OF THE NO RELIGIOUS TEST CLAUSE

Article VI, Clause 3, of the Constitution contains one sentence with two separate provisions: the Oath Clause and the No Religious Test Clause.⁴ The Oath Clause requires that certain government officials be “bound by Oath or Affirmation” to support the Constitution.⁵ Limiting this mandate, the No Religious Test Clause then provides, “but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”⁶

The No Religious Test Clause cannot be understood without first defining the term “religious Test.” The Constitution, however, provides no such definition. Moreover, the constitutional text permits interpretations of the No Religious Test Clause as prohibiting only those religious tests included as part of an official’s formal oath, or all religious tests regardless of whether they occur during a formal oath, or something in between. An analysis of the historical background of the clause is therefore necessary to understand its meaning.

Historical evidence demonstrates that the Founders understood the clause as prohibiting the sorts of religious tests that were common in England and in many states at the time of ratification. History also shows that the Founders understood the clause as having a narrow purpose — namely, prohibiting the government from requiring an individual to bind himself to a religious belief or sacrament through an oath or affirmation in order to hold federal office. Fittingly, then, the Founders placed the No Religious Test Clause in the same sentence as the Oath Clause and wrote it as an explicit limitation on the scope of the government’s power under the Oath Clause.

A. *Religious Tests at the Founding*

At the Founding, England and many American states used religious tests to protect their established churches or preferred religions. In England, shortly after the restoration of the English monarchy, Par-

⁴ U.S. CONST. art. VI, cl. 3. The full clause provides: “The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” *Id.*

⁵ *Id.*

⁶ *Id.*

liament enacted the Test Act of 1672,⁷ which required all persons holding any public office to take an oath declaring a belief against transubstantiation in Holy Communion and to receive the sacrament according to the rites of the Church of England within three months of admittance to office.⁸ This test had the obvious effect of excluding Catholics and nearly all other non-Anglicans from holding public office. The test, therefore, was a “central feature of the establishment in England”⁹ because it served as a means of “secur[ing] the established church against perils from nonconformists of all denominations.”¹⁰

Like England, many American states imposed religious tests to limit the ability of individuals of certain denominations to hold public office. As of 1789, five states (Delaware,¹¹ Maryland,¹² Massachusetts,¹³ North Carolina,¹⁴ and Pennsylvania¹⁵) had constitutional pro-

⁷ 1672, 25 Car. 2, c. 2, amended by Second Test Act, 1678, 30 Car. 2, stat. 2, c. 1.

⁸ See *id.* The Act provided: “I A.B. doe declare That I doe beleive [sic] that there is not any Transubstantiation in the Sacrament of the Lords Supper, or in the Elements of Bread and Wine, at, or after the Consecration thereof by any person whatsoever.” *Id.*

⁹ Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2176 (2003).

¹⁰ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1843 (Boston, Hillard, Gray, & Co. 1833) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *58).

¹¹ DEL. CONST. of 1776, art. XXII, reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 273, 276 (Ben Perley Poore ed., Washington, Gov’t Printing Office 1877) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS] (requiring public officials to take the following oath: “I, A B, do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration”).

¹² MD. CONST. of 1776, art. LV, reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 11, at 817, 828 (requiring every person holding public office to take an oath containing “a declaration of his belief in the Christian religion”).

¹³ MASS. CONST. of 1780, ch. VI, art. I, reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 11, at 956, 970 (requiring certain public officials to take the following oath: “I, A. B., do declare that I believe the Christian religion, and have a firm persuasion of its truth”).

¹⁴ N.C. CONST. of 1776, art. XXXII, reprinted in 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 11, at 1409, 1413 (“[N]o person, who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, . . . shall be capable of holding any office or place of trust or profit in the civil department within this State.”); see also Letter from Sam Johnston, Member, 1776 North Carolina Legislature, to Hannah Iredell (December 13, 1776), in 1 LIFE AND CORRESPONDENCE OF JAMES IREDELL 339 (Griffith J. McRee ed., New York, D. Appleton & Co. 1857) (“[U]nfortunately one of the members from the back country introduced a test, by which every person, before he should be admitted to a share in the Legislature, should swear that he believed in the Holy Trinity, and that the Scripture of the old Testament was written by divine inspiration. This was carried after a very warm debate . . .” (emphasis added) (footnote omitted)).

¹⁵ PA. CONST. of 1776, § 10, reprinted in 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 11, at 1540, 1543 (requiring representatives to take the following oath: “I do believe in one God . . . And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration” (emphasis omitted)); see also *id.* (stating that “no further or other religious test shall ever hereafter be required of any civil officer or magistrate in this State”).

visions requiring individuals holding public office to swear a belief in Christianity — specifically, for instance, a belief in the Holy Trinity or a belief that the New Testament was divinely inspired. And New York required officeholders to take an oath disavowing allegiance to a foreign prince — in other words, the Pope — in all ecclesiastical and civil matters, thereby “exclud[ing] Catholics from state office” because of their “ecclesiastical ties to Rome.”¹⁶ The oath was an unmistakable component of each of these tests.¹⁷ Only if individuals passed such a test — that is, only if they bound themselves through such an oath — could they hold office.

B. The Drafting and Ratification of the No Religious Test Clause

1. *The Merits of a Religious Test.* — Despite its “dramatic departure from the prevailing practice in the states”¹⁸ and in England, the No Religious Test Clause received little discussion at the Constitutional Convention. One delegate thought that the clause was unnecessary because “the prevailing liberality [was] a sufficient security [against] such tests.”¹⁹ This outlook was aberrational, however, particularly in light of state practices and the reported statements of some delegates that non-Christians should be excluded from holding federal

¹⁶ JOHN WEBB PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 107–08 (1967); see also Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 682 (1987). Four additional states — Georgia, New Hampshire, New Jersey, and South Carolina — imposed outright prohibitions on non-Protestants holding office. GA. CONST. of 1777, art. VI, § 5, reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS, supra note 11, at 377, 379 (“The representatives . . . shall be of the Protestant religion . . .”); N.H. CONST. of 1784, pt. 2, reprinted in 2 THE FEDERAL AND STATE CONSTITUTIONS, supra note 11, at 1280, 1286–87 (requiring that all senators, representatives, and the state president be “of the protestant religion”); N.J. CONST. of 1776, art. XIX, reprinted in 2 THE FEDERAL AND STATE CONSTITUTIONS, supra note 11, at 1310, 1313 (“[A]ll persons, professing a belief in the faith of any Protestant sect, . . . shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature . . .”); S.C. CONST. of 1778, arts. III, XII, XIII, reprinted in 2 THE FEDERAL AND STATE CONSTITUTIONS, supra note 11, at 1620, 1621–23 (requiring that all senators, representatives, and the governor be “of the Protestant religion”). It is not clear how these provisions were enforced, whether through religious tests or otherwise. And a “professed atheist, polytheist, or unorthodox Christian” in Virginia presumably “would have had to serve from jail, because both by common law and statute Virginia criminalized at least the public utterance of such views.” Bradley, supra, at 683.

¹⁷ In some cases it was the only component. See, e.g., PA. CONST. of 1776, § 10, reprinted in 2 THE FEDERAL AND STATE CONSTITUTIONS, supra note 11, at 1540, 1543 (requiring a religious oath and then stating that “no further or other religious test shall ever hereafter be required of any officer or magistrate in this State” (emphasis added)).

¹⁸ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1474 (1990).

¹⁹ 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 468 (Max Farrand ed., 1911).

office.²⁰ Indeed, many non-Christians in Philadelphia itself were excluded from holding office. One such individual, Jonas Phillips, encouraged members of the Convention not to impose a Christian religious test because “to swear and believe [in certain Christian tenets] is absolutely [sic] against the religious principle of a Jew[] and is against his Conscience to take any such oath.”²¹ After a brief discussion, the clause passed unanimously.²²

Although the clause received little attention at the Convention, during ratification it was “one of the more controversial features” of the Constitution because many Antifederalists “considered it too risky a proposition to allow Catholics or non-Christians to hold office.”²³ For instance, during the ratification debates in Massachusetts, a delegate stated that one of his “principal objections” to the proposed Constitution was “the omission of a religious test” because “rulers ought to believe in God or Christ.”²⁴ Similarly, during the ratification debates in North Carolina, a delegate argued that a religious test similar to those used in the states was necessary to ensure that a Catholic could not become President: “This is most certain, that Papists may occupy [the presidency] . . . I see nothing against it. There is a disqualification, I believe, in every state in the Union — it ought to be so in this system.”²⁵ Some Antifederalists even proposed formal amendments that would have replaced the No Religious Test Clause with a religious test.²⁶ In short, the Antifederalists, who were accustomed to the religious tests and establishment regimes in many of their home states, did not take well to the separationist undertones of the No Religious Test Clause.

The Federalists, in contrast, defended the clause. One of its most prominent defenders was Oliver Ellsworth, a delegate at the Constitutional Convention and later a U.S. Senator and the third Chief Justice of the United States. Ellsworth both explained what a religious test was and defended the No Religious Test Clause:

²⁰ See HENRY F. MAY, *THE ENLIGHTENMENT IN AMERICA* 97 n.20 (1976) (quoting Luther Martin, a delegate of Maryland, who commented that some delegates thought “that, in a Christian country, it would be at least decent to hold out some distinction between the professors of Christianity and downright infidelity or paganism” (internal quotation mark omitted)).

²¹ Letter from Jonas Phillips to President and Members of the Convention (Sept. 7, 1787), in 4 *THE FOUNDERS’ CONSTITUTION* 638 (Philip B. Kurland & Ralph Lerner eds., 1987).

²² 2 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 19, at 461.

²³ McConnell, *supra* note 9, at 2178.

²⁴ Debate in Massachusetts Ratifying Convention (Jan. 30, 1788), in 4 *THE FOUNDERS’ CONSTITUTION*, *supra* note 21, at 643.

²⁵ William Lancaster, North Carolina Ratifying Convention (July 30, 1788), in 4 *THE FOUNDERS’ CONSTITUTION*, *supra* note 21, at 645.

²⁶ See Winston E. Calvert, Note, *Judicial Selection and the Religious Test Clause*, 82 *WASH. U. L.Q.* 1129, 1148–49 (2004) (discussing proposed amendments requiring public servants to swear devotion to a theistic deity).

A religious test is an act to be done, or profession to be made, relating to religion (such as partaking of the sacrament according to certain rites and forms, or declaring one's belief of certain doctrines,) for the purpose of determining whether his religious opinions are such, that he is admissible to a publick office. . . .

If any test-act were to be made, perhaps the least exceptionable would be one, requiring all persons appointed to office to declare . . . their belief in the being of a God, and in the divine authority of the scriptures. . . . But I answer: His making a declaration of such a belief is no security at all. . . . [T]est-laws are utterly ineffectual: they are no security at all; because men of loose principles will, by an external compliance, evade them. If they exclude any persons, it will be honest men, men of principle, who will rather suffer an injury, than act contrary to the dictates of their consciences. If we mean to have those appointed to public offices, who are sincere friends to religion, we, the people who appoint them, must take care to choose such characters; and not rely upon such cob-web barriers as test-laws are.²⁷

Ellsworth, then, viewed religious tests as useless and counterproductive. A better policy, a contemporary of Ellsworth's suggested, was to prohibit such tests and allow any "wise, informed and upright man" to hold office, "provided he possess[] the moral, religious and political virtues which are necessary to secure the confidence of his fellow citizens."²⁸

James Iredell, who was then a member of North Carolina's ratifying convention and who later became one of the original Justices of the Supreme Court, shared Ellsworth's view of religious tests. Iredell argued:

[M]en of no religion at all have no scruple to [qualify themselves for office through a religious test]. It never was known that a man who had no principles of religion hesitated to perform any rite when it was convenient for his private interest. No test can *bind* such a one. I am therefore clearly of opinion that such a discrimination would neither be effectual for its own purposes, nor, if it could, ought it by any means to be made. . . .

. . . [A religious test would not] answer the purpose, for the worst part of the excluded sects would comply with the test, and the best men only be kept out of our counsels. But it is never to be supposed that the people of America will trust their dearest rights to persons who have no religion at all, or a religion materially different from their own.²⁹

²⁷ Oliver Ellsworth, Landholder, No. 7 (Dec. 17, 1787), reprinted in 4 THE FOUNDERS' CONSTITUTION, *supra* note 21, at 640. Edmund Randolph, who was then Governor of Virginia and who later became the first U.S. Attorney General, defined religious tests similarly. See *infra* note 49 and accompanying text.

²⁸ Tench Coxe, An Examination of the Constitution (Fall 1787), reprinted in 4 THE FOUNDERS' CONSTITUTION, *supra* note 21, at 639.

²⁹ Debate in North Carolina Ratifying Convention (July 30, 1788), in 5 THE FOUNDERS' CONSTITUTION, *supra* note 21, at 90 (statement of James Iredell) (emphasis added).

Thus, Iredell, like Ellsworth, saw religious tests as useless and counterproductive because they would exclude only the best religious men from office, while men of no religious principle would have no misgivings about swearing to any religious belief or performing any religious rite to further their personal interests.

2. *The Religious Nature of Oaths.* — James Madison also saw religious tests as unnecessary, at least insofar as the tests required only a belief in God (as opposed to a belief in a particular religious sect). Madison explained:

Is not a religious test as far as it is necessary, or would operate, involved in the oath itself? 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. If the person in question be an unbeliever in these points and would notwithstanding take the oath, a previous test could have no effect. He would subscribe it as he would take the oath, without any principle that could be affected by either.³⁰

Therefore, according to Madison, requiring individuals seeking public office to swear a belief in God as part of a separate test would be unnecessary for both believers and nonbelievers alike. Believers would fear the consequences of violating their general oath regardless of whether they also took a separate religious oath affirming their belief in God, while nonbelievers would subscribe to both a general and religious oath without any fear of the consequences of offending God.

Several others shared Madison's views. For instance, Oliver Wolcott of the Connecticut Ratifying Convention explained that religious tests were unnecessary because the Oath Clause in Article VI already contained "a direct appeal to that God who is the avenger of perjury."³¹ Iredell also shared this view of the Oath Clause. He explained:

According to the modern definition of an oath, it is considered a "solemn appeal to the Supreme Being, for the truth of what is said, by a person who believes in the existence of a Supreme Being and in a future state of rewards and punishments, according to that form which will bind his conscience most." . . . [Accordingly], in administering an oath, it is only necessary to inquire if the person who is to take it, believes in a Supreme Being, and in a future state of rewards and punishments. . . . It is . . . necessary that such a belief should be entertained, because otherwise

³⁰ Letter from James Madison to Edmund Pendleton (Oct. 28, 1787), in 4 THE FOUNDERS' CONSTITUTION, *supra* note 21, at 639; *cf.* 3 STORY, *supra* note 10, § 1838 ("Oaths have a solemn obligation upon the minds of all reflecting men, and especially upon those, who feel a deep sense of accountability to a Supreme being.")

³¹ Oliver Wolcott, Connecticut Ratifying Convention (Jan. 9, 1788), in 4 THE FOUNDERS' CONSTITUTION, *supra* note 21, at 641.

there would be nothing to bind his conscience that could be relied on; since there are many cases where the terror of punishment in this world for perjury could not be dreaded.³²

Based on the same view of the Oath Clause, South Carolina proposed, albeit unsuccessfully, that “other” be inserted between the words “no” and “religious test” in Article VI.³³ Each of these views confirms that the Founders understood the phrase “religious test” in Article VI as relating to a particular type — or to the particular content — of an oath.

Madison and other Founders’ emphasis on the oath/non-oath distinction and their view of oaths as inherently religious may seem odd to a modern audience. But around the time of the Founding, oaths were “serious matters.”³⁴ In the words of Justice Story, they imposed “solemn obligation[s], . . . especially upon those . . . who fe[el]t a deep sense of accountability to a Supreme being.”³⁵ Indeed, Hamilton referred to the “sanctity” of the oath imposed on government officials as an important means of ensuring that the Constitution would be respected as the supreme law of the land.³⁶ As Professor Robert Natelson explains:

The view that oaths and theism were necessarily connected was more than merely a view: *It was the law*. The essence of an oath was an appeal to God to witness the truth of what one said. Thus, the oath of an atheist received no recognition. The English courts so ruled prior to American independence, and American courts acknowledged the principle as late as 1823.³⁷

Moreover, a statement made under oath is different in kind from one not made under oath. A declarant making a statement under oath traditionally calls upon God as a witness and, as a result, enters into a binding covenant with God. A declarant who believes in God presumably does not take such a covenant lightly. As President Lincoln remarked, oaths are “registered in heaven.”³⁸ Indeed, in the Old Tes-

³² Debate in North Carolina Ratifying Convention (July 30, 1788), in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 21, at 91 (statement of James Iredell); cf. MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 609 (2002) (“[A] belief in God is implicit in the very idea of an oath.”).

³³ See Proposed Amendment, South Carolina Ratifying Convention (May 23, 1788), in 4 THE FOUNDERS’ CONSTITUTION, *supra* note 21, at 644; see also Bradley, *supra* note 16, at 698 (discussing this proposed amendment and indicating that the change was again proposed in the first Congress, “but to no avail”).

³⁴ McConnell, *supra* note 18, at 1475.

³⁵ 3 STORY, *supra* note 10, § 1838.

³⁶ THE FEDERALIST NO. 27, at 177 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³⁷ Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 109 (2005) (footnote omitted).

³⁸ Abraham Lincoln, First Inaugural Address (March 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 271 (Roy P. Basler ed., 1953).

tament, Moses commanded that “[w]hen a man makes a vow to the Lord or binds himself under oath . . . , he shall not violate his word, but must fulfill exactly the promise he has uttered.”³⁹

To be sure, the Constitution allows individuals to give an affirmation rather than an oath.⁴⁰ That provision, however, was not aimed at protecting nonbelievers, although it certainly does protect them. Instead, the affirmation option was principally aimed at protecting “several small religious sects, including the influential Quakers, [who] refused to swear oaths, on authority of *Matthew* 5:33–37.”⁴¹ As Justice Story observed, “there are known denominations of men, who are conscientiously scrupulous of taking oaths . . . and therefore, to prevent any unjustifiable exclusion from office, the constitution has permitted a solemn affirmation to be made instead of an oath, and as its equivalent.”⁴² The solemnity of the administration of an affirmation is nearly indistinguishable from that of an oath, and the individual giving an affirmation subjects himself to a charge of perjury should he violate it. Therefore, both affirmations and oaths are different in kind from a statement not made under oath or penalty of perjury.

3. *The Scope of the Clause.* — Although the Federalists’ arguments concerning the ineffectiveness and counterproductivity of religious tests may have eased some Antifederalists’ concerns about nonbelievers holding public office, the argument that seems to have carried the day for the Federalists was the claim that, were a test to be included, it was not clear which sect would get the test it most wanted. Thus, if religious majorities changed in the future, a particular sect arguing for a religious test might actually bring about its own political demise.⁴³ As Iredell argued, it is not possible to “exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for The people in power were always right, and every body else wrong. If you admit the least difference, the door to persecution is opened.”⁴⁴ The clause was thus “sold

³⁹ *Numbers* 30:3 (New American).

⁴⁰ See U.S. CONST. art. VI, cl. 3.

⁴¹ McConnell, *supra* note 18, at 1475.

⁴² 3 STORY, *supra* note 10, § 1838.

⁴³ See Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1051 (1990); Calvert, *supra* note 26, at 1149–50 & n.95.

⁴⁴ Debate in North Carolina Ratifying Convention (July 30, 1788), in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 21, at 90 (statement of James Iredell). Oliver Wolcott, a delegate at the Connecticut Ratifying Convention, advanced a similar argument: “[A]s we know not what may take place hereafter, . . . [the] clause . . . secures us from the possibility of such oppression.” Oliver Wolcott, Connecticut Ratifying Convention (Jan. 9, 1788), in 4 THE FOUNDERS’ CONSTITUTION, *supra* note 21, at 642.

as a constitutionalized Golden Rule with a Machiavellian spin to it: ‘Constrain yourself as you would constrain others.’⁴⁵

Whatever the ultimate selling point of the clause, it is “implausib[e] . . . that [the Founders] were motivated by an affirmative desire on the part of most Americans to welcome Catholics, Jews, or, perhaps most unthinkable of all, atheists, into positions of leadership.”⁴⁶ It is equally implausible that the Founders understood the clause to prohibit citizens or officials from considering or even inquiring into an individual’s religious views when deciding whether to nominate, confirm, or vote for the individual.

Instead, the only thing the Founders understood the clause to prohibit was a “religious test” — or, in today’s parlance, a religious oath or affirmation. Stated differently, in Article VI, Clause 3, the Founders first gave the federal government the power to require individuals seeking federal offices to bind themselves through an oath or affirmation (the Oath Clause), but they then took away from the government the power to include in that oath or affirmation a religious test (the No Religious Test Clause), at least to the extent that the oath itself is not a religious test.⁴⁷ Indeed, virtually all of the commentators on the No Religious Test Clause at the time of the Founding viewed the clause as inextricably linked to the Oath Clause.⁴⁸ Thus, if there was no oath or affirmation involved, there was no “religious test” as the Founders understood the term. As Edmund Randolph, who was then Governor of Virginia and who later became the first U.S. Attorney General, explained:

The exclusion of religious tests is an exception from this general provision, *with respect to oaths, or affirmations*. Although officers, &c. are to swear that they will support this constitution, yet they are not *bound* to support one mode of worship, or to adhere to one particular sect. It puts all sects on the same footing.⁴⁹

Many scholars who have analyzed the No Religious Test Clause have concluded, based largely on Randolph’s “same footing” language,

⁴⁵ Bradley, *supra* note 16, at 703.

⁴⁶ Levinson, *supra* note 43, at 1051.

⁴⁷ Even if the Oath Clause itself contained an implicit religious test, the affirmation option made that test voluntary and thus not “*required* as a Qualification to any Office or public Trust under the United States.” U.S. CONST. art. VI, cl. 3 (emphasis added).

⁴⁸ Cf. MCCONNELL ET AL., *supra* note 32, at 845 (“The Religious Test Clause should be read together with the Oath Clause, which immediately precedes it.”); *Meet the Press* (NBC television broadcast Aug. 7, 2005) (statement of Professor Douglas Kmiec), transcript available at <http://www.msnbc.msn.com/id/8714275/> (“The same constitutional provision . . . that requires an oath . . . also says that there shall be no religious test for public service. . . . [The Founders] said no one is going to be required to take a test *oath* on the basis of faith in order to serve.” (emphasis added)).

⁴⁹ Edmund Randolph, Virginia Ratifying Convention (June 10, 1788), in 4 THE FOUNDERS’ CONSTITUTION, *supra* note 21, at 644 (emphases added).

that the clause prohibits denomination-based religious qualifications for public office.⁵⁰ Accordingly, these scholars include in their discussion of Founding-era religious tests the state constitutional provisions⁵¹ that explicitly and directly permitted only Protestants or only Christians to hold public office.⁵² These scholars, however, overread the No Religious Test Clause and Randolph's remark. The clause, as Randolph explained, is a limit on the government's power only with respect to oaths and affirmations. It is not a limit on the government's power to prescribe status-based religious qualifications on holding public office, so long as those qualifications are not enforced by requiring individuals seeking office to bind themselves through an oath or affirmation to a particular religious belief or sacrament — that is, so long as individuals seeking office are not forced to take a religious test. Only in that limited sense, as Randolph himself recognized, does the No Religious Test Clause put all religious sects on equal footing.

The placement of the No Religious Test Clause in the same sentence as the Oath Clause — and the fact that the two clauses are joined by the conjunction “but” — confirms the reading of the No Religious Test Clause as an exception to the Oath Clause. Indeed, if the Founders intended the clause to prohibit status-based religious qualifications, they presumably would not have written it as only a limitation on the Oath Clause but would instead have included the clause in those sections of the Constitution that discuss the requisite qualifications for holding certain offices.⁵³ In short, as Madison said, the No Religious Test Clause “can imply *at most* nothing more than that without that exception, a power would have been given [to the federal government] to impose an *oath* involving a religious test as a qualification for office.”⁵⁴

⁵⁰ See, e.g., Calvert, *supra* note 26, at 1150 (quoting Randolph and indicating that the “text and structure of the Constitution indicate that status-based religious qualifications are impermissible”); Erwin Chemerinsky, John Roberts and the Establishment Clause and the Role of the Religious Test Clause in the Confirmation Process 8 (Aug. 17, 2005), <http://www.acslaw.org/pdf/chemerinsky.pdf> (same).

⁵¹ See sources cited *supra* note 16.

⁵² See, e.g., Calvert, *supra* note 26, at 1146 & nn.76–77; Chemerinsky, *supra* note 50, at 8. Professor Gerard Bradley also includes these status-based qualifications in his discussion of religious tests at the Founding. See Bradley, *supra* note 16, at 681. But after doing so, Professor Bradley indicates that “[i]n these states the legislatures presumably filled out the constitutional requirement with some verbal formula . . .” *Id.* at 681. In making this latter statement, Professor Bradley seems correctly to recognize the limited scope of the No Religious Test Clause: that there is no religious test without “some verbal formula” — that is, an oath or affirmation — enforcing the status-based qualification.

⁵³ See, e.g., U.S. CONST. art. I, § 5 (“Each House shall be the Judge of the . . . Qualifications of its own Members . . .”).

⁵⁴ Letter from James Madison to Edmund Randolph (Apr. 10, 1788), *reprinted in* 4 THE FOUNDERS’ CONSTITUTION, *supra* note 21, at 644 (emphases added).

C. Judicial Interpretations of the No Religious Test Clause

Judicial interpretations of the No Religious Test Clause are virtually nonexistent.⁵⁵ There are two potential explanations for this void. First, because the Supreme Court has applied the First Amendment against the states and held that religious tests violate the First Amendment,⁵⁶ courts have had little reason to consider the clause, at least since incorporation. More generally, however, there are very few cases because “there have been no tests” at the federal level,⁵⁷ or at least no tests that have been recognized as such.

The closest any federal court has come to deciding a case under the No Religious Test Clause was in *Torcaso v. Watkins*.⁵⁸ In *Torcaso*, the Supreme Court addressed the constitutionality of a provision in the Maryland Constitution barring every person who refused to declare a belief in God from holding public office in the state.⁵⁹ Without specifying on which religion clause of the First Amendment it was basing its decision, the Court held that “neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’”⁶⁰ Because the Court held that this provision of the Maryland Constitution violated the First Amendment, it found it unnecessary to consider whether the No Religious Test Clause applied to the states or was violated.⁶¹

* * * *

Although judicial interpretations of the No Religious Test Clause are scarce, history makes clear what the Founders understood the clause to prohibit: a test forcing individuals seeking certain positions in the federal government to bind themselves through an oath or affirmation to a particular religious belief or sacrament in order to be qualified to hold office. The placement of the clause in Article VI, immedi-

⁵⁵ See Bradley, *supra* note 16, at 714 (stating that, except for one holding that a particular oath was not a religious test, “no judicial decision has rested upon the clause”).

⁵⁶ See *Torcaso v. Watkins*, 367 U.S. 488, 489 n.1, 496 (1961) (holding that a state religious test violated the First Amendment and thus deeming it unnecessary to consider the appellant’s claim that the test also violated the No Religious Test Clause).

⁵⁷ Bradley, *supra* note 16, at 715.

⁵⁸ 367 U.S. 488. The court also addressed a claim under the No Religious Test Clause in *American Communications Ass’n v. Douds*, 339 U.S. 382 (1950), in which it held that an oath requiring union members to disavow a belief in communism was not a religious test, *see id.* at 414–15.

⁵⁹ See *Torcaso*, 367 U.S. at 489–90.

⁶⁰ *Id.* at 495 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)).

⁶¹ See *id.* at 489 n.1. Recently, a federal district court concluded that “whether Article VI applies to the states through the Fourteenth Amendment is an unsettled question.” *Habecker v. Town of Estes Park*, 452 F. Supp. 2d 1113, 1129 (D. Colo. 2006).

ately after the Oath Clause — and connected by the conjunction “but” — confirms this understanding, as do the ratification debates.

II. MODERN ARGUMENTS MADE UNDER THE NO RELIGIOUS TEST CLAUSE

Because the Supreme Court’s First Amendment and incorporation jurisprudence prohibit religious tests at the state level, the No Religious Test Clause has been largely eliminated from modern constitutional discourse. Many scholarly works that discuss the issue of church and state in America do not even mention the clause, the leading constitutional law casebooks and treatises make only passing reference to it, and many of today’s law students likely do not even know that the clause exists, unless they had one of those rare constitutional law professors who actually assigned the Constitution as required reading. Indeed, in his treatise on constitutional law, Professor Laurence Tribe declares that “the religious test clause is now of little independent significance.”⁶²

Nevertheless, several commentators and politicians have advanced arguments under the No Religious Test Clause in recent years. These arguments have arisen in the context of individuals being considered for public offices, including House Chaplain, leader of the White House Office of Faith-Based and Community Initiatives, and positions on the federal bench. This Part analyzes those arguments to determine whether the underlying governmental actions run afoul of Article VI. An examination of these arguments leads to two conclusions. First, in confirmation hearings the Senate Judiciary Committee has come dangerously close to violating the No Religious Test Clause, if it has not done so already. In contrast, neither the President through his appointment power nor the House of Representatives through its officer selection power has violated the clause. The key distinction between the Senate Judiciary Committee’s confirmation hearings and the actions of the President and the House is that the former take place with the nominee under oath and thus closely resemble the tests with which Article VI is concerned, whereas the latter do not take place with the nominee under oath (or subject to an affirmation) and thus can raise no valid Article VI objections.

A. *Judicial Confirmation Hearings*

Judicial confirmations have become increasingly contentious in recent decades. As the federal courts have ventured into several religiously laden areas, some members of the Senate have deemed it neces-

⁶² LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-2, at 813 n.1 (1st. ed. 1978).

sary and appropriate both to question nominees about their religious beliefs and to base their votes in part on whether the nominees' answers are satisfactory. For instance, in explaining his vote against Judge Robert Bork's nomination to the Supreme Court, Senator Howell Heflin stated that he "was . . . disturbed by [Judge Bork's] refusal to discuss his belief in God or the lack thereof."⁶³ Similarly, during the more recent confirmation hearings of Judge William Pryor, Senator Charles Schumer expressed concern over Judge Pryor's "very, very deeply held views" — a formulation that one commentator called a "transparent euphemism for religiously grounded views."⁶⁴ During a hearing on Judge Pryor's nomination, Senator Schumer stated: "[I]n Pryor's case, his beliefs are so well known, so deeply held, that it's very hard to believe . . . that they're not going to deeply influence the way he comes about saying, 'I will follow the law.'"⁶⁵ Senator Richard Durbin expressed similar concerns over Judge Pryor; he asked Judge Pryor whether he was "asserting an agenda of [his] own, a religious belief of [his] own, inconsistent with separation of church and state."⁶⁶ Senator Durbin also expressed concern over the religious views of then-Judge John Roberts, who, like Judge Pryor, is Catholic. During a private meeting with Judge Roberts, Senator Durbin reportedly asked him "what he would do if the law required a ruling that his church considers immoral."⁶⁷

Particularly in the case of Judge Pryor, public outcry ensued. The Committee for Justice ran an advertisement with the slogan "Catholics Need Not Apply," accusing Senate Judiciary Committee Democrats of effectively barring nominees with orthodox religious beliefs from confirmation.⁶⁸ Senate Judiciary Committee Republicans suggested that their Democratic colleagues had created a de facto religious test.⁶⁹ Senator Patrick Leahy and other Democratic senators, several of whom are Catholic, were infuriated by the claims and responded by introducing the following amendment to the Standing Rules of the Senate: "In any proceeding of a committee considering a nomination made by the President of the United States to the Senate, it shall not

⁶³ ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 295 (1989).

⁶⁴ Charles Krauthammer, *In Defense of Certainty*, TIME, June 1, 2005, at 96, 96, available at <http://www.time.com/time/columnist/krauthammer/article/0,9565,1067816,00.html> (quoting Senator Schumer).

⁶⁵ *Id.*

⁶⁶ *Confirmation Hearing on the Nomination of Judge William H. Pryor, Jr.: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 90 (2003) [hereinafter *Hearing*] (statement of Sen. Durbin, Member, Senate Comm. on the Judiciary), available at <http://www.access.gpo.gov/congress/senate/pdf/108hrhg/91200.pdf>.

⁶⁷ Jonathan Turley, Op-Ed., *The Faith of John Roberts*, L.A. TIMES, July 25, 2005, at B11.

⁶⁸ See York, *supra* note 1.

⁶⁹ See, e.g., 149 CONG. REC. S10,465–66 (daily ed. July 31, 2003) (statement of Sen. Hatch).

be in order to ask any question of the nominee relating to the religious affiliation of the nominee.”⁷⁰ The amendment never went to a vote.

Many of the aforementioned questions by members of the Senate Judiciary Committee could qualify as a religious test if asked of a nominee under oath. For instance, Senator Durbin’s question of Judge Pryor may have been a religious test, as might have been his question of Judge Roberts had it been asked when Judge Roberts was under oath. Senator Durbin essentially asked Judge Roberts whether he was willing to relegate his religious views when those views conflicted with Supreme Court precedent — in other words, would Judge Roberts give his word that he would not put the views of the Catholic Church over those of the Supreme Court. This line of questioning was remarkably similar to the test that New York used at the Founding to keep Catholics out of office. That test essentially required individuals seeking office to swear that the Pope had no jurisdiction or authority over civil matter arising in the state.⁷¹ “With one stroke, . . . Roman Catholics — earmarked . . . by fealty to the Pope — were rendered ineligible.”⁷² Senator Durbin’s question seemed to imply that Judge Roberts would not get his vote unless Judge Roberts assured him that he would not take orders from the Pope in deciding cases. Calling such required assurances anything other than a religious test — again, assuming for the sake of argument that Judge Roberts had been questioned by Senator Durbin under oath — would be dubious.

Ironically, during Judge Pryor’s confirmation hearings, perhaps the clearest violation of the No Religious Test Clause was committed by Senator Orrin Hatch, a Republican and Judge Pryor’s most ardent supporter on the Judiciary Committee. The following dialogue took place between Senator Hatch and Judge Pryor while Judge Pryor was under oath:

Senator Hatch: Now, just for the record, what is your religious affiliation?

Mr. Pryor: I’m a Roman Catholic.

Senator Hatch: Are you active in your church?

Mr. Pryor: I am.

Senator Hatch: You are a practicing Roman Catholic.

Mr. Pryor: I am.

Senator Hatch: You believe in your religion.

Mr. Pryor: I do.⁷³

⁷⁰ S. Res. 207, 108th Cong. (2003).

⁷¹ See PRATT, *supra* note 16, at 107–08; see also *supra* p. 1652.

⁷² Bradley, *supra* note 16, at 682.

⁷³ *Hearing, supra* note 66, at 104–05.

When his Democratic colleagues turned the tables on Senator Hatch, accusing him of imposing a religious test through these questions, Senator Hatch responded that the “questions were an attempt to prevent General Pryor . . . from being subjected to a religious test.”⁷⁴ According to Senator Hatch, “[i]n no way, shape or form” did he or would he “ever attempt to impose such a test.”⁷⁵ Whatever Senator Hatch’s motives, his questions essentially forced Judge Pryor to answer questions about his religious beliefs under oath. And although these questions might not have been for “qualification” purposes in Senator Hatch’s mind, they nonetheless smack of a religious test and should be avoided in the future.

The drafters and proponents of the No Religious Test Clause would be astonished to learn that members of the Senate Judiciary Committee have questioned judicial nominees under oath about their religious beliefs and the extent of those beliefs. Not only would they likely see such questions as violations of the No Religious Test Clause, but, equally importantly, they would also see the questions as counterproductive at worst and useless at best. They would see the questions as counterproductive because such questions might result in “honest men, men of principle, . . . who are sincere friends to religion,” being excluded from office.⁷⁶ They would see the questions as useless because the questions provide “no security at all,” given that “men of loose principles will . . . evade them.”⁷⁷ “Unprincipled and dishonest men will not hesitate to subscribe to *any thing* that may open the way for their advancement”⁷⁸

To be sure, not all questions asked of a nominee under oath that potentially touch on religious issues qualify as religious tests. A critical distinction exists between an ideological or judicial-philosophy test, which is constitutional, and a religious test, which is not.⁷⁹ The distinction between the two turns on whether the question asked of a nominee under oath requires him to profess a religious belief or to agree to celebrate a religious sacrament. If it does — that is, if the nominee cannot answer the question without expressing a religious belief or agreeing to participate in a religious sacrament — it violates the No Religious Test Clause. If it does not, there is no Article VI concern.

⁷⁴ 149 CONG. REC. S10,465–66 (daily ed. July 31, 2003) (statement of Sen. Hatch).

⁷⁵ *Id.*

⁷⁶ Ellsworth, *supra* note 27, at 640.

⁷⁷ *Id.*

⁷⁸ Debate in Massachusetts Ratifying Convention (Jan. 30, 1788), in 4 THE FOUNDERS’ CONSTITUTION, *supra* note 21, at 642 (statement of Rev. Mr. Shute).

⁷⁹ For a discussion of the distinction between religious tests and ideological tests, see Calvert, *supra* note 26, at 1132–45.

Based on this understanding of the scope of the clause, some questions unmistakably qualify as religious tests. Examples of such questions include asking a nominee if he believes in God, in transubstantiation, or in the truth of the New Testament. Similarly, some questions clearly do not qualify as religious tests. For instance, a common question in almost all recent judicial nominations, and indeed the one that has triggered some groups' claims of anti-Catholic sentiment, concerns whether the nominee agrees with or will uphold *Roe v. Wade*,⁸⁰ *Lawrence v. Texas*,⁸¹ and other substantive due process decisions that implicate significant religious issues. Asking such a question when the nominee is under oath is constitutional because it in no way requires the nominee to discuss his religious views. A nominee could answer the question by discussing, among other things, his understanding of the Constitution, his theory of constitutional interpretation, or his level of support for *stare decisis*. Personal religious views are not necessarily reflective of a judge's views on substantive due process decisions that involve serious religious issues. Indeed, one can agree with *Roe* and *Lawrence* and still think that abortion and homosexual activity are morally abhorrent, just as one can disagree with *Roe* and *Lawrence* and think that abortion and homosexual activity are not morally wrong.

A closer question is whether asking a nominee under oath if he agrees with his religion's teachings regarding the morality of abortion or homosexual activity is a religious test. This is a difficult issue because, for many nominees, there is no way around the religious implications of the question. Whatever the nominee's views on the matter, he will likely feel forced to reveal and explain his religious beliefs and the extent of those beliefs. The nominee, of course, does not have to answer the question. But he undoubtedly will feel pressure to do so, knowing that confirmation hearings are used to determine a nominee's fitness for office and that he may not get the senator's vote — and most likely will be subject to ridicule by other senators and the press — if he refuses to answer. Asking a nominee such a question under oath should therefore be avoided because it risks violating the No Religious Test Clause.

A possible initial objection is that being questioned under oath about one's religious beliefs is not the same as being required to profess a religious belief as part of an oath of office (or affirmation). The No Religious Test Clause, this objection would contend, is concerned with only the latter, not the former. That objection, however, takes too narrow a view of the clause. To be sure, the principal form of a reli-

⁸⁰ 410 U.S. 113 (1973).

⁸¹ 539 U.S. 558 (2003).

gious test at which the clause is aimed is one included as part of the oath of office. But such a reading would allow the government to engage in the very abuses giving rise to the clause's ban on religious tests by requiring an individual seeking public office to profess a religious belief under oath in some form other than his official oath of office.

Imagine, for instance, that the Senate adopted a rule stating that it will not confirm any judicial nominee who does not profess under oath a belief in Christianity during his confirmation hearings. Even though this profession under oath would take place at some time other than during the official oath of office, the drafters and ratifiers of Article VI would likely have seen it as a violation of the No Religious Test Clause.⁸² They understood the clause as prohibiting the government from requiring an individual seeking a federal office to bind himself — through an oath — to a religious belief or sacrament. It should make no difference whether this binding takes place through an oath of office, a sworn affidavit, or a legislative inquiry under oath. The common result of all three is that the government has required an individual seeking public office to bind himself through an oath to a religious belief or sacrament in order to be qualified to hold public office. Such governmental action violates the No Religious Test Clause because, as Ellsworth explained, “[l]egislatures have no right to set up an inquisition, and examine into the private [religious] opinions of men [seeking public office].”⁸³

A second possible objection to the conclusion that a senator violates the No Religious Test Clause by requiring a nominee to profess a religious belief under oath is that a single senator cannot violate the clause. The clause is violated, this objection would go, only when the Senate acting as a body rejects a nominee based in whole or in part on the nominee's failure to profess a satisfactory religious belief under oath. This objection also takes too narrow a view of the clause. A senator asking a nominee about his religious beliefs presumably considers the nominee's answer to have some bearing on her ultimate vote. One senator requiring a judicial nominee to express a religious belief under oath violates the clause because an individual seeking

⁸² Cf. MCCONNELL ET AL., *supra* note 32, at 845 (“Presumably, it would be unconstitutional for the Senate to adopt a rule that it would not confirm any Mormon nominees to the federal bench.”).

⁸³ Ellsworth, *supra* note 27, at 640–41. Professor Erwin Chemerinsky disagrees with this conclusion and argues that “[i]nquiring into a judicial nominee's religious beliefs . . . does not bind nominee[s] to support ‘one mode of worship’ or ‘adhere to one particular sect’ and thus does not violate the prohibition of a religious test for office.” Chemerinsky, *supra* note 50, at 8–9. In reaching this conclusion, Professor Chemerinsky correctly focuses on whether any binding to a religious belief or sacrament occurs, but he overlooks the fact that an oath has a binding impact. If a nominee under oath makes a statement concerning his religious beliefs or practices, he is binding himself to that statement.

public office will have essentially been forced to profess a religious belief under oath in order to obtain that office.

To be sure, the extent of the injured nominee's remedy, if any, may depend on how pervasive the violation was — for instance, how many senators were involved in the questioning or how many senators actually based their votes on the nominee's religious beliefs. The question of remedy, however, is distinct from the question whether a violation occurred. Regardless of the availability of judicial remedies, the Senate should at a minimum consider using its Article I, Section 5 power⁸⁴ both to develop procedures that a nominee can invoke if Article VI is violated and to discipline senators who violate the No Religious Test Clause. Senator Leahy's proposal was a step in the right direction, but it did not address the question of remedy; future proposals should fill this gap.⁸⁵

B. Presidential and Other Congressional Actions

Several commentators have alleged that the President and certain members of the House of Representatives also have violated the No Religious Test Clause in recent years. For instance, some groups accused President George W. Bush of violating the clause when he stated that he intended to appoint "common-sense judges who understand that our rights were derived from God"⁸⁶ and in his allowance of religiously based hiring decisions for jobs funded through the White House Office of Faith-Based and Community Initiatives.⁸⁷ Additionally, the *Pittsburgh Post-Gazette* argued that the House of Representatives risked violating the clause when a Catholic cleric was allegedly "passed over because some evangelical Protestants in the House were uncomfortable with the idea of a Catholic priest in the chaplain's role."⁸⁸ Each of these claims is misguided, however, because none of the aforementioned instances involved requiring an individual seeking public office to bind himself to a religious belief or sacrament through an oath or affirmation.

The Founders understood the No Religious Test Clause to prohibit tests forcing individuals seeking certain public offices to bind themselves through an oath or affirmation to a particular religious belief or sacrament in order to be qualified to hold office. They did not under-

⁸⁴ See U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.").

⁸⁵ For a thorough discussion of the proper remedy for an Article VI violation in the context of a judicial nomination, see J. Gregory Sidak, *True God of the Next Justice*, 18 CONST. COMMENT. 9, 40–49 (2001).

⁸⁶ Press Release, Am. Humanist Ass'n, *supra* note 2.

⁸⁷ See Lanceta, *supra* note 2.

⁸⁸ See Editorial, *supra* note 3.

stand the clause to prohibit government officials from considering or even inquiring into an individual's religious beliefs — assuming the individual is not under oath during the inquiry — in deciding whether to nominate, confirm, or vote for the individual. Indeed, the ratification debates suggest the opposite, that government officials *should* consider religious beliefs in making such decisions. For instance, in defense of the No Religious Test Clause, Ellsworth argued that “[i]f we mean to have those appointed to public offices, who are sincere friends to religion, we, the people who appoint them, must take care to choose such characters; and not rely upon such cob-web barriers as test-laws are.”⁸⁹ Similarly, Iredell stated that “it is never to be supposed that the people of America will trust their dearest rights to persons who have no religion at all, or a religion materially different from their own.”⁹⁰ And Madison and many others believed that the Oath Clause itself inherently contained a religious test that advantaged believers over non-believers.⁹¹

Because of this fundamental and critical distinction between statements made under oath or affirmation and statements not made under oath or affirmation, none of the aforementioned actions of the President or the House violated the No Religious Test Clause.⁹² In the case of the House Chaplain, certainly an individual must be religious to be considered for such office.⁹³ Similarly, in the case of the leader of the Office of Faith-Based and Community Initiatives, such a person is likely to be a religious individual who believes in the mission of the Office. Moreover, although it is debatable whether federal judges can, should, or do consider their personal religious beliefs when deciding cases, President Bush may have sound, results-oriented policy reasons for nominating to the federal bench individuals who have strong religious convictions.⁹⁴ Given, however, that these individuals are not re-

⁸⁹ Ellsworth, *supra* note 27, at 640; *see also* Coxe, *supra* note 28, at 639 (“Any wise, informed and upright man . . . can exercise the trusts and power of the state, provided he possess the moral, religious and political virtues which are necessary to secure the confidence of his fellow citizens.”).

⁹⁰ Debate in North Carolina Ratifying Convention (July 30, 1788), *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 21, at 90 (statement of James Iredell).

⁹¹ *See supra* pp. 1655–56.

⁹² This conclusion is not to say that the President and the House are immune from the No Religious Test Clause. If, for example, the President required a potential nominee to sign an affidavit swearing a belief in Christianity before he would nominate her to the position, the President would violate the No Religious Test Clause.

⁹³ For the sake of argument, this Note treats the Office of the House Chaplain as an “office or public trust under the United States” for purposes of the No Religious Test Clause.

⁹⁴ A 2005 ABC News/Washington Post poll on the confirmation of Justice Alito found that 86% of individuals with “no religion” wanted Justice Alito, if confirmed, to uphold *Roe*, while only 41% of “weekly churchgoers” held the same view. *See* Jon Cohen, *Poll: Majority Wants Alito on Supreme Court*, ABC NEWS, Dec. 21, 2005, <http://abcnews.go.com/Politics/PollVault/story?id=1426504>.

quired to bind themselves to a particular religious belief or sacrament through an oath or affirmation before taking office,⁹⁵ there is no violation of the No Religious Test Clause. In short, there is no “religious test” because the essential oath or affirmation component is missing.

III. CONCLUSION

Oaths were taken seriously at the Founding, and an individual who bound himself through an oath was considered solemnly bound to keep his word and to fulfill exactly the promise he had uttered. Anything less would breach the covenant that the individual had formed with God and with the state when he took the oath. Thus, it is not surprising that the Founders placed so much emphasis on the oath/non-oath distinction and viewed the Oath Clause itself as containing an inherent religious test.

Because the placement of the No Religious Test Clause as a modifier of the Oath Clause reflects an understanding that the former clause would prohibit only religious tests involving an oath or affirmation, many — though not all — of the recent allegations of violations of the clause are misguided. Senators participating in Senate Judiciary Committee hearings, which take place with the nominee under oath, should take note of the No Religious Test Clause and form their questions accordingly because requiring a nominee under oath to profess a religious belief runs afoul of the clause. In contrast, when a nominee or potential nominee is not under oath — for instance, during a private meeting with the President or a senator — there is no risk of questions violating the clause because the individual is not required to bind himself to a religious belief or sacrament. Indeed, several of the Founders would have encouraged inquiries into the nominee’s religious beliefs when the individual was not under oath. Although the modern wisdom of the Founders’ support for religious inquiries outside the oath and affirmation context may be debated and possibly contested under the First Amendment’s religion clauses, the No Religious Test Clause does not forbid those inquiries. Policymakers interested in a nominee’s religious beliefs, therefore, need take account of only the nature of their questions and the setting in which those questions are asked in order to ascertain whether they are violating the clause.

⁹⁵ The House Chaplain takes the following oath:

Do you solemnly swear that you will support and defend the Constitution of the United States against all enemies, foreign and domestic; that you will bear true faith and allegiance to the same; that you will take this obligation freely, without any mental reservation or purpose of evasion; that you will well and faithfully discharge the duties of the office on which you are about to enter. So help you God.

146 CONG. REC. 3481 (2000) (swearing in Father Daniel Coughlin as the House Chaplain).