

## Kiss the Book...You're President...: "So Help Me God" and Kissing the Book in the Presidential Oath of Office

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**KISS THE BOOK . . . YOU'RE PRESIDENT . . . :  
"SO HELP ME GOD" AND KISSING THE BOOK IN THE  
PRESIDENTIAL OATH OF OFFICE**

Frederick B. Jonassen\*

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#### INTRODUCTION

On the afternoon of September 13, 2001, an unmarked police cruiser was driving through the empty streets of lower Manhattan on its way to Fraunces Tavern, the historic restaurant where, on December 4, 1783, George Washington bid farewell to his officers about a month after relinquishing command of the Continental Army that won the Revolutionary War.<sup>1</sup> All of lower Manhattan, including Pearl Street where the old tavern still operates, had been closed to the public in the immediate aftermath of the 9/11 attack on the World Trade Center.<sup>2</sup> The Masons of the oldest Masonic Lodge in

<sup>1</sup> For a first-person account of Washington’s farewell to his officers, see BENJAMIN TALLMADGE, MEMOIR OF COLONEL BENJAMIN TALLMADGE 63–64 (1858), quoted by FRAUNCES TAVERN MUSEUM, [http://www.frauncestavernmuseum.org/mus\\_farewell.html](http://www.frauncestavernmuseum.org/mus_farewell.html) (last visited Mar. 15, 2012). During the Revolutionary War, Colonel Tallmadge was Washington’s chief intelligence officer and may have been responsible for discovering the betrayal of Benedict Arnold. See ALEXANDER ROSE, WASHINGTON’S SPIES: THE STORY OF AMERICA’S FIRST SPY RING *passim* (2006). Fraunces Tavern is located at 54 Pearl Street, New York, NY 10004. It was established in 1762, and operates to this day. FRAUNCES TAVERN, <http://www.fraunces-tavern.com> (last visited Mar. 15, 2012).

<sup>2</sup> Leslie Eaton, *In Wounded Financial Center, Trying to Head Off Defections*, N.Y. TIMES, Sept. 13, 2001, at A23 (referring to lower Manhattan: “With the area closed off, and

New York State, St. John's Lodge, founded in 1757, were concerned about one of their most prized possessions: a decorative Bible that was printed in 1767 and had been on display in Fraunces Tavern the day the Twin Towers fell.<sup>3</sup> No one had been able to check on the book for two days after the attack. There was a fear that gas leaks in the area could ignite a fire that would damage or destroy the Bible, and thus the Masons asked the Port Authority Police of New York and New Jersey to help them retrieve it, and received a police escort.<sup>4</sup>

As the police cruiser entered lower Manhattan, Thomas Savini, the Director of the Chancellor Robert R. Livingston Masonic Library in New York City, was shocked and unnerved by the absence of life on the usually chaotic streets. "[T]he air was filled with dust and smoke, and it looked like dusk, even though it was mid afternoon . . ."<sup>5</sup> The Tavern was covered with rubble and debris, but the building itself appeared to be undamaged.<sup>6</sup> Anxiously, Mr. Savini entered and approached the display case where the Bible was housed. He found the precious book unharmed, and carefully wrapped it in the blanket he brought with him to protect the old tome.<sup>7</sup>

Had this Bible been destroyed or lost as a result of the 9/11 attack, Osama Bin Laden might have claimed yet another cause for celebrating the success of the mission, aside from the murder of three thousand civilians on American soil and the destruction of a modern landmark that plausibly represented the American, if not Western, commercial and economic order.<sup>8</sup> This potential source of satisfaction was one that Bin

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their stores and restaurants dark, owners of the host of small businesses in the area were unable to examine the damage or begin to calculate how the disaster had affected them."); *Lower Manhattan to Stay Closed*, N.Y. TIMES, Sept. 12, 2001, at A8 ("Lower Manhattan is expected to remain cut off from the rest of the city today, and schools and stock exchanges will be closed."); Tom Savini, *The Rescue of the George Washington Inaugural Bible*, THE N. LIGHT, Nov. 2001, at 6.

<sup>3</sup> Savini, *supra* note 2, at 6. On St. John's Lodge, see *Welcome to St. John's Lodge No. 1*, A.Y.M., ST. JOHN'S LODGE NO. 1, <http://stjohns1.org/portal/> (last visited Mar. 15, 2012) ("St. John's Lodge No. 1 is the oldest operating lodge under the jurisdiction of the Grand Lodge of New York F&AM. Originally warranted in 1757 by the Modern Grand Lodge of England . . ."). Further information about the auspices under which St. John's Lodge was established may be found at *History of St. John's Lodge No. 1*, ST. JOHN'S LODGE NO. 1, [http://www.stjohns1.org/portal/lodge\\_history](http://www.stjohns1.org/portal/lodge_history) (last visited Mar. 15, 2012). A brief description of the Masonic Bible may be found at FEDERAL HALL NATIONAL MUSEUM, <http://www.nps.gov/feha/historyculture/george-washington-inaugural-bible.htm> (last visited Mar. 15, 2012). The Bible has, at times, been on display on the first floor of the Federal Hall National Memorial, though the author learned from a telephone communication with the National Museum that the Bible was not on display there as of June 2011.

<sup>4</sup> Savini, *supra* note 2, at 6.

<sup>5</sup> *Id.*

<sup>6</sup> Telephone Interview with Tom Savini (June 6, 2011).

<sup>7</sup> *Id.*

<sup>8</sup> Many immediately identified the symbolism of the targets attacked on 9/11. Consider, for example, *World Trade Center Towers Collapse After Attack*, N.Y. TIMES, Sept. 12, 2001,

Laden most likely could not have anticipated, but it would have touched the historical essence of American democracy, because the Bible that the Masons retrieved from Fraunces Tavern was the Bible on which George Washington swore the Oath to “preserve, protect, and defend the Constitution of the United States” at the first presidential inauguration, April 30, 1789.<sup>9</sup>

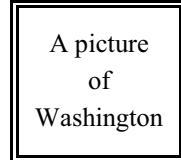
The words Washington spoke in taking that first oath recently became the source of some contention in litigation challenging religious expression at the presidential inauguration. On December 30, 2008, Michael Newdow, “Reverend of the First Atheist Church of True Science . . . and a member of the Freedom from Religion Foundation,” filed a complaint on behalf of himself and various other atheists and their organizations claiming that certain religious expression likely to occur at the inauguration of President

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at C1 (“In attacks on symbols of American financial and military power, hijacked airplanes slammed into both towers of the World Trade Center in Manhattan, and less than an hour later, into the Pentagon, outside Washington.”).

<sup>9</sup> The earliest attestation the author has been able to find for the presence of this Bible at Washington’s inauguration is SIDNEY HAYDEN, *WASHINGTON AND HIS MASONIC COMPEERS* 124–25 (N.Y., Masonic Pbl’g & Mfg. Co. 1867). The account indicates that on one of the leaves of the Bible there is a likeness of George Washington, which is accompanied by the following text:

On  
Sacred



This  
Volume,

ON THE 30TH DAY OF APRIL, A.M. 5789, IN THE CITY OF NEW YORK,  
WAS ADMINISTERED TO  
GEORGE WASHINGTON,  
THE FIRST PRESIDENT OF THE UNITED STATES OF AMERICA,  
THE OATH  
TO SUPPORT THE CONSTITUTION OF THE UNITED STATES.

*Id.* at 126. The website, MASONIC LEADER, <http://themasonicleader.com/?p=325> (last visited Mar. 15, 2012), states, “[T]he George Washington Inaugural Bible has been used for the Inaugurations of Warren G. Harding, Dwight D. Eisenhower, Jimmy Carter, and George H.W. Bush.” The website goes on to give some earlier history of the book:

[It was] present at the funeral processions of President George Washington, Andrew Jackson, and Zachary Taylor. It has also been present at the cornerstone laying of the U.S. Capitol, the dedication of the Washington Monument, the centennials of the cornerstone laying of the White House, U.S. Capitol, and the Statue of Liberty, the 1964 World’s Fair as well as the launching of the aircraft carrier George Washington.

*Id.*; see also JOHN WRIGHT, *HISTORIC BIBLES IN AMERICA 177–79* (1905); Winthrop Clarence Bowen, *The Inauguration of Washington*, 37 *CENTURY MAG.* 828, 830 n.1 (1889).

Barack Obama would violate the Establishment Clause of the U.S. Constitution.<sup>10</sup> This was not the first time Mr. Newdow had attempted such litigation, as he had undertaken suits in 2000 and 2004 objecting to clerical prayer planned for the inaugurations of President George W. Bush.<sup>11</sup> But this time, he added something new. Whereas previously Newdow had only opposed clerical prayers at the inaugural ceremony, this time he also objected to including “So help me God” in the administration of the President’s Oath of Office.<sup>12</sup> The essential argument he made on behalf of the plaintiffs in *Newdow v. Roberts* was that the President’s Oath of Office, as it appears in the Constitution, does not include the words, “So help me God.”<sup>13</sup> Therefore, whoever administers the Oath ought to recite only those words that the Constitution provides, neither adding nor taking anything away.<sup>14</sup>

The objection did not extend to the President’s unprompted or independent use of the phrase. “The President, like all other individuals, has Free Exercise rights, which might permit such an alteration.”<sup>15</sup> However, Newdow argued, if a government official

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<sup>10</sup> Complaint at 2–8, *Newdow v. Roberts*, No. 1:08-CV-02248-RBW (D.D.C. Dec. 30, 2008).

<sup>11</sup> The previous suits were *Newdow v. Bush*, No. 2:01-CV-00218 (E.D. Cal. July 17, 2001), and *Newdow v. Bush*, 355 F. Supp. 2d 265 (D.D.C. 2005).

<sup>12</sup> Complaint, *supra* note 10, at 24–29.

<sup>13</sup> *Id.* at 20.

<sup>14</sup> *Id.* at 24, 26.

101. The oath of office for the President of the United States is specified in the Constitution’s Article II, Section 1. . . .

102. It is to be noted that the words, “so help me God” are not included in this oath.

. . . .

110. Absent constitutional amendment, there is no authority to alter the text of the Constitution, the provisions of which are “fixed and exclusive.” *United States Term Limits v. Thornton*, 514 U.S. 779, 790 (1995) . . . .

*Id.*

<sup>15</sup> *Id.* at 21. Preceding this statement, the Complaint states, “If President-elect Obama . . . feels that the verbiage formulated by the Founders is so inadequate that he needs to interlard his oath with a purely religious phrase deemed unnecessary by the first twenty presidents, Plaintiffs have no objection at this time.” *Id.* The phrase, “at this time,” intimates that Newdow may have been reserving an objection to the President’s independent inclusion of the phrase for some other time. In any event, the distinction between permissible religious expression on the part of the President and prohibited religious expression on the part of the government is consistent with Newdow’s position in earlier suits—that the President may engage in religious expression in his own inaugural address but may not appoint a clergyman, directly or indirectly, to say prayers at the inauguration. *See* Brief of the Plaintiff/Appellant Appealing District Court’s Order Granting Defendant’s Motion to Dismiss and Denying Plaintiff’s Motion to Amend at 12–13, *Newdow v. Bush*, 89 Fed. App’x 624 (9th Cir. 2004) (No. 02-16327). Newdow argued that the District Court dismissed his suit by blurring the distinction between the President’s own religious expression and the religious expression of clergy appointed to

utters these words in administering the Oath, that official is not speaking in a personal capacity, but in an official government capacity. And when this phrase is spoken “by the Chief Justice of the United States as part of the inauguration of the President, it wields enormous power in reinforcing the false notion that the United States is a nation where Monotheism is officially preferred, thus stigmatizing Plaintiffs and others who hold contrary religious views.”<sup>16</sup> It is the government, then, that is speaking the words, “So help me God,” and in so speaking, the government is sponsoring a religious belief. The Complaint concludes, “[The] addition of ‘so help me God’ to the constitutionally-prescribed presidential oath of office violates every Establishment Clause test enunciated by the Supreme Court . . . .”<sup>17</sup>

To the counterargument that the inclusion of “So help me God,” if not sanctioned by the Constitution, was nevertheless sanctioned by George Washington when he included it spontaneously at the first presidential inauguration in 1789,<sup>18</sup> the plaintiffs replied that this is a myth.<sup>19</sup> The Complaint succinctly provides the main argument for regarding Washington’s addition to be a mere fabrication:

There is no contemporaneous account supporting this claim, which was first made in 1854, apparently on the basis of a recollection

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recite prayer and thereby mischaracterized what Newdow sought as a ban on prayer per se at the presidential inauguration. *Id.* at 17–20. Newdow related that when he was asked by the Court, “[Y]ou’re not seeking to enjoin the President himself from uttering the word God or seeking the Deity’s help in his speech are you?” he replied, “I think that’s wrong, but that’s not what I’m seeking here.” *Id.* at 15. Newdow then stated that the Magistrate vacillated between “an injunction against all religious speech (including ‘the President himself . . . uttering the word God’) and an injunction against prayer given by clergy, which is all that was requested by Newdow in his complaint.” *Id.* at 16. Newdow later stated,

Thus [the Magistrate] concluded that “prayers per se at the Presidential inauguration do not violate the Establishment Clause,” utilizing this blurred distinction between chaplain-provided prayer (which Newdow asked to enjoin) and religious presidential utterances (which Newdow did not ask to enjoin), to recommend: that the President’s motion to dismiss . . . be granted insofar as plaintiff complains about permitting a chaplain (or the President) from making any prayer at the Presidential inauguration.

*Id.* at 17.

<sup>16</sup> Complaint, *supra* note 10, at 24. It is a matter of some consequence for the President to recite the exact words set out by the Constitution for the Oath of Office. On January 21, 2009, the day after Chief Justice John Roberts flubbed the words in administering the Oath to President Barack Obama, the Chief Justice readministered the Oath at the White House. See Michael D. Shear, *Obama Sworn in Again, Using the Right Words*, WASH. POST, Jan. 22, 2009, at A4. A video of the flub can be found at, *Barack Obama Oath of Office*, YOUTUBE.COM, [http://www.youtube.com/watch?v=274\\_VdeckAU](http://www.youtube.com/watch?v=274_VdeckAU) (last visited Mar. 15, 2012).

<sup>17</sup> Complaint, *supra* note 10, at 29.

<sup>18</sup> For a history of how the story that Washington included the words, “So help me God,” in his oath developed, see *infra* Part II.

<sup>19</sup> Complaint, *supra* note 10, at 20.

of Washington Irving. Irving was six years old in 1789, when the first inaugural was held. A historical claim based upon nothing but the alleged recollection of a six year old, first made more than six decades later, is of highly questionable validity. Combined with the fact that Irving's report of where he was standing during the inauguration would have made it impossible for him to have heard the oath at all, that validity falls to zero.<sup>20</sup>

The "validity" of the claim diminishes still more in view of the lack of evidence that any President uttered these words at his inauguration until Chester A. Arthur did so 92 years later, in 1881.<sup>21</sup>

But there is another detail about Washington's inauguration, the significance of which has thus far been largely, if not entirely, ignored. Though Washington may not have said "So help me God" at that first inauguration, it is fairly certain that he performed another gesture of religious import: he kissed the Bible on which he took the Oath of Office.<sup>22</sup>

This Article will focus on the argument that the first presidential inauguration provides no historical or legal support for the spatchcocking of "So help me God" in the administration of the presidential oath. The reader is asked to note well that the constitutionality of clerical prayers at the presidential inauguration is a separate issue not within the focus of this Article. Part I examines arguments that litigants and jurists have made regarding Washington's supposed utterance of "So help me God" and its relevance to the constitutionality of including the phrase in the administration of the presidential oath. Part II examines the evidentiary record for Washington's utterance of "So help me God." In Part III, the Article turns to the evidence that Washington kissed the Bible on which he took the Oath of Office. In Part IV, the Article examines what an oath has meant historically and what it likely meant to Washington and his contemporaries. Part V then assesses the significance of kissing the Bible and how this relates to both oath-taking and to the phrase, "So help me God." Finally, Part VI of the Article addresses the implications that the osculatory gesture may have for the constitutional issue that the *Newdow* plaintiffs raised.

#### I. THE LEGAL SIGNIFICANCE OF "SO HELP ME GOD" AS HISTORICAL PRECEDENT IN THE PRESIDENT'S INAUGURATION

Ironically, the issue of what Washington said when he took the Oath is not entirely relevant to the position of the *Newdow* plaintiffs—that the Chief Justice should not utter "So help me God" to prompt the President.<sup>23</sup> As weak as the evidence may be

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<sup>20</sup> *Id.* at 20.

<sup>21</sup> *Id.* at 21.

<sup>22</sup> HAYDEN, *supra* note 9, at 124–25.

<sup>23</sup> *See supra* notes 15–16 and accompanying text.



that Washington uttered the phrase, there is absolutely no evidence that Livingston prompted him. The *Newdow* plaintiffs could have argued in the alternative that even if Washington had, *sua sponte*, uttered “So help me God,” the historical precedent would be for the President to likewise utter these words on his own, unprompted by the Chief Justice. By accepting the dubious historical opinion to advance an argument in the alternative, the plaintiffs could well have bolstered their legal position.

Why did the *Newdow* plaintiffs—and the *Newdow* defendants for that matter—argue over the historical issue? Perhaps the answer has to do with the still-mythical stature that Washington enjoys. If it were historical fact that Washington said these words, his speech would have sanctioned more than a President’s independent repetition of the phrase. If Washington himself set this precedent at the first inauguration, his stature could extend the sanction of using these words to the Chief Justice’s prompting of the President with “So help me God” and perhaps to more religious expression in the public forum.

In an interview conducted on C-Span on September 5, 2010, Gordon Wood, Professor Emeritus at Brown University, was asked his opinion about whether George Washington said “So help me God” in taking the first Oath of Office. Among other things, Professor Wood remarked:

What I think is fascinating is the interest in this, because the stakes seem high for people. If you can show that he said or did not say that phrase, then certain things follow from that. I’m not sure we want our politics to hinge on that one fact. . . . But obviously lots of people want it settled for reasons that have to do with contemporary political life.<sup>24</sup>

Professor Wood identified contemporary politics as the engine which generates the continuing interest in Washington’s words. Acceptance of the commonly held belief that Washington said these words when taking the first Oath of Office would support religious expression not only in the presidential inauguration ceremony, but also in other public ceremonies. For many, this acceptance would also support the notion that belief in God is a foundational assumption of American government. Rejecting as mythical Washington’s inclusion of these words, however, would advance the diminishment and prohibition of such religious expression in public events and advance the establishment of a government that is rigorously secular. The question of what Washington said, therefore, has implications that concern the nature of American public life and government.

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<sup>24</sup> The transcript and video of this interview may be found at *In-Depth with Gordon Wood*, C-SPAN.ORG, <http://www.c-spanvideo.org/program/GordonW> (last visited Mar. 15, 2012). The exchange on this topic begins at the one hour, twenty minute, twenty second (1:20:20) mark of the interview. *Id.*

*A. Washington's "So Help Me God" in the Supreme Court*

Reference to what Washington is thought to have said has also appeared in a very direct and specific way in judicial opinions. In justifying government accommodation of religious expression, Justices of the Supreme Court have cited the inclusion of "So help me God" at the first inauguration as an edifying example of the prominent place that the Founding Fathers assigned to religious expression in public ceremonies. In *Elk Grove Unified School District v. Newdow*, for example, to support his opinion that official government inclusion of the words "under God" in the Pledge of Allegiance does not violate the Establishment Clause, Chief Justice Rehnquist wrote: "Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound. At George Washington's first inauguration on April 30, 1789, he, ' . . . responded, "I solemnly swear," and repeated the Oath, adding, "So help me God."'"<sup>25</sup> And in *McCreary County v. ACLU*, Justice Scalia disagreed with the majority opinion that the display of the Ten Commandments in a courthouse violated the Establishment Clause.<sup>26</sup> At the outset of his dissent, he contrasted the strict secularism of the French Constitution with the more accommodating approach of its American counterpart.<sup>27</sup> In support of his view, Scalia brought up Washington's addition to the Oath of Office:

[The French model of strict secularism] is not, and never was, the model adopted by America. George Washington added to the form of Presidential oath prescribed by Art. II, § 1, cl. 8, of the Constitution, the concluding words "so help me God."<sup>28</sup>

Although neither Justice depends exclusively on Washington's words to support his conclusions, they both treat his use of the phrase as an historical fact of some significance to their Establishment Clause jurisprudence. Of course, both Justices cite scholarly authorities for their statements, but not primary evidence, which is crucial for actually determining whether Washington's invocation of God is fact or myth.<sup>29</sup>

It is, however, the reasoning of *Marsh v. Chambers*<sup>30</sup> that most clearly invests historical events with legal significance and sets the stage for the legal battle found in *Newdow v. Roberts*. The *Marsh* court addressed the Nebraska Legislature's practice

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<sup>25</sup> 542 U.S. 1, 26 (2004) (Rehnquist, C.J., concurring) (quoting MICHAEL P. RICCARDS, *A REPUBLIC, IF YOU CAN KEEP IT: THE FOUNDATION OF THE AMERICAN PRESIDENCY, 1700–1800*, at 73–74 (1987) (quoting George Washington)).

<sup>26</sup> 545 U.S. 844, 885 (2005) (Scalia, J., dissenting).

<sup>27</sup> *Id.* at 886.

<sup>28</sup> *Id.* at 886 (citing Robert F. Blomquist, *The Presidential Oath: The American National Interest and a Call for Presiprudence*, 73 UMKC L. REV. 1, 34 (2004)).

<sup>29</sup> See discussion *infra* notes 108–18 and accompanying text.

<sup>30</sup> 463 U.S. 783 (1983).

of having a chaplain paid by the State open each legislative day with prayer.<sup>31</sup> In holding legislative prayer conducted by religious chaplains to be constitutional, the Court relied primarily on historical tradition stretching back to the founding of the country.<sup>32</sup>

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.<sup>33</sup>

The Court then went on to cite the procedures and statutes by which the Continental Congress from 1774 to 1784, and later the first Congress in 1789, provided for the selection and payment of chaplains to open the sessions of these legislative bodies.<sup>34</sup> Pointing out that only three days after Congress authorized the appointment of paid chaplains, this very same Congress reached the final wording of the Bill of Rights, the *Marsh* Court concluded, “[T]he men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.”<sup>35</sup> For the Court, the Founding Fathers’ near simultaneous appointment of paid chaplains and approval of the First Amendment were determinative of their intent regarding the extent to which the Establishment Clause permits religious expression under the auspices of the government.<sup>36</sup>

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<sup>31</sup> *Id.* at 784.

<sup>32</sup> *Id.* at 786.

<sup>33</sup> *Id.*

<sup>34</sup> [T]he Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain. Although prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer. Thus, on April 7, 1789, the Senate appointed a committee “to take under consideration the manner of electing Chaplains.” On April 9, 1789, a similar committee was appointed by the House of Representatives. On April 25, 1789, the Senate elected its first chaplain; the House followed suit on May 1, 1789. A statute providing for the payment of these chaplains was enacted into law on September 22, 1789.

*Id.* at 787–88 (footnotes and citations omitted).

<sup>35</sup> *Id.* at 788 (footnote omitted).

<sup>36</sup> The *Marsh* Court recognized that not all patterns of conduct should be preserved merely because they are historical. However, in this case, the Court held that the conduct that the first Congress displayed in establishing the legislative chaplaincy provides an insight into the Founding Fathers’ intent regarding the meaning of the Establishment Clause.

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply

The *Marsh* decision carved out an exception to the Supreme Court's Establishment Clause jurisprudence which might be applied by analogy to religious expression at the presidential inauguration if similar historical antecedents for "So help me God" are found. However, commentators have recognized that in making this exception, *Marsh* is an aberration.<sup>37</sup> At the outset of his dissent, Justice Brennan pointed out that the Court was departing from its previous Establishment Clause jurisprudence.<sup>38</sup> "The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause."<sup>39</sup> In regard to religious expression at the presidential inauguration, the validity

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historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.

*Id.* at 790. The *Marsh* Court also recognized that there was some opposition to the appointment of chaplains in the first Congress, but saw this as evidence that the decision was carefully considered and discussed.

We do not agree that evidence of opposition to a measure weakens the force of the historical argument; indeed it infuses it with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society.

*Id.* at 791.

<sup>37</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 14–15, at 1288–89 (2d ed. 1988) (describing *Marsh* as "seemingly anomalous"); Leslie C. Griffin, *No Law Representing the Practice of Religion*, 85 U. DET. MERCY L. REV. 475, 479 (2008) ("A living constitutional tradition does not permit the Court to stick with exclusionary practices of the past or to offer a historical exception to the Establishment Clause. . . . There should be no historical exception to the rule that government should not become involved in religious practice."); Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988) ("I dissent. I believe that *Marsh v. Chambers* represents original intent subverting the principle of the rule of law. Unless we can articulate some *principle* that explains *why* legislative chaplains might not violate the establishment clause, and demonstrate that that principle continues to be applicable today, we cannot uphold a practice that so clearly violates fundamental principles we recognize under the clause."); Eric J. Segall, *Mired in the Marsh: Legislative Prayers, Moments of Silence and the Establishment Clause*, 63 U. MIAMI L. REV. 713, 724 (2009) ("If state and federal practices that have long been unbroken were automatically constitutional solely because of their historical pedigree, many pernicious laws that have been held unconstitutional by the Supreme Court should have instead been upheld[, including] prayers in public schools, bans on interracial marriage, prohibitions on women embarking on professional careers such as law, and, of course, state-required segregation of public schools." (footnotes omitted)).

<sup>38</sup> *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting).

<sup>39</sup> *Id.* And later, Brennan states, "In sum, I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." *Id.* at 800–01. Furthermore, as Christopher C. Lund has recently pointed out, under the *Marsh* ruling, "[L]egislative prayer has grown into a fissure that now divides county boards, state legislatures, and city councils

of analogizing legislative prayer with what might be called “executive prayer” at the far more public inauguration of the President may be highly questionable as well.<sup>40</sup> Most importantly, if, in contrast to legislative prayer, there is no good historical evidence that Washington or any other President in the founding generation added the words, “So help me God,” to the presidential oath, then religious expression at the President’s inauguration would not be traceable back to any time near the establishment of the country, and the analogy of executive prayer to legislative prayer would be manifestly false.<sup>41</sup> *Marsh*, then, could not be enlisted in the defense of religious expression at the President’s inauguration. Such a defense would then have to fall back on the Establishment Clause tests and doctrines that might not be as favorable to such religious expression.

#### B. *Newdow v. Roberts*

The *Marsh* rationale explains why the plaintiffs in *Newdow v. Roberts* raised the historical argument and why the defendants took it seriously and responded to it.

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across the country” as these representative bodies bicker over what prayers are acceptable to their members, changing the course of elections and leading to violence and frequent litigation. Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 974–75 (2010). Professor Lund offers examples:

In South Carolina, the town council of the city of Great Falls regularly opens its sessions with identifiably Christian prayer. A woman tries to avoid the prayer by showing up late to the meetings, is harassed for doing so by council members, and brings suit to end the council’s prayer practice. In Virginia, the Fredericksburg City Council adopts a policy where all legislative prayers must be nondenominational, and is sued by one of its own council members who feels religiously committed to referring to Jesus Christ in his prayers. Elsewhere in Virginia, a resident tries to get on the list to offer prayers before the Chesterfield County Board of Commissioners, but receives a letter in the mail denying her the opportunity because she is a Wiccan. In Indiana, pandemonium ensues when, on the floor of the state legislature, a member of the clergy who was invited to give a prayer breaks out into the song, “Just a Little Walk with Jesus.” In Utah, outcries erupt when, at a Murray City Council meeting, a citizen seeks to offer a prayer that begins, “Our Mother. Who art in heaven (if, indeed, there is a heaven and if there is a god that takes a woman’s form), hallowed be thy name.”

*Id.* at 976.

<sup>40</sup> The *Newdow* plaintiffs make this point in regard to inaugural prayer. See Plaintiffs’ Motion for Preliminary Injunction at 15, *Newdow v. Roberts*, No. 1:08-CV-02248-RBW (D.D.C. Jan. 5, 2009) (“Another crucial limiting factor pertaining to legislative prayer is that such prayer—as opposed to that given at inaugurations—is not intended for the public at large.”).

<sup>41</sup> Again, the *Newdow* plaintiffs argue this as well. See *id.* (“As noted in the Complaint, the history of the challenged practices is short, lacking the ‘unambiguous and unbroken history of more than 200 years’ found in *Marsh*.”) (quoting *Marsh*, 463 U.S. at 793).

However, what the defendants' response revealed was a stubborn resolve to obfuscate the lack of historical evidence that Washington uttered "So help me God" at the first inauguration. For instance, after the *Newdow* plaintiffs moved for a preliminary injunction<sup>42</sup> that would bar the Chief Justice from including the phrase and the clerical prayers planned for the inaugural, the federal defendants filed an Opposition to Plaintiffs' Motion for a Preliminary Injunction, in which they argued,

Plaintiffs' principal support for this claim is a dubious reading of the historical record that should be rejected. Plaintiffs assert that none of the first twenty Presidents is known to have said "so help me God" after taking the oath, that the oath was so affirmed only intermittently between 1881 and 1933, and that it was not until the 1930s that the Chief Justice began adding the words after the oath. To the contrary, however, the addition of the phrase has long been traced to President George Washington's first inauguration.<sup>43</sup>

The artfulness of this statement is plain, for to say that the phrase "has long been traced to Washington" only indicates that historians and their readers have uncritically accepted the Washington addition as fact for a long time. But the statement says nothing about whether the examination of the historical evidence in fact justifies the attribution or whether historians today agree that the inclusion is a reliable fact upon which a judge can securely base a legal decision.<sup>44</sup>

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<sup>42</sup> *Id.* at 2.

<sup>43</sup> Federal Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction at 35, *Newdow v. Roberts*, No. 1:08-CV-02248-RBW (D.D.C. Jan. 8, 2009) (citations omitted) [hereinafter Federal Defendants' Opposition]. The federal defendants included Chief Justice John Roberts, Jr., the Joint Congressional Committee on Inaugural Ceremonies, Senator Diane Feinstein, the Armed Forces Inaugural Committee, and General Richard J. Rowe. Complaint, *supra* note 10, at 9.

<sup>44</sup> The argument regarding Washington's words came up in the Proposed Brief of [the Fifty States] as *Amici Curiae* at 5, *Newdow v. Roberts*, No. 1:08-CV-02248-RBW (D.D.C. Jan. 12, 2009) ("Likewise it was President George Washington who began the tradition of including 'so help me God' at the end of his oath of office . . .") and in Plaintiffs' Response to Order to Show Cause at 35–36, *Newdow v. Roberts*, No. 1:08-CV-02248-RBW (D.D.C. Feb. 23, 2009) (explaining that "Newdow spent countless hours in libraries and online researching the extant data," and that "[h]e traveled to New York City to the site of the 1789 event," and with two other researchers "accumulated sufficient original source material to demonstrate conclusively that no valid evidence at all exists to support the claim that President Washington added 'so help me God' when he took the first presidential oath of office."). The Response lists the authorities that have claimed otherwise and provides their materials in Appendix H, which includes: the Library of Congress, the National Archives and Records Administration, the National Constitution Center, the Department of State, the National Endowment for the Humanities, the Congressional Quarterly, the Architect of the Capitol, the

As authority for this statement, the federal defendants went on to cite Justice Scalia's dissent in *McCreary County*, Chief Justice Rehnquist's concurrence in *Elk Grove*, and other authorities whose historical reliability will be addressed in the next Part.<sup>45</sup> In their Appellee Brief responding to the Plaintiffs' Appeal before the Court of Appeals for the District of Columbia, the federal defendants relied on the same argument, using the same citations and the same artful statement of their proposition.<sup>46</sup>

On January 16, 2009, the district court denied Newdow's Motion for Preliminary Injunction,<sup>47</sup> and two months later, on March 12, the court dismissed the case for issue preclusion and lack of standing.<sup>48</sup> On May 7, 2010, the D.C. Circuit affirmed the dismissal on the grounds that "[the] Plaintiffs' claims regarding the 2009 inaugural ceremony are moot and plaintiffs lack standing to challenge the 2013 and 2017 inaugurations."<sup>49</sup> An analysis of the arguments regarding mootness and standing lies beyond the scope of this Article, but a brief summary may be helpful for understanding

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House of Representatives, CBS, PBS, CNN, the BBC, *National Review*, News in Education, the Voice of America, the Capitol Historical Society, Supreme Court justices, professors, authors, and Defendant Joint Congressional Committee on Inaugural Ceremonies. *Id.* at 36–37; *see also infra* note 74 (discussing the Brief of Peter R. Henriques and its treatment of Washington's words).

<sup>45</sup> Federal Defendants' Opposition, *supra* note 43, at 35–36 (discussing the cases cited, *supra* notes 25–26); *see also infra* notes 109–18 and accompanying text.

<sup>46</sup> Appellee Brief for Federal Defendants/Appellees at 51, *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010) (No. 09-5126). "Finally, we note that the addition of the phrase 'so help me God' in the presidential oath of office has long been traced to President George Washington's first inauguration." *Id.* The Brief of [the States] as Amici Curiae in Support of the Appellees at 5–6, *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010) (No. 09-5126), likewise repeats the same account appearing in the Proposed Brief [of the Fifty States] to the district court below.

<sup>47</sup> Order Denying Motion for Preliminary Injunction, *Newdow v. Roberts*, No. 1:08-CV-02248-RBW (D.D.C. Jan. 16, 2009). The district court concluded that the plaintiffs failed to show a substantial likelihood that they would prevail on the merits or that they would suffer irreparable harm if the injunction were not issued. *Id.* at 2. The court based this conclusion on the finding that Newdow was precluded from relitigating the issue of standing because of his participation in prior litigation regarding this issue before the D.C. and Ninth Circuits; because none of the plaintiffs identified a concrete and particularized injury; and because they failed to show their harms were redressable. *Id.* at 1–2. Finally, the court found that because the filing of the action was so close in time to the inauguration, the balance of harms and the public interest weighed in favor of the defendants. *Id.* at 2; *see supra* note 11 and accompanying text (discussing the previous litigation).

<sup>48</sup> Order to Dismiss, *Newdow v. Roberts*, No. 1:08-CV-02248-RBW (D.D.C. Mar. 12, 2009). The court conceded that Newdow was not precluded from contesting the inclusion of the words, "So help me God," although he was precluded from challenging inaugural prayers due to his participation in prior litigation concerning the issue. *Id.* at 2. The court found that none of the plaintiffs had standing because they failed to identify a concrete and particularized injury and because they failed to demonstrate redressability. *Id.* at 2–3.

<sup>49</sup> *Newdow v. Roberts*, 603 F.3d 1002, 1006 (D.C. Cir. 2010).

the procedural obstacles that prevented the suit from receiving a judicial decision on its merits.

In regard to the mootness issue, the defendants argued that the presidential inauguration had already taken place, and therefore the issue of granting an injunction had become moot.<sup>50</sup> Plaintiffs argued that their case fell into an exception for mootness because it was capable of repetition but evading review.<sup>51</sup> The court, however, found that the plaintiffs could not claim this exception because they failed to appeal the district court's denial of the preliminary injunction before the inauguration, which they could have done.<sup>52</sup>

In regard to standing,<sup>53</sup> the court assumed that there was an injury in fact, but found two problems with the redressability prong of federal standing. First, the plaintiffs were asking for an injunction against anyone who would include prayer at the presidential inauguration in the future, or as the court put it, "an injunction against the world."<sup>54</sup> The court found this type of relief is legislative, and "not within the power of the court[s]."<sup>55</sup> Secondly, the court held that injunctive or declaratory relief against the defendants would not prevent the injury because, in regard to the details of the inauguration at issue, the defendants took orders from the President, and the President was not named in the suit.<sup>56</sup> Even if the President were named, the court maintained that the challenged religious expression was "a decision committed to the executive discretion of the President or the personal discretion of the President-elect. A court—whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions."<sup>57</sup>

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<sup>50</sup> *Id.* at 1008. The Constitution limits the exercise of federal jurisdiction to cases and controversies. U.S. CONST. art. III, § 2. The dispute cannot be moot, but must be "an actual controversy . . . extant at all stages of review, [and] not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974).

<sup>51</sup> *Newdow*, 603 F.3d at 1008. A claim qualifies for this exception if two circumstances are simultaneously present: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481 (1990) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)).

<sup>52</sup> *Newdow*, 603 F.3d at 1008 ("Had plaintiffs pursued an appeal of that denial and had the preliminary injunction been granted, their case would not have become moot.").

<sup>53</sup> To have standing, a plaintiff must: 1) "have suffered an 'injury in fact'"; 2) that is "fairly . . . trace[able] to the challenged action of the defendant"; and 3) that will likely be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Allen v. Wright*, 468 U.S. 737, 756 (1984) and *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41–43 (1976)) (internal quotation marks omitted).

<sup>54</sup> *Newdow*, 603 F.3d at 1010–11.

<sup>55</sup> *Id.* at 1011 (stating that "[t]here is another name for that type of generally applicable relief: legislation. And that's not within the power of the courts . . ." (citations omitted)).

<sup>56</sup> *Id.* at 1011–12.

<sup>57</sup> *Id.* at 1012.



In his concurrence, Judge Brett M. Kavanaugh disagreed with the majority about these procedural matters, finding that the case was not moot and that the plaintiffs had standing.<sup>58</sup> In addressing the mootness aspect of standing, Judge Kavanaugh made the point that “the Supreme Court’s consistent adjudication of religious display and speech cases . . . suggests that the Court has thought it obvious that the plaintiffs in those matters had standing.”<sup>59</sup> He reasoned that the injury-in-fact requirement was satisfied if “the alleged injury is ‘imminent,’” and imminence is satisfied if the injury is “substantially probable.”<sup>60</sup> “In this case, it is substantially probable that the presidential oath at the next Inauguration will include ‘so help me God’ and that there will be prayers during the Inaugural ceremony. History, tradition, and common sense tell us as much.”<sup>61</sup> In regard to the standing issues of causation and redressability, Kavanaugh argued that the “plaintiffs’ alleged injury [was] fairly traceable to the defendants,” the officers and committees whom the President appointed to run the event.<sup>62</sup> “An injunction against the named defendants is therefore also likely to redress plaintiffs’ alleged injuries.”<sup>63</sup>

Kavanaugh then discussed the merits of the Plaintiffs’ Motion for Preliminary Injunction, but concluded that the court should deny the motion because the plaintiffs could not prevail.<sup>64</sup> In reaching this conclusion, he relied heavily on *Marsh*: “This case concerns government-sponsored religious speech at public events outside of the public school setting. The Supreme Court’s landmark ruling in *Marsh v. Chambers* sets forth the Court’s approach to that issue.”<sup>65</sup> But in identifying the historical precedent that anchors the constitutionality of “So help me God,” Kavanaugh used the same type of artful language found in the federal defendants’ response.<sup>66</sup>

[L]ike the practice of legislative prayer, use of “so help me God”  
in oaths for government officials is deeply rooted in the Nation’s  
history and tradition. By many accounts, George Washington said

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<sup>58</sup> *Id.* at 1013 (Kavanaugh, J., concurring) (“Under the Supreme Court’s precedents, plaintiffs have standing to raise an Establishment Clause challenge to the Inaugural prayers and to the inclusion of the words ‘so help me God’ in the official Presidential oath administered at the public Inauguration ceremonies.”).

<sup>59</sup> *Id.* at 1014.

<sup>60</sup> *Id.* at 1014–15 (quoting *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 518 (D.C. Cir. 2009)).

<sup>61</sup> *Id.* at 1015.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1013 (“I would reject plaintiffs’ claims on the merits because those longstanding practices do not violate the Establishment Clause as it has been interpreted by the Supreme Court.”).

<sup>65</sup> *Id.* at 1017 (citation omitted).

<sup>66</sup> See *supra* notes 43–46 and accompanying text.

“so help me God” when he took the first Presidential oath in New York on April 30, 1789.<sup>67</sup>

It may be true that the use of “So help me God” is deeply rooted in the nation’s history and tradition, but this does not mean that it occurred at the first inauguration. It may also be true that many accounts indicate that Washington included the phrase when he took the first presidential oath. But many accounts do not make the theory a reliable, or even likely, fact given the lack of historical evidence extant. Judge Kavanaugh’s dependence on the secondary sources proffered by the federal defendants in *Newdow v. Roberts* would not withstand scrutiny in a controlling court opinion that actually ruled on the merits of the case. Consequently, the application of *Marsh*, which relies upon the analogy between religious expression at the presidential inauguration and legislative prayer, would fail.

The *Newdow* plaintiffs petitioned for certiorari on September 27, 2010.<sup>68</sup> The arguments of the Appellants and Appellees focused on redressability, though the defendants, in referring to Judge Kavanaugh’s *Marsh* argument, seemed to temper their statements about Washington’s utterance of “So help me God.”<sup>69</sup> The Supreme Court summarily denied certiorari on May 16, 2011.<sup>70</sup> A denial of certiorari, of course, is not an affirmation of the decision below.<sup>71</sup> Judge Kavanaugh’s opinion, then, remains significant in its disagreement with the majority on the procedural and substantive issues of the case. Another appellate court might see the case in the same light as Kavanaugh, setting up a circuit split that the Supreme Court could not avoid. It is also significant that the appellate court did not find a lack of standing on the basis of issue preclusion. The court found that the plaintiffs who had not previously engaged in litigation over this matter were not precluded by *Newdow*’s earlier litigation.<sup>72</sup> Litigants who are strangers

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<sup>67</sup> *Newdow*, 603 F.3d at 1018. The majority opinion more broadly states,

The President cannot be denied the prerogative of making such a religious reference [“so help me God”], [plaintiffs] concede, because doing so would abrogate his First Amendment rights. For sure, if it were otherwise, George Washington could not have begun the tradition by appending “So help me God” to his own oath . . .

*Id.* at 1010 (citation omitted).

<sup>68</sup> Petition for Writ of Certiorari, *Newdow v. Roberts*, 131 S. Ct. 2441 (2011) (No. 10-757).

<sup>69</sup> Brief for the Federal Respondents in Opposition at 12–14, *Newdow v. Roberts*, 131 S. Ct. 2441 (2011) (No. 10-757).

<sup>70</sup> *Newdow v. Roberts*, 131 S. Ct. 2441 (2011).

<sup>71</sup> *Atl. Coast Line R.R. v. Powe*, 283 U.S. 401, 403–04 (1931) (“The denial of a writ of certiorari imports no expression of opinion on the merits of the case. . . .” (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923) (internal quotation marks omitted))).

<sup>72</sup> *Newdow*, 603 F.3d at 1007–08. The plaintiffs argued that *Newdow* was not precluded because “changes in circumstances and in the relevant law have cured or made obsolete the standing issues on which those prior challenges failed.” *Id.* at 1008. The plaintiffs also argued that the court did not have to consider issue preclusion because if it found that “any of the

to the *Newdow* inauguration cases, then, would not be precluded from bringing a claim on the issue of religious expression at some future presidential inauguration to the District Court for the District of Columbia. Even if they were so precluded, other litigants who claim injury from religious expression at presidential inaugurations could file in district courts in circuits other than the D.C. and Ninth Circuits.<sup>73</sup> Thus, an analysis of the oath issue in *Newdow v. Roberts* may not be an entirely academic exercise.

## II. THE CASE AGAINST “SO HELP ME GOD”

Peter R. Henriques, Professor Emeritus at George Mason University and author of two biographies about Washington, was among several professors who submitted an amicus brief to the district court in *Newdow v. Roberts*.<sup>74</sup> He provides sterling academic authority for doubting Washington’s inclusion of “So help me God” at the first presidential inauguration.

There is absolutely no extant contemporary evidence that President Washington altered the language of the oath as laid down in Article 2, Section 1 of the Constitution. . . . It was not until 65 years after the event that the story that Washington added this phrase first appeared in a published volume. In his book, *The Republican Court*, Rufus Griswold referenced a childhood memory of Washington Irving as his source. It took another 27 years before the first clearly documented case of a President adding the words, “So help me God,” was recorded—when Chester A. Arthur took the oath in 1881.<sup>75</sup>

Henriques also gives his opinion that it would have been “out of character for . . . Washington to have tampered with the constitutional text,” because he had “presided over the Constitutional Convention” that had set out the Oath in Philadelphia during

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other plaintiffs [had] standing, then . . . *Newdow*’s standing [was] irrelevant.” *Id.* (citing *Carey v. Population Servs. Int’l*, 431 U.S. 678, 682 (1977)). The court agreed with the second argument and set aside the preclusion issue. *Id.*

<sup>73</sup> On issue preclusion, see generally 18 JAMES W. MOORE, *MOORE’S FEDERAL PRACTICE* § 132 (3d ed. 2011), and 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* §§ 4416–4426 (2d ed. 2002).

<sup>74</sup> Brief of Peter R. Henriques et al. as Amici Curiae, *Newdow v. Roberts*, No. 1:08-CV-02248-RBW (D.D.C. Jan. 14, 2009) [hereinafter Brief of Peter R. Henriques et al.]. Much of this brief can also be found in an article written by Peter R. Henriques, “*So Help Me God*”: *A George Washington Myth That Should Be Discarded*, GEO. MASON U. HIST. NEWS NETWORK (Jan. 11, 2009), <http://www.hnn.us/articles/59548.html> [hereinafter Henriques, “*So Help Me God*”]. Professor Henriques is also the author of *THE DEATH OF GEORGE WASHINGTON: HE DIED AS HE LIVED* (2000), and *REALISTIC VISIONARY: A PORTRAIT OF GEORGE WASHINGTON* (2006).

<sup>75</sup> Brief of Peter R. Henriques et al., *supra* note 74, at 5–6 (footnote omitted).

the summer of 1787, and he was a serious “Constitutional literalist” in respecting the precise words of the founding document.<sup>76</sup> Article II, Section 1 of the United States Constitution provides the text of the Oath:

Before he [the President] enter on the Execution of his Office, he shall take the following Oath or Affirmation:—“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”<sup>77</sup>

This is the only oath for which the Constitution gives the precise words, and the only place the Constitution employs quotation marks.

Ample support for Professor Henriques’s opinion may be found in a thoroughgoing study entitled, *So Help Me God in Presidential Oaths (SHMG)*.<sup>78</sup> In its first paragraph, the article provides a statement from Charlene Bickford, the Director of the First Federal Congress Project at George Washington University: “After much back and forth with the editors of the ‘Papers of George Washington’ . . . and research in the sources . . . we were unable to locate any contemporary account . . . that reported that [George Washington] said [the words, ‘so help me God’].”<sup>79</sup>

The *SHMG* article cites or quotes five newspaper accounts of the first inauguration that give no indication that Washington said “So help me God.”<sup>80</sup> The article also discusses specific eyewitness accounts, including those of French Consul Comte de

<sup>76</sup> *Id.* at 7. According to the authors of *So Help Me God in Presidential Oaths*, at the website of the Nonbelievers’ Antidiscrimination Project, this view is shared by Philander D. Chase, retired Senior Editor of *The Papers of George Washington*, at the University of Virginia. “Washington as president was a remarkably strict constructionist of the Constitution, and it seems to me very unlikely that he would have altered or amended the constitutional oath . . . .” *So Help Me God in Presidential Oaths*, NONBELIEVER ANTIDISCRIMINATION PROJECT, [http://www.nonbeliever.org/commentary/inaugural\\_shmG.html](http://www.nonbeliever.org/commentary/inaugural_shmG.html) (last visited Mar. 15, 2012) [hereinafter *SHMG*].

<sup>77</sup> U.S. CONST. art. II, § 1.

<sup>78</sup> See *SHMG*, *supra* note 76 (“The research for this article is a collaborative effort with contributions from many individuals.”). Among those mentioned as contributors are Michael Newdow, Glen P. Goffin, Ray Soller, and Matthew Goldstein. *Id.* The succeeding pages demonstrate the debt that I owe to the research found here, which is painstaking, meticulous, and thorough.

<sup>79</sup> *Id.* The purpose of The First Federal Congress Project at George Washington University, as indicated at its website, <http://www.gwu.edu/~ffcp/>, is to document the history of the First Federal Congress, 1789–1791.

<sup>80</sup> *SHMG*, *supra* note 76. The newspapers include: the CONNECTICUT COURANT (Hartford), May 4, 1789; the GAZETTE OF THE UNITED STATES (N.Y.), May 2, 1789; the MASSACHUSETTS CENTINEL (Boston), May 6, 1789; and the PENNSYLVANIA GAZETTE (Philadelphia) May 6, 1789. There was also an anonymous *Extract of a letter from New York, May 3*, published in the GAZETTE OF THE UNITED STATES (N.Y.), May 9–13, 1789.

Moustier,<sup>81</sup> Tobias Lear,<sup>82</sup> Eliza Morton Quincy,<sup>83</sup> William Duer,<sup>84</sup> and Samuel Otis,<sup>85</sup> none of which attest to the phrase. The *SHMG* article cites approximately forty of the early biographical and nonbiographical accounts of the first inauguration, many of which base their information on eyewitnesses, and points out that none of these early biographies includes the phrase.<sup>86</sup>

### A. *The Washington Irving Recollection*

As Henriques mentions, the earliest claim that Washington added “So help me God” to the presidential oath appeared in a book that was published in 1854 by Rufus Wilmot Griswold entitled, *The Republican Court or American Society in the Days of Washington*.<sup>87</sup> Griswold bases his account on a conversation he had with Washington

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<sup>81</sup> *SHMG*, *supra* note 76. A translation of the letter may be found at 15 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, Mar. 4, 1789–Mar. 3, 1791, at 403–06 (Charlene B. Bickford et al. eds., 2004). It is the only first-hand account of the inauguration which repeats the Oath word for word. It does not contain the phrase, “So help me God.” *Id.* at 404.

<sup>82</sup> *SHMG*, *supra* note 76. Lear was Washington’s personal secretary. For more on his account, see *infra* notes 101–07 and accompanying text.

<sup>83</sup> *SHMG*, *supra* note 76. Eliza Morton was the younger sister of Jacob Morton, who secured the Bible on which Washington took the Oath. For more about her account, see *infra* notes 95–97, 169–74 and accompanying text.

<sup>84</sup> *SHMG*, *supra* note 76. William A. Duer wrote accounts of the inauguration in his later reminiscences about New York. See *infra* notes 164–68 and accompanying text.

<sup>85</sup> *SHMG*, *supra* note 76. Samuel Otis was the Secretary of the Senate who held the Bible on which Washington took the Oath. See *infra* notes 179–81 and accompanying text.

<sup>86</sup> *SHMG*, *supra* note 76.

<sup>87</sup> RUFUS WILMOT GRISWOLD, *THE REPUBLICAN COURT OR AMERICAN SOCIETY IN THE DAYS OF WASHINGTON* 141 (New York, D. Appleton & Co. 1854); *SHMG*, *supra* note 76. Brief of Peter R. Henriques et al., *supra* note 74, at 7 n.6, points out that the account was “[f]irst published in 1854 as a subscriber edition in 25 sections, [r]epublished 1856. . . .” Griswold relates,

A gesture of the Chancellor arrested the attention of the immense assembly, and he pronounced slowly and distinctly the words of the oath. The Bible was raised, and as the President bowed to kiss its sacred pages, he said audibly, “I swear,” and added, with fervor, his eyes closed, that his whole soul might be absorbed in the supplication, “So help me God!”

GRISWOLD, *supra*, at 140–41. Griswold goes on to state,

Few persons are now living who witnessed the induction of the first President of the United States into his office; but walking, not many months ago, near the middle of a night of unusual beauty, through Broadway—at that hour scarcely disturbed by any voices or footfalls except our own—Washington Irving related to Dr. Francis and myself his recollections of these scenes, with that graceful conversational eloquence of which he is one of the greatest of living masters.

*Id.* at 142.

Irving, and states, “[Irving] had watched the procession till the President entered Federal Hall, and from the corner of New street and Wall street had observed the subsequent proceedings in the balcony.”<sup>88</sup> But the corner from which Griswold says the six-year-old Irving observed the inauguration was more than two hundred feet west of Federal Hall.<sup>89</sup> “From that distance and sideway viewing angle it is unlikely anyone would have a clear view of the activities or be able to hear what was said.”<sup>90</sup>

In his book, *So Help Me God: The Founding Fathers and the First Great Battle Over Church and State*, the Reverend Forrest Church defends the accuracy of the Irving witness, observing that Irving, though six years old, was clearly correct “about Washington bending down to kiss the Bible.”<sup>91</sup> Irving, Church contends, “was present in person at the inauguration of his famous namesake,” and “[i]n doing research for his biography or sharing reminiscences over the years, he likely tested his memories against those of other eyewitnesses.”<sup>92</sup> His biography of Washington, Church claims, “is free of the pious cant that compromises certain other early treatments of Washington’s life, and he certainly had no religious ax to grind, being himself a thorough secularist.”<sup>93</sup>

Irving published his own biography of George Washington, entitled *Life of George Washington*, in 1857.<sup>94</sup> Both he and Griswold may have gotten some details about the inauguration by taking material from a previously published Washington biography by Jared Sparks based on Washington’s manuscripts in the Department of State and the *Memoir of the Life of Eliza Susan Morton Quincy*, neither of which have Washington uttering, “So help me God.”<sup>95</sup> In regard to the latter of these sources, the editor of Eliza Morton Quincy’s *Memoir*, who did not publish the work until 1861, states in an unnumbered footnote, “The preceding pages, which describe the entrance and inauguration of Washington, were sent to Mr. Irving, in 1856, at his request, by

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<sup>88</sup> *Id.*

<sup>89</sup> *SHMG*, *supra* note 76.

<sup>90</sup> *Id.*

<sup>91</sup> FORREST CHURCH, *SO HELP ME GOD: THE FOUNDING FATHERS AND THE FIRST GREAT BATTLE OVER CHURCH AND STATE* 446 (2007); *SHMG*, *supra* note 76.

<sup>92</sup> CHURCH, *supra* note 91, at 447.

<sup>93</sup> *Id.*

<sup>94</sup> 4 WASHINGTON IRVING, *LIFE OF GEORGE WASHINGTON* (1857). Irving states:

The chancellor advanced to administer the oath prescribed by the constitution, and Mr. Otis, the secretary of the Senate, held up the Bible on its crimson cushion. The oath was read slowly and distinctly; Washington at the same time laying his hand on the open Bible. When it was concluded, he replied solemnly, “I swear—So help me God.” Mr. Otis would have raised the Bible to his lips, but he bowed down reverently and kissed it.

*Id.* at 514.

<sup>95</sup> See also IRVING, *supra* note 94, at 514; ELIZA S.M. QUINCY, *MEMOIR OF THE LIFE OF ELIZA S.M. QUINCY* (E.S. Quincy ed., Bos., John Wilson & Son 1861); JARED SPARKS, *LIFE OF GEORGE WASHINGTON* (Bos., F. Andrews 1839); *SHMG*, *supra* note 76.

the Editor, and are inserted in his ‘Life of Washington,’ vol iv. pp. 510, 513, 514, but without reference to their source.”<sup>96</sup> The detail about kissing the Bible is in the *Memoir* which Irving was accused of plagiarizing.<sup>97</sup> Furthermore, it appears Irving reported some important details wrong. He described the coach that conveyed Washington to Federal Hall as driven by a single pair of horses and carrying “the arms of the United States.”<sup>98</sup> Contemporary newspapers reported that the coach was driven by four horses and bore the coat of arms of the Beekman family, who lent it for the occasion.<sup>99</sup> Irving’s “recollection” simply cannot be trusted.

### B. The Freeman Source

Aside from Irving’s questionable recollection, a lapse in a highly respected Washington biography might have also contributed to spreading the story that Washington said “So help me God” at his first inauguration. The authors of *SHMG* relate an interesting exchange with the Library of Congress regarding its web page entitled, “Inaugurals of Presidents of the United States, Some Precedents and Notable Events,” which apparently asserted at one time that Washington added the phrase to the inaugural oath.<sup>100</sup> After inquiring about the authority for this assertion, the *SHMG*

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<sup>96</sup> QUINCY, *supra* note 95, at 52; *see also* *SHMG*, *supra* note 76.

<sup>97</sup> *See* QUINCY, *supra* note 95, at 52; *see also* *infra* notes 169–72 and accompanying text.

<sup>98</sup> *SHMG*, *supra* note 76.

<sup>99</sup> *Id.* (quoting IRVING, *supra* note 94, at 21).

Newspapers reported that the horse drawn coach carrying George Washington to the ceremony bore the Beekman family coat of arms. . . .

Irving misdescribes the inaugural coach coat of arms thusly: “on the panels of which were emblazoned the arms of the United States.”

*Id.* (quoting IRVING, *supra* note 94, at 21). The *SHMG* authors quote from the bibliographical note for Part 3 of HENRY JONES FORD, *WASHINGTON AND HIS COLLEAGUES: A CHRONICLE OF THE RISE AND FALL OF FEDERALISM* 227 (1918):

Washington Irving, who as a child witnessed the first inauguration parade, says in his *Life of Washington* that the President’s coach “was drawn by a single pair of horses.” But the detailed account given in the *New York Packet* of May 1, 1789, the day after the ceremony, says that “the President joined the procession in his carriage and four.”

*SHMG*, *supra* note 76. The *SHMG* authors point out that both Griswold and Irving belonged to a circle which included two other authors, John Frederick Schroeder and Caroline Matilda Kirkland, who published accounts of the Washington inauguration claiming the inclusion of “So help me God.” *Id.* As for Irving, the *SHMG* authors discuss other notable misinformation Irving may have popularized, including the notion that Christopher Columbus had difficulty getting support for his voyage to the Indies because the vast majority of his contemporaries thought the world was flat. *Id.*

<sup>100</sup> *SHMG*, *supra* note 76; *see also* *Presidential Inaugurations, Inaugurals of Presidents of the United States: Some Precedents and Notable Events*, LIBRARY OF CONGRESS, <http://memory.loc.gov/ammem/pihtml/pinotable.html> (last visited Mar. 15, 2012). The site no longer includes “So help me God” as a precedent at the first inauguration.

authors were emailed a reference to the historian “Douglas S. Freeman, Washington’s preeminent biographer, [who] cites a Tobias . . . Lear letter of May 3, 1789, to George A. Washington as evidence that Washington added ‘So Help Me God.’”<sup>101</sup> Tobias Lear was George Washington’s personal secretary, and George Augustine Washington was George Washington’s nephew who was managing Washington’s Mount Vernon estate at the time.<sup>102</sup> Lear’s letter relating the event would provide an eyewitness account from an excellent source.

Here is how Freeman’s multivolume biography narrates the events of Washington’s first inauguration:

Samuel Otis the “small, short” Secretary of the Senate, lifted the Bible and the red cushion from the table and took his station between Washington and the Chancellor. Otis stood with his face to the throng; the Judge and the President were in profile when seen from the street. After the briefest of pauses, when Washington saw that the Judge was ready, he put his right hand on the Bible. “Do you solemnly swear,” asked the Chancellor, “that you . . . will, to the best of your ability, preserve, protect, and defend the Constitution of the United States?” “I solemnly swear,” Washington answered—and repeated the oath. Reverently he added, “So help me God.” He bent forward as he spoke and, before Otis could lift the Bible to his lips, he kissed the book. “It is done,” Livingston announced, and, turning to the crowd, he made a broad gesture with his hand and shouted, “Long live George Washington, President of the United States!” The roar of the throng came back on the instant, joyful and sustained. Livingston’s cry was taken up, and with it came clearly, “God bless our President.”<sup>103</sup>

At the end of the account, Freeman provides footnote 50, which states: “Lear’s letter of May 3, 1789, as *supra*.”<sup>104</sup> Page 185, footnote 3, reads: “Lear’s letter of May 3, 1789, to George Augustine Washington; *Duke Univ. MSS.*”<sup>105</sup> The text of the Tobias Lear letter of May 3, 1789, to George Augustine Washington is as follows:

They received the President in the most respectful manner; and the Vice President conducted him to a spacious elevated seat at the head of the Room. \_\_\_ A dead and solemn silence prevailed! \_\_\_

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<sup>101</sup> *SHMG*, *supra* note 76.

<sup>102</sup> *Id.*

<sup>103</sup> DOUGLAS SOUTHALL FREEMAN, 6 *GEORGE WASHINGTON, PATRIOT AND PRESIDENT*, 192 (1954); *SHMG*, *supra* note 76.

<sup>104</sup> FREEMAN, *supra* note 103, at 192 n.50.

<sup>105</sup> *Id.* at 192; *see also SHMG*, *supra* note 76.



In a few moments the Vice President arose, and informed the President all things were prepared to administer the OATH, whenever he saw fit to proceed to the Balcony to take it. He immediately descended from his seat and advanced through the middle door of the hall into the Balcony. \_\_\_ The Oath was administered in Public by Chancellor Livingston \_\_\_ and the moment the Chancellor proclaimed him President of the UNITED STATES of AMERICA! the air was rended by repeated shouts and hurrars \_\_\_ God Bless our Washington!<sup>106</sup>

The account has no “So help me God.” In Lear’s manuscript diary of April 30, 1789, he wrote, “The Oath was administered in Public by Chancellor Livingston—and the moment the Chancellor proclaimed him President of the United States, the air was rent by repeated shouts and huzzas.”<sup>107</sup> This account is consistent with that of the letter and also many other newspaper accounts in providing no evidence of “So help me God.” As it happens, Freeman’s magisterial biography may have been the major source of the pervasive misinformation today.

The reader will recall that in the *Newdow* litigation challenging the Chief Justice’s prompt of “So help me God,” the federal defendants attempted to support assertions that Washington included the phrase by citing to both Chief Justice Rehnquist in *Elk Grove Unified School District v. Newdow* and Justice Scalia in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*.<sup>108</sup> Both members of the Supreme Court were the victims of mistaken or unreliable authorities.

In *Elk Grove*, Rehnquist cited to Michael Riccards’s book, *A Republic, If You Can Keep It*.<sup>109</sup> Riccards states, “The President responded, ‘I solemnly swear,’ and repeated the Oath, adding, ‘So help me God.’ He then bent forward and kissed the Bible before him.”<sup>110</sup> The account repeats Freeman’s version virtually verbatim.<sup>111</sup> Riccards does not provide a footnote immediately after this passage, but in the footnote preceding the passage, Riccards cites to Freeman’s biographical volume,<sup>112</sup> and in the footnote

<sup>106</sup> *SHMG*, *supra* note 76. The article provides a link to the handwritten letter, a copy of which the *SHMG* authors received from Russell Machalak, a post graduate fellow of Special Collections Reference at the Perkins Library of Duke University. *Id.* The authors also note that a major portion of the letter can be found in 2 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 154–55 (Philander Chase ed., 1987).

<sup>107</sup> *SHMG*, *supra* note 76. The *SHMG* article provides two sources for this entry: JARED SPARKS, 10 THE WRITINGS OF GEORGE WASHINGTON app. at 463 (1836), and *First Inaugural Address*, Apr. 30, 1789, *The Papers of George Washington*, UNIV. OF VA., <http://gwpapers.virginia.edu/documents/inaugural/index.html> (last visited Mar. 15, 2012).

<sup>108</sup> See Federal Defendants’ Opposition, *supra* note 43 and accompanying text.

<sup>109</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 27 (2004).

<sup>110</sup> RICCARDS, *supra* note 25, at 74.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 207 n.4 (citing FREEMAN, *supra* note 103, at 190–92).

following the passage, cites to Freeman again.<sup>113</sup> As noted above, the information about Washington's inclusion of "So help me God" appears in Freeman's tome.<sup>114</sup> There are other accounts that Riccards cites earlier in his book, including Griswold, but none are primary historical sources evidencing Washington's inclusion of the phrase.<sup>115</sup> Because Freeman is not reliable on this point, Riccards is not reliable, and neither is Rehnquist.

Justice Scalia cited Robert F. Blomquist, *The Presidential Oath, The American National Interest and a Call for Presiprudence*, and Blomquist in turn cites Michael Nelson's 1989 edition of *The Congressional Quarterly Guide to the Presidency*.<sup>116</sup> The federal defendants in *Newdow* also cite to Nelson, but use his 2008 edition of *The Guide*.<sup>117</sup> This is a reference work regarding information about the Presidents. The first volume of the 2008 edition reads, "The practice of adding the words 'so help me God' at the conclusion of the Oath is said to have been initiated by George Washington at the first inaugural ceremony."<sup>118</sup> There is no citation to the source. This is yet another artful statement. Certainly, it has been said that Washington added these words, but just because it has been "said" doesn't mean it actually happened. The Nelson reference is therefore not dependable, and thus neither is Blomquist nor Scalia.

Aside from Rehnquist and Scalia, the federal defendants in *Newdow* cited to Nelson and Blomquist, whose reliability was addressed in the previous paragraph. The federal defendants also cited and quoted Martin Jay Medhurst's doctoral dissertation, "*God Bless the President*": *The Rhetoric of Inaugural Prayer*.<sup>119</sup> Medhurst wrote, "As the last word [of the Oath] still lingered in the air, Washington added spontaneously, 'I swear, so help me God.'"<sup>120</sup> The citation to Medhurst's dissertation is also unreliable

<sup>113</sup> *Id.* at 207 n.5 (citing FREEMAN, *supra* note 103, at 194–97).

<sup>114</sup> FREEMAN, *supra* note 103, at 192.

<sup>115</sup> RICCARDS, *supra* note 25, at 206–07 nn.1–2. The citations include: AN ACCOUNT OF THE INAUGURATION OF GEORGE WASHINGTON (1939); GRISWOLD, *supra* note 87; MARTHA J. LAMB, THE WASHINGTON INAUGURATION (1889); WILLIAM MACLAY, JOURNAL OF WILLIAM MACLAY (1927); FRANK MONAGHAN, NOTES ON THE INAUGURAL JOURNEY OF GEORGE WASHINGTON (1939); FRANK FLETCHER STEPHENS, THE TRANSITION PERIOD 1788–1789 IN THE GOVERNMENT OF THE UNITED STATES (1909).

<sup>116</sup> *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) (citing Blomquist, *supra* note 28, at 34 (citing THE CONGRESSIONAL QUARTERLY'S GUIDE TO THE PRESIDENCY 588 (Michael Nelson, ed. 1989))).

<sup>117</sup> Federal Defendants' Opposition, *supra* note 43, at 35–36 (citing 1 CONGRESSIONAL QUARTERLY'S GUIDE TO THE PRESIDENCY 339 (Michael Nelson ed., 2008)).

<sup>118</sup> CONGRESSIONAL QUARTERLY'S GUIDE, *supra* note 117, at 339.

<sup>119</sup> Federal Defendants' Opposition, *supra* note 43, at 36 (quoting Martin Jay Medhurst, "God Bless the President": The Rhetoric of Inaugural Prayer 62 (Aug. 1980) (unpublished Ph. D dissertation, The Pennsylvania State University) (on file with author)).

<sup>120</sup> Medhurst, *supra* note 119, at 62. The dissertation is  
an historical and critical study of the role played by clergymen in the act of inaugurating the President of the United States. The study focuses on how the words and deeds of clergymen have functioned rhetorically to

because, in fact, Medhurst does not provide any authority for this statement. Immediately following the quote above, Medhurst makes a comparison between Washington's inauguration and the English coronation service,<sup>121</sup> and then provides a footnote that cites to a book about the English coronation.<sup>122</sup> Although this comparison will be of interest later in this Article, it does not provide an authority supporting Washington's inclusion of "So help me God." Medhurst read Freeman, however, for in the next paragraph he cites to Freeman regarding the prayers that Washington may have heard after the inauguration at St. Paul's Chapel.<sup>123</sup> Thus, Freeman is probably the source for the statement that the federal defendants quote from Medhurst's dissertation. There is nothing, then, in the citations of the federal defendants that reliably supports their assertions that Washington uttered the words, "So help me God," at the first inauguration.

The justices and lawyers who used bad history to support legal arguments are not altogether worthy of blame. Not being historical experts, they depended on authorities who seemed to be reflecting an unobjectionable historical fact. Even the scholars who disseminated the disinformation might be forgiven for a failure to scrutinize the evidence under discussion, because the controversy over Washington's religious expression is of recent origin. However, promotion of the myth is becoming less excusable with both the passage of time and the increasingly obvious dearth of evidence supporting Washington's religious expression when he took the first Oath of Office.

Yet, the belief that George Washington uttered "So help me God" at the first presidential inauguration is still resistant to correction or even reasonable qualification. The assurance with which Supreme Court Justices cite this as a trustworthy fact to support their legal arguments is but one example.<sup>124</sup> The website of the Joint Congressional Committee on Inaugural Ceremonies, a government website, states on its "Facts and Firsts" web page, "First Inauguration; precedents set include the phrase, 'So help me God.'"<sup>125</sup> Until recently, the Library of Congress's web page, "Inaugurals of Presidents

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invite audience acceptance of particular views concerning the meaning of the inauguration, the historical role of the American nation, and the relationship of America and Americans to Almighty God.

*Id.* at iii.

<sup>121</sup> *Id.* at 62 ("The new President borrowed this response, it seems, from the English Coronation service.").

<sup>122</sup> *Id.* at 70 n.65 (referring to A FAITHFUL ACCOUNT OF THE PROCESSIONS AND CEREMONIES OBSERVED IN THE CORONATION OF THE KINGS AND QUEENS OF ENGLAND 55 (Richard Thomson ed., London, J. Major 1820)).

<sup>123</sup> Medhurst, *supra* note 119, at 63, 70 n.66 (citing FREEMAN, *supra* note 103, at 196–97).

<sup>124</sup> See *supra* notes 25–26 and accompanying text.

<sup>125</sup> *Facts and Firsts*, JOINT CONGRESSIONAL COMM., <http://inaugural.senate.gov/history/factsandfirsts/index.cfm> (last visited Mar. 15, 2012). Clicking on the name, George Washington, leads to another web page that repeats the same claim. *President George Washington*, JOINT CONGRESSIONAL COMM., <http://inaugural.senate.gov/history/chronology/gwashington1789.cfm> (last visited Mar. 15, 2012). The home web page of the Joint Congressional Committee, <http://inaugural.senate.gov> (last visited Mar. 15, 2012), states, "Since 1901, the Joint Congressional

of the United States: Some Precedents and Notable Events,” also asserted that Washington appended the phrase to his first Oath of Office.<sup>126</sup> The *SHMG* authors cite no fewer than eighteen media and government sources that have published this misinformation.<sup>127</sup> This doubtful belief also appears in some otherwise excellent academic work.<sup>128</sup>

*C. Two Conjectural Arguments for “So Help Me God” Discredited*

The *SHMG* article also addresses two other conjectural arguments by the Reverend Church that support Washington’s inclusion of “So help me God.”<sup>129</sup> The first points to an article that Church claims was published by David Humphreys, Washington’s principal aide, in the *Pennsylvania Mercury* on May 9, 1789. It states:

I rejoice in the exaltation of a person to the head of the Union, who professes himself to be a Christian, who is not ashamed to confess Christ, glory in his cross, and publicly honor his institutions; and hope and pray, that all our rulers may follow his illustrious example, and be politically as well as religiously wise to promote, both by law and practice, the best interests of their country, by promoting the Christian religion.<sup>130</sup>

The encomium to Washington’s piety does not explicitly state that he used the phrase under discussion. In any event, David Humphreys did not write this letter. As the *SHMG* article explains, this passage appears in the concluding paragraph of a serialized letter that the *Pennsylvania Mercury* began publishing on April 9, 1789.<sup>131</sup> It was addressed to a Mr. Humphreys and signed “Apocalypsophilos.”<sup>132</sup> On May 9, the *Philadelphia Federal Gazette* reprinted this letter with an introduction that read, “Extract from an essay published by Mr. Humphreys, in the *Pennsylvania Mercury*,

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Committee on Inaugural Ceremonies has been responsible for the planning and execution of the swearing-in ceremonies and the luncheon for the Inauguration of the President of the United States at the U.S. Capitol.”

<sup>126</sup> See *supra* note 100 and accompanying text.

<sup>127</sup> *SHMG*, *supra* note 76. These are also found in Plaintiffs’ Response to Order to Show Cause, *supra* note 44, at 36–37.

<sup>128</sup> See, e.g., MATTHEW A. PAULEY, I DO SOLEMNLY SWEAR: THE PRESIDENT’S CONSTITUTIONAL OATH 246–47 n.8 (1999); Eugene L. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1, 28–29 (2009).

<sup>129</sup> *SHMG*, *supra* note 76; see also CHURCH, *supra* note 91, app. at 445–49 (“Did George Washington Say, ‘So Help Me God?’”).

<sup>130</sup> *SHMG*, *supra* note 76 (quoting CHURCH, *supra* note 91, at 447).

<sup>131</sup> *Id.* (citing CHURCH, *supra* note 91, at 447).

<sup>132</sup> *Id.*

this morning.”<sup>133</sup> The publisher of the *Pennsylvania Mercury* at this time was Daniel, not David, Humphreys.<sup>134</sup> Washington’s aide, David Humphreys, did have a father and a brother named Daniel, but neither could have been the Daniel Humphreys who published the *Pennsylvania Mercury* on May 9, 1789. His father died on September 2, 1787, and his brother was not born until May 4, 1779, and so would only be ten years old when this letter was published.<sup>135</sup> It appears, then, that there is no connection between this letter and Washington’s aide or inauguration.

The other argument advanced by Church refers to a letter of March 2, 1801, in which Thomas Jefferson poses a question to Chief Justice John Marshall regarding his upcoming inauguration.<sup>136</sup>

I would pray you in the meantime to consider whether the oath prescribed in the Constitution be not the only necessary to take. It seems to comprehend the substance of that prescribed by the act of Congress to all officers, and it may be questionable whether the legislature can require any new oath from the President.<sup>137</sup>

Church writes that he could conceive of no other reason for Jefferson’s question “apart from Jefferson wishing assurance from Marshall that he would not be required to add the words, ‘So help me God,’ to the Oath spelled out in the Constitution.”<sup>138</sup> The *SHMG* article, however, provides a far more plausible explanation. Jefferson merely wanted the Chief Justice’s opinion regarding whether, as President-elect, he had to recite both the oath prescribed for government officials in the June 1, 1789, Act of Congress as well as the Presidential Oath found in the Constitution, or only the latter.<sup>139</sup> Chief Justice Marshall’s response was, “The records of the office of the department of state furnish no information respecting the oaths which have been heretofore taken.

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> The anonymous author of this letter states that “it was written in response to an ‘alleged’ Indian speech which he characterized as ‘a stupid nonsensical squib thrown out against the christian religion by some person, who preferred heathenism to christianity.’” *Id.* The *SHMG* article states, “Reverend Church has acknowledged he was mistaken in identifying the author of the letter as David Humphreys and promised to correct the version of his book’s appendix that he maintains on the internet.” *Id.* The Reverend Forrest Church passed away on September 29, 2009. *Obituary: In Memoriam, Rev. Forrest Church, ALL SOULS*, <http://www.allsoulsnyc.org/site/c.atJQL8NRJqL8H/b.6416361/k.CF2F/Obituary.htm> (last visited Mar. 15, 2012). He may not have been able to correct the error as it remains on the website in the *Appendix* at <http://www.forrestchurch.com/writings/books/AppendixSoHelpMeGod.pdf> (last visited Mar. 15, 2012).

<sup>136</sup> CHURCH, *supra* note 91, at 448–49; *see also SHMG*, *supra* note 76.

<sup>137</sup> CHURCH, *supra* note 91, at 448–49; Letter from Thomas Jefferson to the Hon. John Marshall (Mar. 2, 1801), in 4 THE WRITINGS OF THOMAS JEFFERSON 364 (H.A. Washington ed., Wash. D.C., Taylor & Maury 1859).

<sup>138</sup> CHURCH, *supra* note 91, at 448–49.

<sup>139</sup> *SHMG*, *supra* note 76.

That [oath] prescribed in the constitution seems to me to be the only one which is to be administered. I shall however inquire what has been the practice.”<sup>140</sup>

*D. One More Conjecture*

Aside from the arguments mentioned at the beginning of this Part against the likelihood that Washington appended “So help me God” to his oath, Professor Henriques advances another position based on activity in Congress that occurred just before and after Washington’s inauguration, and concerned the oath or affirmation that Article VI of the Constitution requires of government officials: “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.”<sup>141</sup> Henriques states, “[A]t exactly the same time as these inaugural events were unfolding, the first Congress was debating what oath the new members of the new federal government should take so as to comply with the Constitution.”<sup>142</sup> He summarizes the “debate” as follows:

Early arrivals to the House of Representatives had taken an oath that included the words, “So help me God.” But, following the lead of a committee led by James Madison, legislators passed a new oath act on April 27, 1789—just three days before Washington’s inauguration—that excluded the words “So help me God.” The Senate, after adding unrelated amendments, passed the bill on May 5, 1789.<sup>143</sup>

The professor then presents the following rhetorical questions: “Would the Senate have passed an oath bill without the words, ‘So help me God,’ only five days after

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<sup>140</sup> CHURCH, *supra* note 91, at 448; *see also* SHMG, *supra* note 76. Both quote parts of Marshall’s statement. The full letter may be accessed at *John Marshall Agrees to Administer Oath of Office to Jefferson*, LIBRARY OF CONGRESS, <http://myloc.gov/Exhibitions/creatingtheus/BillofRights/PeacefulTransition/ExhibitObjects/JohnMarshallAgrees.aspx> (last visited Mar. 15, 2012). Church suggests that Washington may have added “So help me God” as part of a “script” influenced by Senator Richard Henry Lee, who chaired the inaugural planning committee and was the leader of those legislators who wished to acknowledge God. CHURCH, *supra* note 91, at 448. To this argument may be added Washington’s familiarity with oaths he had previously taken that included “So help me God.” The SHMG article, however, argues that Washington would have been familiar with oaths that omitted these words. SHMG, *supra* note 76. These include: the Continental Congress Oath of February 3, 1778; the Valley Forge Oath of Allegiance of May 12, 1778; the Enlisted Oath of 1789 and its replacement, the Officer and Enlisted Oath of 1790; and Washington’s oath of 1798 when, under threat of war with France, he was commissioned lieutenant general and commander in chief of the United States Army. *Id.*

<sup>141</sup> U.S. CONST. art. VI, cl. 3.

<sup>142</sup> Brief of Henriques et al., *supra* note 74, at 7.

<sup>143</sup> *Id.* at 7–8.

the great hero of the American people ‘solemnly’ and ‘with fervor’ added them to his own oath? And do so without any contemporary comment surviving?”<sup>144</sup>

On April 6, 1789, the House of Representatives appointed a committee to prepare a bill “to regulate the taking the oath or affirmation prescribed by the sixth article of the Constitution.”<sup>145</sup> James Madison was indeed on that committee.<sup>146</sup> The initial wording of the oath that the House approved included religious expression: “I, A B, a representative of the United States in the Congress thereof, do solemnly swear (or affirm, as the case may be) in the presence of Almighty GOD, that I will support the Constitution of the United States. So help me God.”<sup>147</sup> Regarding the April 27 passage of that bill, which he says removed the phrase under discussion, Henriques had the following footnote: “April 27 the House reads and approves the bill, which specifies ‘I do solemnly swear that I will support the Constitution of the United States.’, [sic] and forwards it to the Senate for its consideration. *Annals of Congress, House of Representatives, 1st Congress, 1st Session, page 215.*”<sup>148</sup> However, neither this *Annals* entry cited by Henriques, nor the earlier *Annals* entries regarding the bill, provide this text indicating that the House had eliminated “So help me God.” Nor are there any entries suggesting that this was done at the suggestion, or “leadership,” of James Madison. It is true that the entries for April 22 and 25 indicate there were amendments to the bill, but those entries are not explicit about what was changed.<sup>149</sup> The amendments

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<sup>144</sup> *Id.* at 8.

<sup>145</sup> 1 ANNALS OF CONG. 97 (1789) (Joseph Gales ed., 1834).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Brief of Peter R. Henriques et. al, *supra* note 74, at 8 n.8 (citing 1 ANNALS OF CONG., *supra* note 145, at 215).

<sup>149</sup> The entries read as follows: “Mr. White presented, according to order, a bill to regulate the taking the oath or affirmation prescribed by the sixth article of the Constitution; which was received and read the first time.” 1 ANNALS OF CONG., *supra* note 145, at 123. “A bill to regulate the taking the oath or affirmation prescribed by the sixth article of the constitution, was read the second time, and ordered to be committed to a Committee of the whole House on Monday next.” *Id.* at 151. “The bill regulating the manner of taking the oath prescribed by the Constitution, was committed to the Committee of the whole; after proceeding some time in considering it, the committee rose and reported progress.” *Id.* at 175–76.

The House resolved itself into a Committee of the whole on the bill to regulate the taking the oath or affirmation prescribed by the sixth article of the constitution, Mr. Page in the chair. After going through the bill, and making some amendments therein, the committee rose and reported the bill with the amendments; which report was ordered to be on the table.

*Id.* at 191.

The House, according to the order of the day, received the report from the committee of the whole House, to the bill to regulate the taking the oath or affirmation prescribed by the sixth article of the constitution; and the amendments to the said bill being read and amended at the Clerk’s table, were agreed to by the House. *Ordered*, That the said bill, with the amendments, be engrossed, and read the third time on Monday next.

may have changed the wording of the oath, and presumably the House made no further changes after April 27, because on that day the bill “was read the third time and passed, and ordered to be sent to the Senate for their concurrence.”<sup>150</sup>

For the passage of the bill by the Senate on May 5, Henriques provides a footnote, which states, “May 7, the Senate agreed to bill as amended by the House, *Journal of the House [sic] Representatives: 1st–13th Congress, page 31*.”<sup>151</sup> This entry also does not provide the revised text of the Oath.<sup>152</sup> There are, however, entries in the *Annals of Congress, Senate*, regarding this bill for April 28, April 29, May 2, and May 4, the last of which has the unrelated amendments to which Henriques is no doubt referring.<sup>153</sup> The *Annals* relate that on May 5, the Senate passed the bill and sent it back to the House for the approval of the Senate amendments.<sup>154</sup> On May 6, the House agreed to the amendments,<sup>155</sup> and on May 7, the

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*Id.* at 199–200. “The engrossed bill to regulate the time and manner of administering certain oaths, was read the third time and passed, and ordered to be sent to the Senate for their concurrence.” *Id.* at 207.

<sup>150</sup> *Id.* at 207.

<sup>151</sup> Brief of Henriques et al., *supra* note 74, at 8 n.9.

<sup>152</sup> H. JOURNAL, 1st Cong., 1st Sess. 31 (1826). “*Mr. Speaker*: The Senate agree to the amendment proposed by this House to their third amendment to the bill, entitled ‘An act to regulate the time and manner of administering certain oaths.’” *Id.*

<sup>153</sup> “Received from the House of Representatives, . . . a bill to regulate the time and manner of administering certain oaths. . . . The bill received its first reading.” 1 ANNALS OF CONG., *supra* note 145, at 25–26 (April 28). “The Senate proceeded to the second reading of the bill to regulate the time and manner of administering certain oaths; and, after debate, it was committed to Messrs. Strong, Patterson, Reed, Johnson, and Henry.” *Id.* at 26 (April 29). “*Mr. Strong*, from the committee to whom the bill from the House of Representatives was referred, to regulate the time and manner of administering certain oaths, reported sundry amendments thereto, which were assigned for consideration on Monday next.” *Id.* at 30 (May 2). “The Senate proceeded to the consideration of the report of the committee on the bill to regulate the time and manner of administering certain oaths.” *Id.* at 30 (May 4). The amendments concerned an addition that state legislators, executive and judicial officers appointed before August 1 take the same oath within a month after appointment, and those state legislators, executive and judicial officers appointed after August 1 take the same oath before they begin the duties of their offices. There were other changes in the language of the bill, of which only the addition of “as the case may be” appears to concern the oath itself. *Id.* at 31.

<sup>154</sup> The bill to regulate the time and manner of administering certain oaths was read the third time and passed, with amendments. *Ordered*, That the Secretary carry the aforementioned bill to the House of Representatives, together with the amendments, and address the Speaker with the words following: Sir: The Senate have passed the bill . . . to which they desire the concurrence of the House.

*Id.* at 31.

<sup>155</sup> The House proceeded to consider the amendments of the Senate to the bill, entitled “An act to regulate the time and manner of administering certain oaths,” and the same being twice read at the Clerk’s table, were amended, and agreed to by the House. *Ordered*, That the Clerk of this



Senate agreed.<sup>156</sup> George Washington signed the bill, An Act to Regulate the Time and Manner of Administering Certain Oaths, on June 1, 1789, and the final words of the Oath excluded any religious expression: “I do solemnly swear (or affirm as the case may be) that I will support the Constitution of the United States.”<sup>157</sup>

In fact, the positing of a House bill of April 27 that had removed “So help me God” from the oath for government officials is really a reconstruction of the bill that was passed that day. The *Documentary History of the First Federal Congress* prints the reconstructed bill passed on April 27 without “So help me God,” and identifies this version as a reconstruction.<sup>158</sup> Once this version of the bill is understood as a reconstruction, there is no difficulty in accepting the reasonable inference that the oath had attained a form eliminating the religious expression by April 27, since there are no indications that it was changed after that time. But this conjecture should have been identified as such, because the same incompleteness of the record that necessitates reconstructing the bill makes it possible that the bill could have been changed after as well as before April 27.

In any event, the removal of the religious expression from the Oath occurred sometime between April 6 and May 7, implying some modicum of “debate” over “So help me God” to which Henriques refers around the time of Washington’s inauguration. But what level of debate? Was there actually enough controversy over this matter to lead to Henriques’s conclusion that had Washington appended “So help me God” to his Oath of Office, “such modification of the oath would have created comment at the time that would have survived in the historical record”?<sup>159</sup>

The records, in fact, provide evidence of a debate only as to whether the Constitution permitted Congress to determine the time and manner in which the oath was to be administered to state, as well as federal, officials.<sup>160</sup> They do not, however, provide evidence of a debate as to whether it was appropriate to keep or eliminate “So help me God” from the Oath. The absence of any entry in the journals of the House or Senate identifying the particular amendment that removed the religious verbiage, and the

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House do acquaint the Senate therewith, and desire their concurrence to the amendment to their amendments.

H. JOURNAL, 1st Cong., 1st sess., *supra* note 152, at 29.

<sup>156</sup> 1 ANNALS OF CONG., *supra* note 145, at 32–33.

<sup>157</sup> 1 THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA 23 (Richard Peters ed., 1845).

<sup>158</sup> 15 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789–1791, at 1613 (Charlene Bangs Bickford & Helen E. Veit eds., 1986). After providing the text of the Oath Bill [HR-1] that passed the House on April 27, 1789, the editors state, “The bill as it passed the House has not been located. The above is a reconstruction of the bill at this point. The Amendments are from the S[enate] L[egislative] J[ournal], pp. 35–36, 39.” *Id.*

<sup>159</sup> Brief of Henriques et. al, *supra* note 74, at 7.

<sup>160</sup> JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 51–53 (1999); see also Kent Greenfield, *Original Penumbra: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79, 111–12 (1993).

absence of any record of a debate over the matter, suggest that the congressional level of controversy about “So help me God” was not very high. If this issue were controversial, one would think that, like Washington’s unlikely inclusion of “So help me God,” the controversy in Congress “would have survived in the historical record.” For that matter, if there were a congressional controversy over including “So help me God” in the oath for government officials, Washington’s omission of the phrase “would have survived in the historical record,” just as much as his supposed inclusion.

Arguments based on opinion and conjecture, such as those offered by both the Reverend Church and Professor Henriques, are subject to personal perspective. It is the lack of contemporary evidence that Washington included “So help me God” at his first inauguration that is most significant. Though it is possible that he included the phrase, the lack of reliable historical evidence makes it unreasonable to claim this as fact. Consequently, jurists and lawyers should cease making this claim or suggestion to support legal arguments that affect constitutional rights.

### III. THE EVIDENCE THAT WASHINGTON KISSED THE BIBLE

Washington did not introduce “So help me God” to the presidential oath, or, at least, the evidence is not strong enough to say he did. Neither scholarly speculation nor judicial argument changes the lack of evidence for the cherished belief. However, primary sources indicate that Washington did something else of a religious nature at his inauguration. He kissed the Bible. This gesture, unlike the previously discussed utterance, is far more difficult to dismiss. And if, as the Supreme Court has often held, actions are a form of speech,<sup>161</sup> Washington’s gesture may have the legal significance that the now discredited utterance would enjoy had it actually occurred.

#### *A. First-Hand Accounts of the Biblical Kiss*

Those who have most forcefully attacked the myth of “So help me God” do not seriously question Washington’s biblical kiss. Henriques, for example, accepts it as fact: “Many [of the founding fathers] were [religious]. George Washington kissed the Bible on which he took his oath.”<sup>162</sup> The *SHMG* article, so thorough in debunking the utterance, does not dispute the gesture and, in fact, cites primary sources supporting it.<sup>163</sup> In spite of all this, it would be misleading to suggest that most contemporary

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<sup>161</sup> The Supreme Court has found a variety of physical actions to be expressive conduct or symbolic speech that is protected under the First Amendment. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503 (1969) (wearing black arm bands); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (peaceful marching); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (refusal to salute the flag).

<sup>162</sup> Henriques, “*So Help Me God*,” *supra* note 74.

<sup>163</sup> *SHMG*, *supra* note 76. The author of a posting on the web states, “But there is no disputing that George Washington kissed the bible because Samuel Otis said he did.”

accounts of the first inauguration include this detail. They do not. But those sources that do include the detail provide enough evidence to rely on the gesture as an historical fact.

One of these witnesses is William Alexander Duer, who lived from September 8, 1780, to May 30, 1858.<sup>164</sup> The son of William Duer, a Continental Congressman, and the grandson of William Alexander, one of the American generals during the Revolutionary War, he later held several judicial and political offices, including President of Columbia University from 1829 to 1842.<sup>165</sup> He was eight years old at the time of Washington's inauguration.<sup>166</sup> Later in life, Duer provided two published accounts of the inauguration, both of which have Washington kissing the Bible. The first occurs in his book, *New-York As It Was, During the Latter Part of the Last Century. An Anniversary Address Delivered before the St. Nicholas Society of the City of New York, December 1st, 1848*, published in 1849, which gives the following description of the event:

The next impressive spectacle I witnessed was far more interesting and important than any I had as yet seen, have since beheld, or ever expect to see. It was the inauguration of the first President of the United States. This auspicious ceremony took place under the portico of the Federal Hall, upon the balcony in front of the Senate Chamber, in the immediate presence of both houses of Congress. . . . The oath was administered by Chancellor Livingston, and when the illustrious chief had kissed the book, the Chancellor, with a loud voice, proclaimed, "Long live George Washington, President of the United States."<sup>167</sup>

Duer also provides the following description of the event in his book, *Reminiscences of an Old New Yorker*, published in 1867:

The next morning, a procession was formed at an early hour, consisting, besides the different bodies which formed the escort of the

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*Historian Gordon Wood versus GW Oath History*, EXPLICIT ATHEIST (Sept. 19, 2010), <http://explicit-atheist.blogspot.com/search?q=gordon+wood>. The author suggests that Otis prompted Washington by raising the Bible up to his face, so that Washington did not initiate the act. *Id.* But it does not seem likely that Washington would have allowed himself to be manipulated if he objected to performing this gesture.

<sup>164</sup> 4 AMERICAN BIOGRAPHY: A NEW ENCYCLOPEDIA 267 (1918).

<sup>165</sup> *Id.*; see also *Columbia University President Profiles, William Alexander Duer*, COLUMBIA UNIV. ARCHIVES, [http://library.columbia.edu/indiv/uarchives/presidents/duer\\_william.html](http://library.columbia.edu/indiv/uarchives/presidents/duer_william.html) (last visited Mar. 15, 2012).

<sup>166</sup> Duer was born in September 1780. AMERICAN BIOGRAPHY, *supra* note 164, at 267. Washington's inauguration took place on April 30, 1789. See Bowen, *supra* note 9.

<sup>167</sup> WILLIAM A. DUER, *NEW YORK AS IT WAS, DURING THE LATTER PART OF THE LAST CENTURY* 27 (N.Y., Stanford & Swords 1849).

day before, of the ministers and other representatives from foreign courts, and the Judiciary of the States in their carriages. After assembling in front of the President's house, it proceeded through Queen (now Pearl) and Wall streets to the "Federal Hall," at the head of Broad street, upon the upper portico of which the oath of office was administered to the President elect, in the presence of both houses of Congress, by Robert R. Livingston, Chancellor of the State. The words of the oath were audibly, distinctly repeated by Washington after the Chancellor, in a solemn and impressive manner, and after he had reverently kissed the book, the Chancellor advanced to the balcony of the portico—and in a loud voice proclaimed to the assembled multitude "Long live George Washington—President of the United States."<sup>168</sup>

Another eyewitness account is that of Eliza Susan Morton Quincy. She was born on September 20, 1773, making her fifteen years old at the time of the inauguration.<sup>169</sup> The following is her recollection from the 1861 *Memoir of the Life of Eliza S.M. Quincy*:

I was on the roof of the first house in Broad Street . . . and so near to Washington that I could almost hear him speak. The windows and roofs of the houses were crowded; and in the streets the throng was so dense, that it seemed as if one might literally walk on the heads of the people. The balcony of the hall was in full view of this assembled multitude. In the centre of it was placed a table, with a rich covering of red velvet; and upon this, on a crimson velvet cushion, lay a large and elegant Bible. . . . All eyes were fixed upon the balcony; where, at the appointed hour, Washington entered, accompanied by the Chancellor of the State of New York, who was to administer the oath; by John Adams, the Vice-President; Governor Clinton; and many other distinguished men.

. . . . His entrance on the balcony was announced by universal shouts of joy and welcome. His appearance was most solemn and dignified. Advancing to the front of the balcony, he laid his hand on his heart, bowed several times, and then retired to an arm-chair near the table. The populace appeared to understand that

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<sup>168</sup> WILLIAM A. DUER, REMINISCENCES OF AN OLD NEW YORKER 68–70 (N.Y., W.L. Anderson 1867). A copy may be found in 15 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 81, at 396–97.

<sup>169</sup> *Women in History*, A BIT OF HISTORY, <http://www.abitofhistory.net/> (last visited Mar. 15, 2012). Eliza Susan Morton Quincy was the wife of Senator Josiah Quincy, who was the mayor of Boston from 1823 to 1828. *Id.* It was her daughter, Eliza Susan Quincy, who edited and published her recollections. *Id.*

the scene had overcome him, and were at once hushed in profound silence. After a few moments, Washington arose, and came forward. Chancellor Livingston read the oath according to the form prescribed by the Constitution; and Washington repeated it, resting his hand upon the Bible. Mr. Otis, the Secretary of the Senate, then took the Bible to raise it to the lips of Washington; who stooped, and kissed the book. At this moment, a signal was given, by raising a flag upon the cupola of the Hall, for a general discharge of the artillery of the Battery. All the bells in the city rang out a peal of joy, and the assembled multitude sent forth a universal shout. The President again bowed to the people, and then retired from a scene such as the proudest monarch never enjoyed.<sup>170</sup>

The historian Paul Gutjahr describes Eliza as a careful diarist “[who] kept a meticulous record of the event.”<sup>171</sup> Certainly her account is a highly detailed and vivid description of the inauguration. Eliza Morton was the younger sister of Jacob Morton (1762–1836), who was the Marshal of the inauguration ceremonies.<sup>172</sup> He was also the Master of the St. John’s Masonic Lodge and brought the Bible and its cushion from his lodge.<sup>173</sup> After Washington kissed the opened book, Morton is said to have stepped forward to retrieve the Bible and folded the corner of the page on which the President had kissed the book.<sup>174</sup> Aside from the precise and lively detail Eliza provides, her relationship to someone who was so closely involved in the ceremony is another reason to regard her account as accurate and reliable.

Though they were eyewitnesses, William Duer and Eliza Morton were still children—ages eight and fifteen, respectively—when they attended Washington’s inauguration, and, like Irving, they did not publish their accounts until many years afterward.<sup>175</sup> There were, however, two other eyewitness accounts of the biblical kiss

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<sup>170</sup> QUINCY, *supra* note 95, at 51–52.

<sup>171</sup> PAUL C. GUTJAHR, *AN AMERICAN BIBLE: A HISTORY OF THE GOOD BOOK IN THE UNITED STATES* 39 (1999).

<sup>172</sup> The sibling relationship between Eliza and Jacob may be confirmed at *The Ancestry of Derek Doran Wood, so far*, ROOTSWEB, <http://wc.rootsweb.ancestry.com/cgi-bin/igm.cgi?op=DESC&db=derekw&id=I3093> (last visited Mar. 15, 2012); *see also* HAYDEN, *supra* note 9, at 124 (identifying him as the “marshal of the day”).

<sup>173</sup> HAYDEN, *supra* note 9, at 124.

<sup>174</sup> The author has found this detail in Gutjahr’s book, GUTJAHR, *supra* note 171, at 39, and nowhere else: “Jacob Morton, an attendant on the balcony, then stepped forward to mark the place Washington had kissed.” It makes sense that someone may have done this, and logical that it be Morton. This would explain the folded page on which Washington is said to have kissed the Bible as shown in a photograph in Bowen, *supra* note 9, at 829.

<sup>175</sup> Washington’s inauguration took place in 1789. *See* Bowen, *supra* note 9, at 530 n.1. Duer’s first account was published in 1849. *See* DUER, *supra* note 167, at 1. Quincy’s account was published in 1861. *See* QUINCY, *supra* note 95, at 1.

that were written at the time of the inauguration. One is the anonymous *Extract of a Letter from New York, May 3* that was published in the *Gazette of the United States* from May 9 to May 13, 1789.<sup>176</sup> It stated the following:

The scene was solemn and awful beyond description. It would seem extraordinary that the administration of an oath, a ceremony so very common and familiar, should in so great a degree excite the public curiosity; but the circumstances of his election—the impression of his past services—the concourse of spectators—the devout fervency with which he repeated the oath—and the reverential manner in which he bowed down and kissed the sacred volume—all these conspired to render it one of the most August and interesting spectacles ever exhibited on this globe.<sup>177</sup>

Because of its religious sentiment, this account might also attract suspicion about whether the biblical kiss it relates actually occurred.<sup>178</sup> But there is one more account, by Secretary of the Senate Samuel Otis, who held the Bible for Washington during the ceremony.<sup>179</sup> In the handwritten notes in his *Journal of the Secretary of the Senate*, Otis gives the following account:

The President seated himself and being informed by the Vice President that the two Houses were ready to attend him to take the oath, The Secretary of the Senate whose seat was inclined to the right of the Vice-President carrying a bible on a cushion. The Chancellor of the State administered the oath. The President laying his hand on the bible and repeating the oath[,] after which the President of the United States kissed the book, and the Chancellor proclaimed him President of the United States. The President of the

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<sup>176</sup> *SHMG*, *supra* note 76 (citing the anonymous letter).

<sup>177</sup> *Id.* (quoting *GAZETTE OF THE UNITED STATES* (N.Y.), May 9–13 (1789)).

<sup>178</sup> The account goes on to state:

It seemed, from the number of witnesses, to be a solemn appeal to Heaven and earth at once. Upon the subject of this great and good man I may, perhaps, be an enthusiast; but I confess that I was under an awful and religious persuasion, that the gracious Ruler of the Universe was looking down at that moment with peculiar complacency on an act which to a part of his creatures was so very important. Under this impression, when the Chancellor pronounced, in a very feeling manner, “Long live GEORGE WASHINGTON”, my sensibility was wound up to such a pitch, that I could do no more than wave my hat with the rest, without the power of joining in the repeated acclamations which rent the air.

*SHMG*, *supra* note 76.

<sup>179</sup> Eliza Morton Quincy provides the detail that Otis held the Bible for Washington. *QUINCY*, *supra* note 95, at 52.

United States returning and reposing a few minutes on his chair,  
rose and addressed the two Houses of Congress . . . .<sup>180</sup>

This account confirms those of Duer, Morton Quincy, and the anonymous *Gazette* letter. Otis presumably held the position of Secretary of the Senate because he was accurate and reliable in recording events. The unpolished, note-like quality of the handwritten entry suggests unadorned accuracy of detail rather than artificial embellishment. Because he was holding the cushion on which the Bible lay, Otis was the closest person to Washington at the time of the gesture.<sup>181</sup> There is, then, good reason to regard this record as determinative that Washington kissed the Bible to seal his Oath of Office.

### *B. The Subsequent Tradition*

Early accounts of the first inauguration include the biblical kiss long before the accounts that include “So help me God” appear. As the reader may recall, the earliest published statement indicating that Washington added the phrase appeared in 1854.<sup>182</sup> However, in 1820, Daniel Blowe quoted the account of the biblical kiss from the anonymous *Extract of a Letter from New York in A Geographical, Historical, Commercial and Agricultural View of the United States of America*.<sup>183</sup> John Warner Barber did likewise in *The History and Antiquities of New England, New York, New Jersey, and Pennsylvania*, which was published in 1841.<sup>184</sup> In addition, Samuel George Arnold wrote in his *The Life of George Washington, First President of the United States*, published in 1840, “Having entered the Hall he passed to a balcony in front of the house, where he was received with loud acclamations by the assembled multitudes. Here the oath was administered by Chancellor Livingston. The Bible was raised, and his head bowed to kiss the sacred volume.”<sup>185</sup> After 1850, the detail became commonplace.<sup>186</sup>

The custom of kissing the Bible at the presidential inauguration also began much earlier than did the inclusion of “So help me God.” The only Presidents to have

<sup>180</sup> SAMUEL OTIS, *Oath Administered to the President of the United States* (entry for April 30, 1789), in *JOURNAL OF THE SECRETARY OF THE SENATE 1789–1813*, at 186, *microformed on National Archives Microfilm Publications*, No. 1254, Roll 1, 1984 (Barry Univ. Sch. of Law).

<sup>181</sup> QUINCY, *supra* note 95, at 51 and text accompanying note 170. *SHMG*, *supra* note 76, states that Washington “placed his hand on the Bible and kissed the Bible, which Otis had lifted towards Washington’s face, when the Oath was concluded.”

<sup>182</sup> GRISWOLD, *supra* note 87, at 140–41.

<sup>183</sup> DANIEL BLOWE, *A GEOGRAPHICAL, HISTORICAL, COMMERCIAL, AND AGRICULTURAL VIEW OF THE UNITED STATES OF AMERICA 188–89* (London, Edwards & Knibb 1820); *see also supra* notes 176–78 and accompanying text.

<sup>184</sup> JOHN WARNER BARBER, *THE HISTORY AND ANTIQUITIES OF NEW ENGLAND, NEW YORK, NEW JERSEY, AND PENNSYLVANIA 469–70* (Hartford, H.S. Parsons 1841).

<sup>185</sup> SAMUEL GEORGE ARNOLD, *THE LIFE OF GEORGE WASHINGTON, FIRST PRESIDENT OF THE UNITED STATES 192–95* (N.Y., T. Mason & G. Lane 1840).

<sup>186</sup> *SHMG*, *supra* note 76, lists fourteen books and articles published in the 1850s which give accounts of the first inauguration. Each contains the detail that Washington kissed the Bible. *See id.*

appended the words, “So help me God,” to the Oath before Franklin D. Roosevelt’s first inauguration in 1933 were Chester A. Arthur in 1881, William Howard Taft in 1909, Warren G. Harding in 1921, and Calvin Coolidge upon Harding’s death in 1923.<sup>187</sup> Coolidge reportedly said, “I do,” in response to Chief Justice Taft’s prompt of “So help me God” in 1925, and Herbert Hoover also said, “I do,” but without the prompt in 1929.<sup>188</sup> All the Presidents from Franklin Delano Roosevelt to Barack Obama have added the phrase.<sup>189</sup> But in regard to kissing the Bible, the first President to renew the custom after Washington was Andrew Jackson at his inaugurations in 1829 and 1833.<sup>190</sup> The gesture was not recorded again until Abraham Lincoln took his first Oath of Office in 1861.<sup>191</sup> After Lincoln, Presidents maintained the custom with a degree of consistency until it was finally abandoned by Dwight Eisenhower at his first inaugural in 1953.<sup>192</sup>

Regarding President Jackson, there survives a letter from Margaret Bayard Smith to Mrs. Kirkpatrick dated March 11, 1829, describing the riotous events of Jackson’s first inauguration.<sup>193</sup> She states, “After reading his [Jackson’s] speech, the Oath was administered by the Chief Justice. The Marshal presented the Bible. The President took it from his hands, pressed his lips to it, laid it reverently down, then bowed again to the people—Yes, to the people in all their majesty.”<sup>194</sup> There is also a newspaper account that Jackson kissed what was probably the Bible at his second inauguration in 1833.<sup>195</sup> And in regard to Lincoln, Wilder Dwight, in his *Life and Letters of Wilder*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> See *infra* notes 193–95 and accompanying text. But see Gleaves Whitney, *Bible Passages at Inaugurations*, HAUENSTEIN CENTER FOR PRESIDENTIAL STUDIES, <http://www.gvsu.edu/hauenstein/ask-gleaves-bible-passages-at-inaugurations-417.htm> (last visited Mar. 15, 2012) (stating that “while there are eyewitness accounts of every presidential swearing-in and inauguration, we do not have all the details about the use of a Bible at these events”) (listing the following inaugurations before Jackson’s inauguration as having insufficient information according to the Office of the Curator and Architect of the Capitol: Washington’s second inaugural, Adams’s inaugural, Jefferson’s first and second inaugurals, Madison’s first and second inaugurals, Monroe’s first and second inaugurals, and Quincy Adams’s inaugural).

<sup>191</sup> See *SHMG*, *supra* note 76 (describing accounts of inaugurations between Jackson and Lincoln, none of which mention kissing the Bible, and noting an eyewitness account of Lincoln bending to kiss the Bible after administration of the Oath in 1861).

<sup>192</sup> *Inaugurals of Presidents of the United States: Some Precedents and Notable Events*, AM. MEMORY FROM THE LIBRARY OF CONG., <http://memory.loc.gov/ammem/pihtml/pinotable.html> (last visited Mar. 15, 2012).

<sup>193</sup> MARGARET BAYARD SMITH, *THE FIRST FORTY YEARS OF THE WASHINGTON SOCIETY* 290–98 (1906).

<sup>194</sup> *Id.* at 291.

<sup>195</sup> THE SALEM GAZETTE (Mass.), Mar. 12, 1833, gives a rather confusing description of Jackson’s book-kissing at his 1833 inauguration:

John Marshall rose, ascended the steps, was received by General Jackson standing, to whom he presented a small book with his right hand,



*Dwight*, provides a description of Lincoln's first inauguration in a letter to his father stating, "When the address closed, and the cheering subsided, [Chief Justice] Taney rose, and, almost as tall as Lincoln, he administered the Oath, Lincoln repeating it; and as the words, 'to preserve, protect, and defend the Constitution' came ringing out, he bent and kissed the book."<sup>196</sup> It is also quite certain that Lincoln kissed the Bible at his second inauguration. After the event, the Chief Justice who had administered the oath, Salmon P. Chase, sent Mrs. Lincoln the Bible upon which the Oath was taken. In the accompanying letter, Chase writes, "The page touched by his lips is marked."<sup>197</sup>

Here are the instances of Bible kissing after Lincoln:

#### 1. Andrew Johnson

The accounts of Andrew Johnson's Oath of Office do not say that he kissed the Bible upon being inaugurated after Lincoln's assassination.<sup>198</sup> However, he kissed the Bible at his inauguration as vice president, an event at which he was drunk.<sup>199</sup>

#### 2. Ulysses S. Grant

The *New York Times* of March 5, 1869, reported, "Gen. Grant repeated the words, and at their conclusion kissed the Gospels. Twenty-one guns thunder out to the city and

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containing the oath, and with his left, the Bible. The General took hold of each, and having read the oath, kissed the book and Mr. Van Buren did the same. Here the ceremony ended.

Which book was it that Jackson kissed? Since he kissed the Bible in his first inauguration, he probably did the same at his second.

<sup>196</sup> ELIZA AMELIA WHITE DWIGHT, *LIFE AND LETTERS OF WILDER DWIGHT* 33 (Bos., Ticknor & Fields 1868).

<sup>197</sup> Letter from Salmon P. Chase to Mary Todd Lincoln (Mar. 4, 1865), LIBRARY OF CONG., <http://memory.loc.gov/mss/mal/mal1/410/4104900/001.jpg>. *SHMG*, *supra* note 76, questions the reliability of the reporter, Noah Brooks, who claimed that Lincoln uttered, "So help me God." In any event, his claim that Lincoln kissed the book appears accurate. See MICHAEL BURLINGAME, *LINCOLN OBSERVED: CIVIL WAR DISPATCHES OF NOAH BROOKS* 169 (1998) ("[The President] bent forward and reverently kissed the Book. . ."). The gesture also appears in B.F. MORRIS, *MEMORIAL RECORD OF THE NATION'S TRIBUTE TO ABRAHAM LINCOLN* 6 (Wash. D.C., W.H. & O.H. Morrison 1865) ("The President then reverently pressed his lips upon the sacred pages. . .").

<sup>198</sup> *The New President; Inauguration of Andrew Johnson. Brief and Impressive Ceremonies. The Oath of Office Administered Saturday by [sic] Chief-Justice Chase. President Johnson's Inaugural Address*, N.Y. TIMES, Apr. 17, 1865, available at <http://www.nytimes.com/1865/04/17/news/new-president-inauguration-andrew-johnson-brief-impressive-ceremonies-oath.html>; *SHMG*, *supra* note 76.

<sup>199</sup> HANS L. TREFOUSSE, *ANDREW JOHNSON: A BIOGRAPHY* 188–90 (1989) ("His hand on the Bible, he turned and held the book up, saying in a loud and theatrical voice, 'I kiss this Book in the face of my nation of the United States.'").

the country. . . .”<sup>200</sup> Regarding Grant’s second inauguration, the *Titusville Morning Herald*, of March 10, 1873, reported, “Chief Justice Chase repeating the text of the oath prescribed in the Constitution presented the Bible, which he held in his hand, to the President, who raised it to his lips.”<sup>201</sup>

### 3. Rutherford B. Hayes

In 1877, Rutherford B. Hayes kissed the Bible at his inauguration according to the entry for March 6, in the Diary of James A. Garfield. “The President spoke clearly and forcibly, the Chief Justice administered the oath opening a new bible which Hayes kissed somewhere in the first eleven verses of the 118 psalm.”<sup>202</sup>

### 4. James A. Garfield

The *New Hampshire Sentinel* of March 10, 1881, reported, “When he had concluded his speech, the President-elect . . . faced the Chief Justice. . . . That officer administered the oath. James A. Garfield bent low, kissed the Bible and was declared President of the United States.”<sup>203</sup>

### 5. Chester A. Arthur

After the death of President Garfield, Chester A. Arthur took the Oath of Office, as reported by the *New York Times* on September 23, 1881: “The Chief-Justice then

<sup>200</sup> *Inauguration*, N.Y. TIMES, Mar. 5, 1869, at 3, available at <http://query.nytimes.com/mem/archive-free/pdf?res=9D04EEDB1639E733A25756C0A9659C946891D7CF>.

<sup>201</sup> *Inauguration Day*, TITUSVILLE MORNING HERALD, Mar. 10, 1873. P.C. HEADLEY, THE LIFE AND CAMPAIGNS OF GENERAL U.S. GRANT 754 (N.Y., Geo. A. Leavitt 1869), indicates that President Grant kissed the Bible at his first inauguration: “General Grant repeated the words, and at their conclusion kissed the Gospels.” See also CHARLES A. PHELPS, LIFE AND PUBLIC SERVICES OF ULYSSES S. GRANT, FROM HIS BOYHOOD TO THE PRESENT TIME, AND A BIOGRAPHICAL SKETCH OF HON. SCHUYLER COLFAX 317 (Bos., Lee & Shepard 1872) (“The president bent his head and kissed the sacred volume—Ulysses S. Grant was president.”); *SHMG*, *supra* note 76.

<sup>202</sup> Diary Entry of James A. Garfield (Mar. 5, 1877), <http://memory.loc.gov/mss/mssmisc/pin/pin2601/2601001v.jpg>; see also N.Y. DAILY TRIB., Mar. 9, 1877, at 6 (“Mr. Middleton had marked the verses at the spot where Gov. Hayes kissed the book.”).

<sup>203</sup> N.H. SENTINEL, Mar. 10, 1881, available at <http://fultonhistory.com/fulton.html>; see also JAMES DABNEY MCCABE, OUR MARTYRED PRESIDENT, THE LIFE AND PUBLIC SERVICES OF GEN. JAMES A. GARFIELD 530 (Phila., P.W. Ziegler & Co. 1881) (“Rising, [the Chief Justice] tendered the book to the President-elect, and administered the customary oath of office. General Garfield kissed the page. . . .”); WILLIAM MAKEPEACE THAYER, FROM LOG-CABIN TO THE WHITE HOUSE: LIFE OF JAMES A GARFIELD 387 (Bos., James H. Earle 1881) (“At the conclusion, President Garfield reverently kissed the sacred volume, and returned it to the judge.”).

slowly administered the oath, with his eyes on the face of the President, who kissed the book and responded, ‘I will, so help me God.’”<sup>204</sup>

#### 6. Grover Cleveland

On March 4, 1885, *The Evening Post* reported, “President Cleveland reverently kissed the book, and then turned, shook hands with the Chief Justice, the ex-President, and members of the Supreme Court, and the official ceremony of inauguration was completed.”<sup>205</sup> The *Washington Post* for March 5, 1893, reports that he again kissed the Bible when he took the Oath of Office in 1893. “[T]he oath of office . . . was pronounced by Chief Justice Fuller in a clear voice, Mr. Cleveland assenting to it by bowing his head and kissing the Bible.”<sup>206</sup>

#### 7. Benjamin Harrison

There is no record that Benjamin Harrison kissed the Bible at his inauguration in 1889. Rather, like that of *The Chicago Tribune* of March 5, 1889, the accounts all agree, “At the conclusion of the reading of the oath, the President, with his right hand clasping the Bible, bowed his head in assent.”<sup>207</sup>

#### 8. William McKinley

Regarding the inauguration of William McKinley, *The Evening Post* for March 4, 1897, reports, “The new President kissed the bible presented by the Bishops of the African Methodist Church to seal his oath. There was great cheering.”<sup>208</sup> The

<sup>204</sup> *The New Administration*, N.Y. TIMES, Sept. 23, 1881, at 5, <http://query.nytimes.com/mem/archive-free/pdf?res=980DE1D9103CEE3ABC4B51DFBF66838A699FDE>. The biblical kiss is also recounted in BENJAMIN PERLEY POORE, PERLEY’S REMINISCENCES OF SIXTY YEARS IN THE NATIONAL METROPOLIS 429 (Tecumseh, Mich., A.W. Mills 1886).

<sup>205</sup> *Inauguration Day*, EVENING POST (N.Y.), Mar. 4, 1885, at 1, available at <http://fultonhistory.com/fulton.html>; see also STILSON HUTCHINS & JOSEPH WEST MOORE, THE NATIONAL CAPITAL, PAST AND PRESENT 275 (Wash. D.C., Post Publ’g Co. 1885) (recounting that Cleveland kissed the Bible); POORE, *supra* note 204, at 487 (same); *Presidential Inaugurations*, BALT. SUN, Mar. 5, 1885, <http://memory.loc.gov/ammem/pihtml/pi029.html> (“Mr. Cleveland stood at his left and Chief Justice Fuller at his right, facing each other. Mr. Cleveland and the Chief Justice each put his right hand on one-half the small Bible while the oath was being administered. As Mr. Cleveland bowed to kiss the book another prolonged shout went up. . . .”) (last visited Mar. 15, 2012); Newspaper Clipping from Grover Cleveland’s Scrap Book, source unknown, <http://memory.loc.gov/ammem/pihtml/pi029.html> (stating that Cleveland kissed the Bible) (last visited Mar. 15, 2012).

<sup>206</sup> *Arlington to the Capitol*, WASH. POST, Mar. 5, 1893; see also *Inauguration*, GRAND FORKS HERALD, Mar. 5, 1893; *The Old and the New*, DECATUR DAILEY REPUBLICAN, Mar. 6, 1893.

<sup>207</sup> CHI. TRIB., Mar. 5, 1889, at 9; see also IND. PROGRESS (Indiana, Pa.), Mar. 13, 1889; *Sworn in*, WHEELING REGISTER, Mar. 5, 1889, at 1.

<sup>208</sup> *McKinley Inaugurated*, EVENING POST (N.Y.), Mar. 4, 1885, at 1, available at <http://fultonhistory.com/fulton.html>; see also *Oath of Office Taken*, WASH. POST, Mar. 5, 1897

*Boston Globe* of March 5, 1901, states that after reciting the Oath, “Mr. McKinley bent his head and kissed the holy book with manner eager and devout. Another shout from the spectators. The deed was done.”<sup>209</sup> McKinley, then, kissed the Bible for both his inaugurations.

#### 9. Theodore Roosevelt

There is no record that Theodore Roosevelt kissed the Bible at his first inauguration on September 14, 1901, following the assassination of McKinley.<sup>210</sup> However, at his second inauguration, several sources state that he kissed the Bible. *The Albany Evening Journal*, for instance, for March 4, 1905, states, “The President solemnly repeated the oath after the chief justice and then stooped and kissed the book.”<sup>211</sup> Similarly, the *Indiana Evening Gazette* of March 4, 1905, related that after repeating the Oath, “[Roosevelt] pressed his lips upon the open pages of Holy Writ.”<sup>212</sup>

#### 10. William Howard Taft

The *Washington Post* of March 5, 1909, reported that William Howard Taft “stooped and kissed the Bible and as he did so there was a storm of spontaneous applause.”<sup>213</sup> *The Journal and Republican* of Lowville, New York, reported on March 10 of that year, “President Roosevelt also became a private citizen of the United States when President Taft kissed the Bible in consummation of his oath . . . .”<sup>214</sup>

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(McKinley “kissed the large gilt-edged Bible presented by the Bishops of the African Methodist Church to seal his oath, while the cheering of the people became one mighty roar.”); *President McKinley, The New Chief Executive Takes The Oath of Office*, J. & REPUBLICAN (N.Y.), Mar. 11, 1897.

<sup>209</sup> BOSTON GLOBE, Mar. 5, 1901.

<sup>210</sup> See *Roosevelt Masters His Emotions With Difficulty When Taking Oath*, BUFF. COURIER, Sept. 15, 1901 (“It was as if the newly made President was offering a silent prayer that God might direct . . . him from the bullets of would-be assassins and that the soul of the departed President was at peace with its maker.”); *The New President*, WASH. POST, Sept. 15, 1901, at 1 (observing that Roosevelt ended the Oath by saying, “‘And thus I swear.’ . . . The hand dropped by the side, the chin for an instant rested on the breast, and the silence remained unbroken for a couple of minutes, as though the new President of the United States was offering silent prayer.”). *SHMG*, *supra* note 76, appears to mistakenly identify the first newspaper above as *The Illustrated Buffalo Express*.

<sup>211</sup> *Inaugurated*, ALBANY J. (N.Y.), Mar. 4, 1905, available at <http://fultonhistory.com/fulton.html>.

<sup>212</sup> *Roosevelt Took Oath of Office*, IND. EVENING GAZETTE (Indiana, Pa.), Mar. 4, 1905, at 1; see also *Inauguration of Roosevelt*, WEEKLY KY. NEW ERA (Hopkinsville, Ky.), Feb. 17, 1905, at 39 (“The president-elect repeated this oath after the chief justice, and then, as all other presidents have done, kissed the open pages of the bible.”); *Roosevelt Takes Oath of Office*, NEWARK ADVOC., Mar. 4, 1905, at 1.

<sup>213</sup> *William H. Taft Inaugurated President*, WASH. POST, Mar. 5, 1909, at 17; see also *New President Is Sworn in as Head of Nation*, PITTSBURGH PRESS, Mar. 4, 1909, at 2 (“A second later the crowd saw Mr. Taft press his lips to the Holy Book.”).

<sup>214</sup> *Taft and Sherman Inaugurated*, J. & REPUBLICAN (N.Y.), Mar. 10, 1909, at 1, available at <http://fultonhistory.com/fulton.html>.

### 11. Woodrow Wilson

On March 5, 1913, the *New York Times* reported that Woodrow Wilson “stooped and kissed the opened Bible, held in the hands of James P. Maher, Deputy Clerk of the Supreme Court. His lips touched the page, turned to at random, and fell upon the 199th Psalm, verses 43 and 48 inclusive.”<sup>215</sup> The *Washington Post* of March 5, 1917, has, “Following his repetition of the oath of office [President Wilson] kissed the Bible, open at the passage, ‘The Lord is our refuge, a very present help in time of trouble.’”<sup>216</sup> The reader may also consult a video of Wilson’s second inauguration, which shows that he kissed the Bible.<sup>217</sup>

### 12. Warren G. Harding

The *New York Times* on March 5, 1921, stated that Warren G. Harding did the following: “When he added the final invocation, ‘so help me God,’ he shook his head, then bent over to kiss the Bible, and rose smiling.”<sup>218</sup>

### 13. Calvin Coolidge

The *New York Times* of August 4, 1923, reported that Calvin Coolidge, upon being informed of the passing of President Harding, took the Oath at 2:43 a.m. at his home in Plymouth, Vermont.<sup>219</sup> It was administered by his father.<sup>220</sup> There is no mention of President Coolidge kissing the Bible.<sup>221</sup> However, according to *Time Magazine* on March 16, 1925, at his second inauguration, Calvin Coolidge kissed the Bible. “A purple ribbon held [the Bible] open at the first chapter of St. John. The President kissed it perfunctorily.”<sup>222</sup>

<sup>215</sup> *Wilson Sworn in As President; Pledges Himself to Justice; Biggest Inaugural Throng*, N.Y. TIMES, Mar. 5, 1913, at 1; see also *Thousands Cheer When President Wilson Takes the Oath of Office*, OAKLAND TRIB., Mar. 4, 1913, at 5; *Wilson and Marshall Take Oath*, DAILY NORTHWESTERN (Evanston, Ill.), Mar. 4, 1913, at 9 (“The president-elect repeated the oath word for word, and kissed the open Bible. It was over. A new president had come into office.”).

<sup>216</sup> *Wilson Takes Oath; Sworn Again Today*, WASH. POST, Mar. 5, 1917, at 1; see also *Woodrow Wilson Takes Oath of Office and Begins Second Presidential Term*, MANSFIELD NEWS (Ohio), Mar. 5, 1917, at 1 (“[T]he chief executive repeated the words of the oath after the chief justice and at their conclusion kissed the proffered Bible with deep fervor.”).

<sup>217</sup> *Second Inauguration of President Woodrow Wilson*, CRITICAL PAST, [http://www.criticalpast.com/video/65675067975\\_Thomas-Woodrow-Wilson\\_United-States-Capitol\\_cavalry-troops-march\\_Edith-Bolling-Wilson](http://www.criticalpast.com/video/65675067975_Thomas-Woodrow-Wilson_United-States-Capitol_cavalry-troops-march_Edith-Bolling-Wilson) (last visited Mar. 15, 2012).

<sup>218</sup> N.Y. TIMES, Mar. 5, 1921, at 1.

<sup>219</sup> *Coolidge Sworn in at Farm Homestead*, N.Y. TIMES, Aug. 4, 1923, at 1.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*; see also STATESVILLE LANDMARK (N.C.), Aug. 9, 1923, at 1.

<sup>222</sup> *The Day of Days*, TIME MAG., Mar. 16, 1925, available at <http://www.time.com/time/magazine/article/0,9171,719997-5,00.html>; see also *Coolidge Takes Oath as President of U.S.*, AUBURN CITIZEN (N.Y.), Mar. 4, 1925, at 1, available at <http://fultonhistory.com/fulton>

## 14. Herbert Hoover and Harry Truman

For Herbert Hoover, there is a video of his inauguration, March 4, 1929, indicating that he kissed the Bible at the conclusion of the Oath of Office.<sup>223</sup> For Harry Truman, there are videos of his inauguration upon the death of Franklin D. Roosevelt, April 12, 1945, and of his second inauguration on March 4, 1949.<sup>224</sup> On both occasions he kissed the Bible.<sup>225</sup> A review of presidential oaths of office from Roosevelt to Barack Obama reveals that no other Presidents have kissed the Bible in recent times.<sup>226</sup>

To summarize, eyewitness accounts attest to Washington's biblical kiss in 1789.<sup>227</sup> Some early pre-1850 Washington biographies picked up the detail.<sup>228</sup> Andrew Jackson in 1829 and in 1833 performed the gesture, as did Abraham Lincoln in 1861 and 1865.<sup>229</sup> Then, Presidents Grant, Hayes, Garfield, Arthur, McKinley, Roosevelt, Taft, Wilson, Harding, Coolidge, Hoover, and Truman followed suit.<sup>230</sup> Presidents Arthur in 1881, Cleveland in 1885, Taft in 1909, Wilson in 1913, Harding in 1921, and Truman in 1945 and 1949, all kissed the Bible and appended "So help me God" to the Oath.<sup>231</sup> Coolidge in 1925, and Hoover in 1929, said only, "I do," and kissed the Bible.<sup>232</sup> Franklin D. Roosevelt said, "So help me God" without kissing the Bible for his four inaugurations in 1933, 1937, 1941, and 1945.<sup>233</sup> Every President after Truman has also said, "So help me God," without kissing the Bible.<sup>234</sup>

Table I, below, presents the instances in which the Presidents have observed the two customs. After Washington's inauguration, there are gaps of forty years and twenty-eight years in the tradition of kissing the book. But after Lincoln, the custom occurs regularly for ninety-two years. The inclusion of "So help me God" does not begin until ninety-two years after the founding of the country, and, after a break of

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.html ("President Coolidge bent and kissed the Bible in the hands of Chief Justice Taft . . . and the great throng recognized with a cheer that another administration had been ushered in.").

<sup>223</sup> *Herbert Hoover Takes the Oath of Office*, YOUTUBE.COM, <http://www.youtube.com/watch?v=ctAKm9G8ji8> (last visited Mar. 15, 2012).

<sup>224</sup> *Truman, April 12, 1945, Harry Truman Takes the Oath of Office*, CRITICAL PAST, [http://www.criticalpast.com/video/65675051806\\_Vice-President-Harry-S-Truman-taking-oath-of-office\\_Chief-Justice-Harlan-F-Stone](http://www.criticalpast.com/video/65675051806_Vice-President-Harry-S-Truman-taking-oath-of-office_Chief-Justice-Harlan-F-Stone) (last visited Mar. 15, 2012); *Truman, March 4, 1949, Harry Truman, 1949 Inauguration*, YOUTUBE.COM, <http://www.youtube.com/watch?v=PXE-u4WanMI> (last visited Mar. 15, 2012).

<sup>225</sup> *Id.*

<sup>226</sup> *Presidential Oath of Office* (Franklin D. Roosevelt–Barack Obama), YOUTUBE.COM, at <http://www.youtube.com/watch?v=tYnYdTICqTc> (last visited Mar. 15, 2012); *see also SHMG*, *supra* note 76 (providing a link for videos of the presidential swearing-in ceremonies).

<sup>227</sup> *See supra* Part III.A.

<sup>228</sup> *See supra* notes 183–86 and accompanying text.

<sup>229</sup> *See supra* notes 190–97 and accompanying text.

<sup>230</sup> *See supra* notes 200–24 and accompanying text.

<sup>231</sup> *See supra* notes 187, 204–24 and accompanying text.

<sup>232</sup> *See supra* notes 188, 222–23 and accompanying text.

<sup>233</sup> *See supra* note 226 and accompanying text.

<sup>234</sup> *See supra* note 226 and accompanying text.

another twenty-eight years, starts up again. It then occurs sporadically alongside the biblical kiss for forty years. Roosevelt's four inaugurations may have been influential in establishing "So help me God" and weakening kissing the book. Although Truman did both afterwards, beginning with Eisenhower, all Presidents have used the utterance rather than the gesture. It seems fair to say that the custom of kissing the Bible has an older historical provenance than "So help me God." It also appears that "So help me God" in effect replaced kissing the book after the middle of the twentieth century.

**TABLE I**

<b>President</b>	<b>"So help me God"</b>	<b>Kissed the Bible</b>
Washington	No	Yes (1789 only)
Adams to Quincy Adams	No	No
Jackson	No	Yes (1829 & 1833)
Van Buren to Buchanan	No	No
Lincoln	No	Yes (1861 & 1865)
Johnson	No	No
Grant	No	Yes (1869 & 1873)
Hayes	No	Yes (1877 & 1881)
Garfield	No	Yes (1881 & 1885)
Arthur	Yes (1881)	Yes (1881)
Cleveland	No	Yes (1885 & 1893)
Harrison	No	No
McKinley	No	Yes (1897 & 1901)
Roosevelt	No	Yes (1905 only)
Taft	Yes (1909)	Yes (1909)
Wilson	Yes (1913 only)	Yes (1913 & 1917)
Harding	Yes (1921)	Yes (1921)
Coolidge	No	Yes (1925 only)
Hoover	No	Yes (1929)
Roosevelt	Yes (1933, 1937, 1941 & 1945)	No
Truman	Yes (1945 & 1949)	Yes (1945 & 1949)
Eisenhower to Obama	Yes (at all inaugurations)	No

#### IV. THE MEANING OF THE OATH

When I was an associate in a large law firm, one of my earliest assignments was to prepare a memorandum in support of a summary judgment motion. The partner who reviewed my finished work had one major criticism. I had used the title, "Prayer

for Relief,” for the concluding section, the one in which an attorney states what the attorney is asking the court to do. In law school, I had learned that this was a common, acceptable title for this section.<sup>235</sup> In explaining why he wanted the title of this section changed, however, the partner supervising my work tartly observed that he supported “the separation of church and state.” Whatever one might think of this application of separationist doctrine, the partner’s observation has often led me to contemplate the difficulty of completely purging legal language of religious terms and meaning when the language of the law was often historically conceived in religious contexts with the result that many common legal terms still retain religious connotations. The oath is a good example of this, for it is a word with nearly as much religious content as “prayer.”<sup>236</sup>

#### A. *The Ancient History of the Oath*

The oath is an artifact from a pre-religious, animistic past, a conditional self-curse that operated “automatically, by virtue of the inherent magic of word or gesture . . .”<sup>237</sup> When human culture developed belief in supernatural or divine beings, the oath ceased to operate independently as magic, but rather relied on the gods to exact vengeance for perjury or faithlessness to the oath.<sup>238</sup> The ancient Greek word for oath, *Orkos*, refers to the son of Eris, the goddess of discord.<sup>239</sup> According to Hesiod, *Orkos* is “the divinity who punishes the false and the perjured.”<sup>240</sup> Hence, the oath is a device to restrain the discord of falsehood and promote the order of truth.<sup>241</sup>

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<sup>235</sup> LAUREL CURRIE OATES & ANNE ENQUIST, *THE LEGAL WRITING HANDBOOK, ANALYSIS, RESEARCH, AND WRITING* 299 (5th ed. 2010), still makes use of this title, though most legal writing textbooks do not.

<sup>236</sup> For a good introduction to the history of the oath, see generally ENOCH LEWIS, *A DISSERTATION ON OATHS* (Phila., U. Hunt & N. Kite 1838); PAULEY, *supra* note 128; JAMES ENDELL TYLER, *OATHS; THEIR ORIGIN, NATURE, AND HISTORY* (London, J.W. Parker 1834); Blomquist, *supra* note 28; Milhizer, *supra* note 128; and Helen Silving, *The Oath: I*, 68 *YALE L.J.* 1329 (1959).

<sup>237</sup> Silving, *supra* note 236, at 1330; *see also* Milhizer, *supra* note 128, at 6 (“Oaths are a virtually universal custom, which precede the type of recorded history that would allow for a complete analysis of their origin. . . . These self-curse customs acted as a guarantor of truth insofar as the witness believed that a false statement would result in his imminent peril. . . .”); *cf.* MICHAEL GAGARIN & ELAINE FANTHAM, eds., 5 *THE OXFORD ENCYCLOPEDIA OF ANCIENT GREECE AND ROME* 83 (2010) (“An oath is, in effect, a conditional self-curse . . .”).

<sup>238</sup> Silving, *supra* note 236, at 1331.

<sup>239</sup> PAULEY, *supra* note 128, at 44.

<sup>240</sup> *Id.*; *see also* HESIOD, *WORKS AND DAYS, THEOGONY, THE SHIELD OF HERAKLES* 113 (Richmond Lattimore trans., 1961).

<sup>241</sup> PAULEY, *supra* note 128, at 44 (“The entry informs us . . . that *orkos* derives etymologically from an earlier term, properly understood to mean ‘that which restrains from doing a thing.’”); *cf.* Milhizer, *supra* note 128, at 4 (“The universality of oaths can be explained by their close connection to two dominant aspects of human nature: a natural inclination for truth and a misdirected self-interest that is sometimes opposed to it.”).



In Homer's *Iliad*, Agamemnon swears an impressive oath that he has not had sex with the slave girl Briseis, calling upon various deities to inflict terrible punishments on him if what he says is false.

Let Zeus first be my witness, highest of the gods and greatest,  
and Earth, and Helios the Sun, and Furies, who underground  
avenge dead men, when any man has sworn to a falsehood,  
that I have never laid a hand on the girl Briseis  
on pretext to go to bed with her, or for any other  
reason, but she remained, not singled out, in my shelter.  
If any of this is falsely sworn, may the gods give me many  
griefs, all that they inflict on those who swear falsely before them.<sup>242</sup>

In Greece and Rome, Zeus or Jupiter (Jove) was believed to strike perjurers dead with his thunderbolts.<sup>243</sup>

It is worth noting, however, that faithfulness to an oath did not insulate the oath taker from temporal pain and suffering. In his *City of God*, St. Augustine recounts the story of Marcus Attilus Regulus, a Roman general held captive by the Carthaginians, Rome's arch-enemy during the Punic Wars.<sup>244</sup> His captors sent him back to Rome with a special Carthaginian envoy to negotiate a prisoner exchange, but only after he had sworn an oath to return if the negotiations failed.<sup>245</sup> In Rome, Regulus persuaded the Senate not to agree to the prisoner exchange because it would not be in Rome's best interest to make the exchange.<sup>246</sup> Though the Roman senators would have let him remain in Rome, Regulus, true to his oath, returned to Carthage, preferring to suffer horrible tortures and certain death rather than offend the gods by whom he had sworn.<sup>247</sup>

Greeks and Romans swore oaths by their deities.<sup>248</sup> In ancient Greece, oaths were significant for military service and judicial proceedings.<sup>249</sup> In ancient Rome, fidelity

<sup>242</sup> HOMER, *THE ILIAD AND THE ODYSSEY OF HOMER*, in 3 GREAT BOOKS OF THE WESTERN WORLD, Bk. 19, ll. 258–65, at 238 (Richmond Lattimore trans., 2d ed. 1990); TYLER, *supra* note 236, at 206 (citing HOMER, *THE ILIAD* Bk. XIX, l. 258). Milhizer, *supra* note 128, at 7 n.22, identifies the three earliest oaths in the Bible: *Genesis* 14:22, when Abraham swears not to take anything belonging to the King of Sodom; *Genesis* 21:22–24, when Abraham swears he will not deal falsely with Abimelech; and *Genesis* 8:21, when, after Noah's flood, God, perhaps somewhat illogically, swears He will never again kill all living beings because of man's evil.

<sup>243</sup> Silving, *supra* note 236, at 1331.

<sup>244</sup> PAULEY, *supra* note 128, at 58. The account may be found in AUGUSTINE, *THE CONFESSIONS, THE CITY OF GOD, ON CHRISTIAN DOCTRINE*, in 16 GREAT BOOKS OF THE WESTERN WORLD, Bk. I, ch. 15, at 175 (R.S. Pine-Coffin trans., 2d ed. 1990).

<sup>245</sup> AUGUSTINE, *supra* note 244, at 175.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> See Milhizer, *supra* note 128, at 10 (“The oaths of ancient Greece are characterized by idolatry of their deities, leaders, and heroes. . . .”); *id.* at 11 (“In ancient Rome, a society noted for the power and importance of the state and fidelity to the law, swearing by the emperor and the Roman gods was a common practice.”).

<sup>249</sup> *Id.* (“The oath attained special significance in judicial proceedings . . . as judges, jurors,

to one's oath was the mark of a free and noble character, as the story of Regulus indicates.<sup>250</sup> The early Christians, however, were reluctant to swear oaths because of the apparent prohibition contained in *Matthew 5:33–37*.<sup>251</sup> Nevertheless, testimonial oaths became institutionalized in Roman law during the fourth century when Constantine, wrongly thinking he was following Christian practice, required witnesses to be sworn.<sup>252</sup> With assimilation into Roman society, Christians grew receptive to taking oaths.<sup>253</sup> During the sixth century, the Roman provision requiring testimonial oaths was incorporated into the Code of Justinian.<sup>254</sup>

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and witnesses rendered verdicts or provided evidence while under oath. . . .”) (citing JOSEPH PLESCIA, *THE OATH AND PERJURY IN ANCIENT GREECE* 33 (1970)).

<sup>250</sup> PAULEY, *supra* note 128, at 55 (“With respect to the force of oaths in the Roman republican tradition, Montesquieu observes that nothing ‘among those people . . . bound them more strongly to the laws.’ And to illustrate the fact that they ‘often did more for the observance of an oath than they would ever have performed for the thirst of glory or the love of their country,’ he cites several examples out of Livy.”) (citing 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 118–19 (Thomas Nugent trans., Hafner Press 1949) (1748)); Silving, *supra* note 236, at 1337 (“Absolute veracity was the mark of a proud, self-confident and free man, lying the mark of a slave.”). Pauley discusses the views of several ancient writers on oaths. PAULEY, *supra* note 128, at 45–61. *But see* Silving, *supra* note 236, at 1337 (“[T]he more enlightened philosophers expressed grave doubts about the . . . evidentiary efficacy and moral value [of oaths]. Aristotle characterized the oath as ‘an unproved statement supported by an appeal to the gods.’ . . . The oath . . . declined in importance. Consequently, later Roman restoration of the Graeco-Roman oath tended to supplement divine retribution with incidental secular punishment.”) (quoting ARISTOTLE, *RHETORIC TO ALEXANDER* 349 (H. Rackham trans., 2002)).

<sup>251</sup> Again, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you, Swear not at all; neither by heaven; for it is God's throne: Nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay; for whatsoever is more than these cometh of evil.

*Matthew 5: 33–37* (King James); *see also James 5:12* (King James) (“But above all things, my brethren, swear not, neither by heaven, neither by the earth, neither by any other oath: but let your yea be yea; and your nay, nay; lest ye fall into condemnation.”).

<sup>252</sup> Silving, *supra* note 236, at 1337 (citing the *Constitution of Naissus*, in STEPHAN KUTTNER, *DIE JURISTICHE NATUR DER FALSCHEN BEWEISAUSSAGE* 11 n.24 (1931)).

<sup>253</sup> Milhizer, *supra* note 128, at 12–13 n.45 (citing TYLER, *supra* note 236, at 149–50). Mainstream Christianity has come to accept the oath for serious matters or when required by the state, but not for trivial matters. Milhizer, *supra* note 128, at 12–13 n.45.

<sup>254</sup> Silving, *supra* note 236, at 1337. Milhizer explains that the Eastern Roman Emperor Justinian (482–565) ordered the collection and codification of Roman law in order to produce a normative body of law for the courts and the law schools. Milhizer, *supra* note 128, at 13 n.50. This process, which continued throughout Justinian's reign from 527 to 565, produced the *Corpus Juris Civilis*, which consists of four parts: the *Codex*, the *Digest*, the *Institutes*, and the *Novellae*. The text of the *Code* that provides for the oath may be found at ANNOTATED

With the fall of paganism and the rise of Christianity as the official religion of state, the Christian God replaced the pagan deities as the avenging agent who punished false oaths sworn in His Name.<sup>255</sup> Thus, the oath retained the qualities of its magical or providential origin, as exemplified in trial by oath or compurgation, a Germanic tradition evident in early English judicial procedure.<sup>256</sup> To defend against an action, the litigant would swear an oath denying the claim. Depending on reputation and social standing, the defendant could repeat the oath and have others in the community swear on his behalf. The “oath-helpers” did not swear to their personal knowledge of the facts, but rather to the belief that the defendant was honest or innocent.<sup>257</sup>

A perjurer put her soul in jeopardy of eternal damnation, while the guilty or notorious was unlikely to find oath-helpers. Like the ordeals and battle, compurgation also depended on divine judgment, which was revealed in the ability (or lack of it) of a defendant and his assistants to complete the oath-swearing ritual successfully.<sup>258</sup>

In his *Principles of Moral and Political Philosophy*, Christian apologist William Paley provided the following definition of an oath: “It is the calling upon God to witness, *i.e.* to take notice of, what we say, and it is invoking his vengeance, or renouncing his favour, if what we say be false, or what we promise be not performed.”<sup>259</sup> Paley published this definition in 1785, only four years before Washington’s inauguration.<sup>260</sup> The definition, then, provides an excellent reference for the meaning that Washington’s contemporaries likely gave to an oath. Paley explains the sense of “So help me God” as follows: “The energy of the sentence resides in the particle *so*; *so*, that is, *hâc lege*,

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JUSTINIAN CODE, 4-20-9 (Timothy Kearley ed., Fred H. Blume trans., 2d ed. 2010), UNIV. OF WYO., COLL. OF LAW, GEORGE WILLIAM HOPPER LIBRARY, <http://uwacadweb.uwyo.edu/blume&justinian/> (“We have long since directed that witnesses, before they give their testimony, must be put under the sanctity of an oath, and that more credence should be given to witnesses of honorable standing (than to others).”) (last visited Mar. 15, 2012).

<sup>255</sup> Silving, *supra* note 236, at 1341, 1354.

<sup>256</sup> *Id.* at 1335 (“The original judicial oath was not incidental to testimonial evidence. . . . It was but a means of fortifying the litigants’ oath.”).

<sup>257</sup> *Id.* at 1363 (“As among all other Germanic peoples, these declarants were not true witnesses but compurgators. . . . While the required number of compurgators could be as high as three hundred persons, a foreigner might, according to certain customs, substitute for compurgators his own oath taken in the six nearest churches, that is, six times. Clearly, the magic of the oath lay in its sheer external force, determined by the number of swearers or repetitions. . . . In 1833 it was finally abolished by Parliament.”).

<sup>258</sup> John S. Beckerman, *Procedural Innovation and Institutional Change in Medieval English Manorial Courts*, 10 L. & HIST. REV. 197, 203 (1992).

<sup>259</sup> WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 109 (Liberty Fund 2002) (1785) (internal quotation marks omitted).

<sup>260</sup> *Id.* at xi, xxxiii.

upon condition of my speaking the truth, or performing this promise, and not otherwise, may God help me.”<sup>261</sup> Further examination of the Latin from which the English phrase is translated confirms this interpretation.<sup>262</sup> In “Ita me adjuvet Deus,” the verb “adjuvet” is in the subjunctive,<sup>263</sup> suggesting a condition depending on “ita,” which means “thus” or “so.”<sup>264</sup> The meaning of the phrase within its context is as follows:

<i>Ita</i>	<i>me</i>	<i>adjuvet</i>	<i>Deus</i>
So	me	may help	God
On the condition that		may God favor me	
what I say is true,		[but not otherwise]	

One may note that Paley’s definition of oath is dual in nature. The first part—“the calling upon God to witness”—implies that God, somewhat like the oath-helpers of medieval English procedure, attests to the truth or falsity of the oath by favoring or punishing the oath taker.<sup>265</sup> The second part of the definition—“invoking [God’s] vengeance, or renouncing his favour, if what we say be false, or what we promise be not performed”—identifies the oath as the conditional curse discussed above.<sup>266</sup> The first meaning may be found in some sources. For instance, Johnson’s *Dictionary* defines the oath as “[a]n affirmation . . . corroborated by the attestation of the Divine

<sup>261</sup> *Id.* at 111–12. After quoting Paley’s definition and examining several authorities, Tyler comes to a similar conclusion that this phrase, which seems to seek a blessing, actually places a limiting condition on God’s help or favor. TYLER, *supra* note 236, at 246 (“The nature of an oath involves our saying, ‘May the Deity so far favour me as that is true which I affirm . . .’”).

<sup>262</sup> PALEY, *supra* note 259, at 112.

<sup>263</sup> The OXFORD LATIN DICTIONARY 46 (1982), defines *adjuvo* as “3 (of circumstances, etc.) To be of advantage to, help, benefit, avail.” The dictionary also identifies *adjuvo* as a verb of the first declension. *Id.* In the dictionary the definition is under *adiuvo*. *Id.* FREDERICK M. WHEELOCK, WHEELOCK’S LATIN app. at 452–53 (Richard A. LaFleur, rev., 6th ed. 2000), provides the paradigm for the Latin verb “laudo,” which, like *adjuvo*, is in the first declension. The ending for the third person, singular subjunctive of *laudo* is *laudet*, and thus, the same form for *adjuvo* is *adjuvet*. *Id.*

<sup>264</sup> OXFORD LATIN DICTIONARY, *supra* note 263, at 973, defines the word, “ita,” as “(w. inferential force) Since that is so, accordingly, therefore.”

<sup>265</sup> Silving, *supra* note 236, at 1337, notes,

Variations in the oath formulae also record the transition from proof by oath to testimonial proof. Some Old Testament and Arabic oaths invoked God as a “witness.” In these oaths, it would seem, God still functioned as a “compurgator,” adding strength to the utterer’s case rather than testifying as a witness.

*Id.* (citations omitted).

The second definition of the oath, calling upon God to witness the truth of what is said, may be a rationalization marking the transformation of the oath from a magical talisman to a device for eliciting truth.

<sup>266</sup> PALEY, *supra* note 259, at 113.

Being.”<sup>267</sup> However, Silving is almost certainly right in saying, “In all its various forms, . . . the oath remains essentially a self-curse, even when disguised as a blessing or an invocation of God’s testimony. The curse ‘is part of the oath, as the threat of punishment is part of the law.’”<sup>268</sup>

This understanding of the Oath appears repeatedly in sources before and after Washington’s inauguration. For instance, the philosopher Thomas Hobbes, in his *Leviathan* (1659), speculates about how humankind may escape from the state of nature, which Hobbes famously characterized as a war of each against everyone.<sup>269</sup> He suggests that the escape might be achieved by exploiting man’s fear of what would happen in the afterlife by means of the solemn oath:

All . . . that can be done between two men not subject to Civil Power, is to put one another to swear by the God he feareth: Which Swearing or OATH is a *Forme of Speech, added to a Promise; by which he that promiseth signifieth that, unless he performeth, he renounceth the mercy of his God or calleth to him for vengeance on himself.* Such was the Heathen Forme, *Let Jupiter kill me else, as I kill This beast.* So is our Forme, *I shall do thus, and thus, so help me God.*<sup>270</sup>

This sense of what an oath entails continues after the Revolutionary period. Jeremy Bentham, an incisive critic of the oath, defined the oath as follows in 1817:

By the term *oath*, . . . is universally understood, a ceremony composed of words and gestures, by means of which the Almighty is engaged eventually to inflict on the taker of the oath, or *swearer*, as he is called, punishment, . . . in the event of his doing something which he, the swearer, . . . thereby engages not to do, or omitting to do something which he in like manner engages to do.<sup>271</sup>

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<sup>267</sup> 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 105 (London, J. Knapton 1756).

<sup>268</sup> Silving, *supra* note 236, at 1336 (citing RUDOLF HIRZEL, DER EID, EIN BEITRAG ZU SEINER GESCHICHTE 139 (1902)).

<sup>269</sup> “Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man.” THOMAS HOBBS, LEVIATHAN 83 (A.R. Waller ed., 1904) (1659).

<sup>270</sup> *Id.* at 96 (citations omitted) (quoted by PAULEY, *supra* note 128, at 34). Hobbes’s contemporary, John Milton, reflects this understanding along with the testamentary idea of the oath: “AN OATH is that whereby WE CALL GOD TO witness the truth of what we say, with a curse upon ourselves, either implied or expressed, should it prove false.” JOHN MILTON, A TREATISE ON CHRISTIAN DOCTRINE, COMPILED FROM THE HOLY SCRIPTURE ALONE 579 (Charles Sumner trans., Cambridge Univ. Press 1825) (published after Milton’s death in 1674).

<sup>271</sup> JEREMY BENTHAM, “SWEAR NOT AT ALL”: CONTAINING AN EXPOSURE OF THE NEEDLESSNESS AND MISCHIEVOUSNESS, AS WELL AS ANTI-CHRISTIANITY OF THE CEREMONY OF AN OATH: A VIEW OF THE PARLIAMENTARY RECOGNITION OF ITS NEEDLESSNESS, IMPLIED

Some ratifiers of the Constitution had precisely this understanding of what an oath meant. At the Connecticut Ratifying Convention, there were representatives who wanted the Constitution to include a religious test. Oliver Wolcott maintained that this was not necessary because Article VI already provided one in requiring federal and state officials to “be bound by Oath or affirmation, to support this Constitution.” He argued:

I do not see the necessity of a test as some gentlemen wish for. The Constitution enjoins an oath upon all the officers of the United States. This is a direct appeal to that God who is the avenger of perjury. Such an appeal to him is a full acknowledgment of his being and providence.<sup>272</sup>

Of course, his argument was quite erroneous in perceiving the choice of oath or affirmation as a religious test, since the option of making an affirmation allows one to avoid taking any religious position. However, the passage does reflect the conditional curse understanding of the oath.

Authorities have organized oaths into many categories, but the two main divisions are the assertory oath and the promissory oath.<sup>273</sup> An assertory oath “required the taker to acknowledge the truth or falsehood of statements concerning actions that occurred in the past.”<sup>274</sup> The oath that a witness takes in court would fall into this category. “A promissory oath, . . . bound the swearer to perform his promise in the future.”<sup>275</sup> A subdivision of the promissory oath is the oath of loyalty to the state, and the oaths which are sworn by the President and federal and state officials to defend the Constitution belong to this category.<sup>276</sup> These categories are not completely distinct, as a witness

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IN THE PRACTICE OF BOTH HOUSES, *in* 5 THE WORKS OF JEREMY BENTHAM 1 (John Bowring ed., London, Simpkin, Marshall, & Co. 1838–1843) (1817).

<sup>272</sup> 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 202 (J. Elliot ed., 1836), [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(ed0025\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(ed0025))) (last visited Mar. 15, 2012) (quoted by SANFORD LEVINSON, CONSTITUTIONAL FAITH 55 (1981)). The state representatives of South Carolina also thought that any oath of allegiance to the Constitution would be in the nature of a religious test and therefore passed the recommendation: “Resolved that the third section of the Sixth Article ought to be amended by inserting the word ‘other’ between the word ‘no’ and ‘religious.’” 4 THE FOUNDERS’ CONSTITUTION 645 (Philip Kurland & Ralph Lerner eds., 1987). The relevant portion of Article VI would then read, “but no *other* religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”

<sup>273</sup> DAVID MARTIN JONES, CONSCIENCE AND ALLEGIANCE IN SEVENTEENTH CENTURY ENGLAND: THE POLITICAL SIGNIFICANCE OF OATHS 97 (1999); *see also* TYLER, *supra* note 236, at 257 (using the term, “declaratory” for “assertory.”).

<sup>274</sup> JONES, *supra* note 273, at 97.

<sup>275</sup> *Id.*

<sup>276</sup> PAULEY, *supra* note 128, at 117, cites an article by Ralph S. Brown, *Loyalty Oath*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (L. W. Levy, K.L. Karst, & D.H. Mahoney eds., 1968), that characterizes the presidential oath as “a mild form of loyalty oath.”

can be perceived to be promising to tell the truth, and someone who makes a promise under oath may be thought of as asserting that the promise will be truly carried out.

### *B. The Modern History of the Oath*

At the time of Washington's inauguration, the state or loyalty oath had experienced a long, tortured history in England and its colonies. In 1716, Thomas Beade, writing on the history of oaths, stated it was certain "that no nation in the world has invented more variety of state oaths."<sup>277</sup> He was referring to a development that began in 1534 when Henry VIII, in an effort to extend his government's power and control, modified both the English coronation oath and the feudal oath of allegiance to give the King unconditional authority over both church and state.<sup>278</sup>

Over the next two centuries, the British government demanded a variety of loyalty oaths of political and religious allegiance from portions of the population, which at times included all males over sixteen, and imposed penalties such as loss of office, confiscation of property, and even death.<sup>279</sup> The objects of the loyalty that was professed

<sup>277</sup> JONES, *supra* note 273, at 11 (citing T. BEADE, THE HISTORY OF PUBLICK AND SOLEMN STATE OATHS FROM THE CONQUEST TO THE PRESENT TIME 6 (1716)). Jones goes on to state,

Beade further showed that in the medieval period, England had shared a general European predilection for securing the fidelity or "ligeance" of the more significant vassals of the realm by sundry "antient" feudal oaths. However, a distinctive practice of promulgating oaths had developed in England and this "varying and multiplying of oaths is not to be found among us before the reign of King Henry VIII."

*Id.* (citing BEADE, *supra* at 7).

<sup>278</sup> *Id.* at 25–30. In regard to the coronation order, Tudor officials negated the element of popular consent within the traditional medieval oath.

The coronation ritual presented obvious difficulties for the Tudor view that the allegiance owed to the Crown was unconditional. The monarch's breach of the coronation oath had, in the past century, constituted grounds for resistance, and would do so again in the future. Tudor officials tried to overcome this defect by modifying the ritual. Negating the element of popular consent in the coronation would convey to subjects that the monarch owed his appointment directly to God and that he exercised an authority for which he was accountable to God alone.

*Id.* at 26. As to the feudal oath, Henry's officials replaced it with: (1) the Oath of Succession, in which English subjects swore that they recognized the issue of the King and Anne Boleyn as legitimate, "implicitly renounc[ing] the spiritual supremacy of the pope"; and (2) the Oath of Supremacy, in which English subjects explicitly renounced the Pope and accepted the "King's majesty as the only supreme head in earth of the church of England." *Id.* at 30–31. "In the course of the 1530s, the government introduced general oaths loosely based on the feudal oath of allegiance to test the loyalty of English subjects. At the same time the government substantially expanded the law relating to treason." *Id.* at 30. "[T]he penalty for refusing the new oaths was misprision of treason and, for a brief period, full treason." *Id.* at 31. The best known recusant was Sir Thomas More.

<sup>279</sup> *Id. passim.*

in these oaths would depend on the recent succession to the throne, the political struggles between king and parliament, and the volatile fortunes of religious denominations. These oaths of allegiance included: The Elizabethan Oath of Supremacy of 1559;<sup>280</sup> the Oath of Allegiance of 1606;<sup>281</sup> A Sacred Vow and Covenant Taken by the Lords and Commons Assembled in Parliament of 1645;<sup>282</sup> A Solemn League and Covenant, 1643;<sup>283</sup> the Engagement, 1649, and the Protectorate Oath, 1654;<sup>284</sup> oaths supporting the Restoration, 1661–1665;<sup>285</sup> oaths supporting the Glorious Revolution, 1688;<sup>286</sup> and Anti-Catholic Oaths.<sup>287</sup> Taking these oaths created difficulties not only for Catholics, but also for religious dissenters of “tender conscience” who, like the early Christians, believed it was sinful to swear in God’s name.<sup>288</sup> The imposition of oaths over the course of the seventeenth century requiring English subjects not only to conform to a shifting alliance between church and state, but also to swear a solemn oath of allegiance to the King; and then betray that oath and substitute it with another solemn oath of allegiance to Parliament; and then to betray that allegiance and to pledge loyalty once again to the King; and finally betray the allegiance to that King in favor of another chosen by Parliament, would seem likely to result in skepticism and cynicism regarding the significance of all these oaths. Aside from that, this back and forth swearing of oaths under duress resulted in an ample literature of casuistry, that is, the resolution of the moral dilemmas caused by this contradictory oath taking on the basis of ethical principles and religious doctrine.<sup>289</sup>

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<sup>280</sup> *Id.* at 271–72. This was a continuation of the Henrician effort to extract the recognition that the English monarch was the head of the Church of England. *Id.* at 48.

<sup>281</sup> *Id.* at 272–73. By this oath, King James I attempted to separate politically disloyal Catholics from those who accepted the Protestant monarchy. *Id.* at 44.

<sup>282</sup> *Id.* at 274–75. With this oath Parliament attempted to exact allegiance to itself rather than to the King. *Id.*

<sup>283</sup> *Id.* at 275–78. This oath attempted to impose reforms on the Church of England modeled on the Presbyterianism of Scotland in order to bring the Scots into the Civil War on the Parliament’s side. *Id.* at 125.

<sup>284</sup> *Id.* at 278–79. By these means Parliament, and later Oliver Cromwell, tried to gain allegiance to the Commonwealth. *Id.*

<sup>285</sup> *Id.* at 279–80. The restored monarchy reinstated the Oaths of Succession and Supremacy and added other oaths to indicate that there were no circumstances under which subjects could lawfully resist the King. *Id.*

<sup>286</sup> *Id.* at 280–81. These oaths directed loyalty to William and Mary, who were not in the line of succession, but rather were chosen by Parliament upon the forced abdication of James II. *Id.* at 280.

<sup>287</sup> *Id.* at 281–84.

<sup>288</sup> *See id.* at 40 (“Contention came from two conflicting sources: Puritanism, or more precisely radical Presbyterianism, . . . and Counter-Reformation Jesuitry . . .”); *id.* at 51 (“An analogous consequence of the political pressure to conform to an authoritative arrangement in church and state stimulated the emergence of a sometimes captious, often tender, Puritan conscience.”).

<sup>289</sup> *Id.* at 5 (“From a variety of perspectives, historians of ideas . . . have drawn attention to the centrality of religion, law, conscience, and casuistry in both seventeenth- and early eighteenth-century political debate concerning the vexed issue of political obligation.”).



The English colonists who came to America faced more conflicting oaths. Not only did they have to swear the English oaths, as did, for example, the settlers of Virginia,<sup>290</sup> but also oaths to the colonial governments, as did the settlers of Massachusetts Bay, who in 1634 drew up their own oath of loyalty to the Commonwealth of Massachusetts, rather than to the King.<sup>291</sup> It was not repressed until 1684.<sup>292</sup> As for the War for Independence, “Loyalty tests played a primary role in structuring the Revolution.”<sup>293</sup> To oppose the British tax programs, the colonists organized boycotts enforced by oaths.<sup>294</sup> In 1774, the Continental Congress designed the colonists’ first standard loyalty test.<sup>295</sup> “With practiced efficiency and bland assurances of continued loyalty to the king, Whig committees enforced the provisions of the oath by social ostracism, economic pressure, and physical terrorism.”<sup>296</sup> In the course of the War, colonists found themselves forced to sign loyalist oaths and then rebel oaths as the lines of occupation shifted between the two armies.<sup>297</sup> “By 1778 every state boasted a treason law. . . . Each state had, by 1778, created a loyalty test for all its residents to swear.”<sup>298</sup>

Loyalty oaths again played a vital role during the Civil War, as both the North and South used them to gain control of the population.<sup>299</sup> According to Hyman, Lincoln deployed an effective policy of offering captured rebels or imprisoned Confederacy

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<sup>290</sup> See HAROLD M. HYMAN, *TO TRY MEN’S SOULS: LOYALTY TESTS IN AMERICAN HISTORY* 5 (1959) (“Through the succession of charter changes that followed upon the first precarious years of the Jamestown settlement, one constant note is the king’s and company’s nominal agreement . . . that only loyal men should go to Virginia. . . . So the first charter of Virginia required every company officer and colonist to swear to the lengthy oath of allegiance and supremacy of which James was so proud.”); *id.* at 11 (“[W]hether as members of the initial commercial organization of the Anglican Virginia colony or under its later royal control, as participants in the search for an independent theocracy which the Calvinist Puritans pursued in New England, or as adventurers in the Catholic proprietary colony of Maryland, new Americans carried their heritage of England’s loyalty problems with them.”).

<sup>291</sup> *Id.* at 14–15.

<sup>292</sup> *Id.* at 40–46.

<sup>293</sup> *Id.* at 61.

<sup>294</sup> *Id.* at 62–63. The boycott which the Massachusetts assembly imposed in 1774 was enforced with a loyalty test called the Solemn League and Covenant. *Id.* at 63.

<sup>295</sup> *Id.* at 64–65.

<sup>296</sup> *Id.* at 65.

<sup>297</sup> Hyman describes how in late 1775 to 1776, “George Washington and the Continental Army entered the loyalty-testing business” and “launched loyalty-testing expeditions into the heavily Tory and strategically important Rhode Island and Long Island areas.” *Id.* at 74–75. When a year later, “General Howe’s redcoats flooded across Long Island, New York City, and New Jersey. . . . In the areas abandoned in the face of British might, thousands of civilians, firmly sworn to Whig allegiance, welcomed the royal forces with no apparent taint of conscience.” *Id.* at 78.

<sup>298</sup> *Id.* at 85.

<sup>299</sup> *Id.* at 139 (“Civil War loyalty-testing divides naturally into three parts—Northern, Southern, and the ever-changing border region between the two.”).

sympathizers generous terms of clemency provided that they signed the oath of loyalty to the Union.<sup>300</sup> It was during this period that “So help me God” made a comeback. In an effort to keep Confederate sympathizers out of government office, Congress substantially expanded the language and appended “So help me God” to the oath required of government officials by Article VI of the Constitution, reversing the omission of the 1789 Judiciary Act.<sup>301</sup> The Supreme Court declared this so-called “ironclad” oath unconstitutional as a bill of attainder and a law *ex post facto* in 1868.<sup>302</sup> Congress maneuvered around this by means of the third section of the Fourteenth Amendment, which barred anyone from federal or state office who had contributed to the rebellion

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<sup>300</sup> *Id.* at 141 (“Behind the harshness, Lincoln’s mercy palliated the worst features of the disloyalty prevention program. . . . Lincoln would trust the seemingly innocent man who, seeking freedom, would pay for it by swearing loyalty to the federal government. Lincoln’s mercy was the mercy of trust in the honor of Americans, buttressed by his view of presidential power.”).

<sup>301</sup> An Act to Prescribe an Oath of Office, and for Other Purposes, ch. 128, 12 Stat. 502 (1862). The text of the Oath is as follows:

I, A.B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God[.]

*Id.*

<sup>302</sup> Vic Snyder, *You’ve Taken an Oath to Support the Constitution, Now What? The Constitutional Requirement for a Congressional Oath of Office*, 23 U. ARK. LITTLE ROCK L. REV. 897, 908 (2001). *Ex parte Garland*, 71 U.S. 333, 377 (1866), states:

As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. All enactments of this kind . . . are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included. . . . In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an *ex post facto* law.

after taking the oath of loyalty to the United States Constitution.<sup>303</sup> On July 11, 1868, Congress replaced the ironclad oath with an oath that supporters of the Confederacy whose legal disability had been removed by Congress could take.<sup>304</sup> Then, in 1871, Congress enacted a statute that permitted former Confederate supporters to take the relaxed oath of 1868, and those who had never supported the Confederacy to take the Ironclad Oath.<sup>305</sup> On May 13, 1884, Congress made the 1868 oath one that all federal and state employees would take, and it remains in place to this day, retaining the words, “So help me God.”<sup>306</sup>

Aside from the presidential oath and the federal oath for government officials under discussion, oaths are commonly required for a variety of professional endeavors such as the military, the university, and the bar.<sup>307</sup> Some oaths have provoked litigation in

<sup>303</sup> U.S. CONST. amend. XIV, § 3, reads as follows:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

<sup>304</sup> Snyder, *supra* note 302, at 908 (citing Act of July 11, 1868, ch. 139, 15 Stat. 85 (1868)).

<sup>305</sup> *Id.* at 908–09 (citing Act of Feb. 15, 1871, ch. 53, 16 Stat. 412 (1871) (repealed 1884)).

<sup>306</sup> *Id.* at 908 (citing Act of May 13, 1884, ch. 46, 23 Stat. 21 (1884)). The current version of the Oath is codified at 5 U.S.C. § 3331 (2006). The text of the current oath reads as follows:

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

5 U.S.C. § 3331 (2006).

<sup>307</sup> The Enlistment Oath is:

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.

10 U.S.C. § 502 (2006). On controversies regarding academic oaths, see BOB BLAUNER, *RESISTING MCCARTHYISM: TO SIGN OR NOT TO SIGN CALIFORNIA’S LOYALTY OATH* (2009).

As an example of an oath of admission to a state bar, consider the Oath of the Florida Bar:

I do solemnly swear: I will support the Constitution of the United States and the Constitution of the State of Florida; I will maintain the respect due courts of justice and judicial officers; I will not counsel or maintain

which the Supreme Court has declared unconstitutional those oaths that condition state or federal employment by limiting rights guaranteed under the First and Fourteenth Amendments.<sup>308</sup> Perhaps what John Selden facetiously wrote about oaths in 1686 is still true today: “Oaths are so frequent, they should be taken like Pills, swallowed whole; if you chew them you will find them bitter; if you think what you swear, ’twill hardly go down.”<sup>309</sup>

### C. *The Credibility of the Oath and the Oath Taker*

The efficacy of the oath to elicit the truth and the faithful performance of promises has often been questioned. Even in the ancient world, the Greek dramatist Aeschylus (c. 525 B.C. to 455 B.C.) wrote, “It is not the oath that makes us believe the man, but

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any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land; I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval; To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications; I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone’s cause for lucre or malice. So help me God.

*Oath of Admission to the Florida Bar*, THE FLORIDA BAR, <http://www.floridabar.org/tfb/TFBProfess.nsf/5d2a29f983dc81ef85256709006a486a/04e9eb581538255a85256b2f006ccd7d?OpenDocument> (last visited Mar. 15, 2012). For a history of the lawyer’s oath, see Carol Rice Andrews, *The Lawyer’s Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3 (2009).

<sup>308</sup> *Cole v. Richardson*, 405 U.S. 676, 680 (1972), summarizes these cases. For oaths relating to political beliefs, see *Cornell v. Higginbotham*, 403 U.S. 207 (1971); *Law Students Civil Rights Research Council v. Wadmund*, 401 U.S. 154 (1971); and *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971). For oaths that deny past and future engagement in protected speech activities such as criticizing government, discussing the overthrow of the government, or supporting candidates for political office, see *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964); and *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961). For oaths that deny or abjure associational activities such as membership in political organizations that have illegal purposes unless the oath-taker knew of the illegal purpose and shared an intent to promote that purpose, see *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Keyishian*, 385 U.S. 589; *Elfbrandt v. Russell*, 384 U.S. 11 (1966); and *Wieman v. Updegraff*, 344 U.S. 183 (1952).

<sup>309</sup> CONAL CONDREN, ARGUMENT AND AUTHORITY IN EARLY MODERN ENGLAND 233 (2006) (quoting JOHN SELDEN, TABLE TALK 95 (1686)).

the man the oath.”<sup>310</sup> In the midst of the inconsistent and contradictory oath-taking of the seventeenth century, the satirist Samuel Butler (1612–1680) wrote:

As soon as a Man hath taken an Oath against his Conscience and done his Endeavour to damn himself, He is capable of any Trust or Employment in the Government; So excellent a Quality is Perjury to render the most perfidious of men most fit and proper for publick Charges of the greatest Consequence . . . and this is the Modern Way of Test as they call it—to take measure of Men’s abilities and Faith by their Alacrity in Swearing—And is indeed the most compendious way to exclude all those that have any conscience, and to take in such as have none at all.<sup>311</sup>

In his proposals for judicial reform, the utilitarian Jeremy Bentham unleashed a withering attack on the oath. Aside from issues of utility, Bentham ridiculed the theological rationale of the oath, stating:

The supposition of its efficiency is absurd in principle. It ascribes to man a power over his maker: it places the Almighty in the station of a sheriff’s officer; it places him under the command of every justice of the peace. It supposes him to stand engaged, no matter how, but absolutely engaged to inflict—on every individual, by whom the ceremony, after having been performed, has been profaned,—a punishment (no matter what) which, but for the ceremony and the profanation, he would not have inflicted.<sup>312</sup>

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<sup>310</sup> The version of the aphorism quoted is found in 2 AESCHYLUS, TRAGEDIES AND FRAGMENTS, No. 276, at 188 (Edward Hayes Plumptre trans., 1901); *see also* JOHN BARTLETT, BARTLETT’S FAMILIAR QUOTATIONS, No. 8464 (10th ed. 1919); *see, e.g.*, TYLER, *supra* note 236, at 238 (citing Aeschylus).

<sup>311</sup> JONES, *supra* note 273, at 192–93 (quoting SAMUEL BUTLER, PROSE OBSERVATIONS 6 (H. McQuehen ed., 1979)); *see also* HYMAN, *supra* note 290, at 23 (quoting JOHN LILBURNE, RASH OATHS UNWARRANTABLE (1647) (“Oaths . . . now are nothing but cloaks of knavery, and breeders of strife and mischief. Therefore for shame lay them all down and press them no more upon any man whatsoever, for he that conscientiously makes nothing of an oath, will make as little of breaking his oath, whensoever it shall make for his profit, ease, or preferment, whereas to him that conscientiously scruples an oath, his bare word . . . is the sincerest tie in the world.”)); *cf.* JONES, *supra* note 273, at 147 (quoting Algernon Sydney’s comment that the Engagement Oath was likely “to prove a snare to every honest man whilst every knave would slip through it.”).

<sup>312</sup> JEREMY BENTHAM, *Rationale of Judicial Evidence, Specially Applied to English Practice*, in 6 THE WORKS OF JEREMY BENTHAM 201, 309 (John Bowring ed., London, Simpkin, Marshal, & Co. 1838–1843); *see* PAULEY, *supra* note 128, at 28; *see also* LEWIS, *supra* note 236, at 73–74 (“To persons of strict veracity, . . . an oath is needless; and to one, destitute of principle, it is obviously unavailing.”). In regard to the deity, ENOCH LEWIS,

The religious character of the oath has been a source of difficulty. The common law depended on the oath to elicit the truth, so that all those who could not swear an oath with its religious baggage would be unable to testify in court.<sup>313</sup> At common law, Quakers and other dissenters who refused to take an oath because of religious objections were not only precluded from testifying in court, but also could be fined, despite the reputation that Quakers had for honesty.<sup>314</sup> Courts eventually accommodated such Christians by allowing them to affirm rather than swear.<sup>315</sup> And what of non-Christians? At common law, only Christians could swear an oath, and therefore testify in English courts, because only Christians could swear by the Bible.<sup>316</sup> Eventually, courts accommodated witnesses who adhered to religions other than Christianity, allowing them to swear according to the tenets of their respective religions as long as these non-Christians possessed a belief in divine punishment for lying under the oath ceremony sanctioned by their religions.<sup>317</sup> And at common law, atheists were considered

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OBSERVATIONS ON LEGAL AND JUDICIAL OATHS 12 (Phila., Joseph Rakestraw 1846), states, “Divine displeasure will follow the intentional utterance of falsehood, whether we invoke it or not.”

<sup>313</sup> Thomas Raeburn White, *Oaths in Judicial Proceedings and Their Effect Upon the Competency of Witnesses*, 51 AM. L. REG. 373, 419–20 (1903).

<sup>314</sup> *Id.* at 420.

<sup>315</sup> In 1688, Parliament passed the first of several acts which allowed Quakers “to substitute a declaration of fidelity for the oath of allegiance. . . .” *Id.* (citing 1 W. & M., c. 18 (Eng.)). “Eight years later, in 1696, the idea that only those who had sworn were fit to be believed was definitely overthrown by an act allowing ‘Quakers’ to testify on affirmation in certain cases . . . .” *Id.* at 412 (citing 7 & 8 W. & M., c. 34 (Eng.)) (made perpetual by 1 Geo., 1 Stat. 2, c. 6 (Eng.)). In 1721, to be more accommodating to the Quakers, Parliament prescribed the affirmation now in use. *Id.* at 421 (citing 8 Geo. 1 c. 6 (Eng.)). By the time of the founding of the United States, affirmation for religious dissenters was widely accepted, so that it appears in the Constitution alongside oath requirements and also in the Judiciary Act of 1789. Milhizer, *supra* note 128, at 39. Most of the colonies allowed religious dissenters to affirm, though some followed the contemporary common law in allowing only Quakers to do so. *Id.* at 38–39.

<sup>316</sup> This was the opinion of Sir Edward Coke (1552–1634) in his *Institutes*:

Lord Coke defines an oath to be an affirmation or denial by a Christian. 3 Inst. 165, and he says an oath must be accompanied by the fear of God (meaning the Christian God), and that an alien infidel cannot be a witness. 4th Inst. 278. . . . See also to the same effect Coke upon Lit., Sec. 6(b), where Lord Coke says infidels are perpetual enemies to Christendom.

White, *supra* note 313, at 387 n.26 (citations omitted).

<sup>317</sup> In 1744, the case of *Omychund v. Barker* swept away the rule that adherents to non-Christian religions could not swear an oath at common law. *Omychund v. Barker* (1744) 26 Eng. Rep. 15; White, *supra* note 313, at 389. The case decided that an oath was of binding force when taken by a Christian or non-Christian according to the particular rites of the person’s religion. White, *supra* note 313, at 389, n.31. *Omychund* was uniformly adopted in England and the United States. *Id.* The remarks of Lord Chief Justice Willes are notable: “[T]his notion (that non-Christians cannot be sworn), though advanced by so great a man [Coke], is contrary to religion, common sense and common humanity, and I think the devils themselves to whom he has dedicated them (Jews and non-Christians), could not have suggested anything worse.”

incompetent to give testimony.<sup>318</sup> Because the atheist did not believe in God, the atheist could not believe in divine punishment for perjury, and therefore the oath could not be used to ensure such a person was telling the truth.<sup>319</sup> It was not until the nineteenth and twentieth centuries that such rules of evidence discriminating against atheists were set aside.<sup>320</sup>

The criticism that Bentham, White, Milhizer, and others have directed at the oath mostly concerns the assertory oath that witnesses at judicial proceedings would swear. Although the promissory oath, the type of oath sworn by the President, is arguably subject to many of the same infirmities as the assertory oath, this oath has its defenders in commentators like Sander Levinson and Matthew Pauley.<sup>321</sup> Perhaps the most significant defense of the religious oath was advanced by Simon Greenleaf in his *Treatise on the Law of Evidence*: “The design of the oath is not to call the attention of God to man; but the attention of man to God;—not to call on Him to punish the wrong-doer,

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*Id.* at 389–90. Thus, one American court summarized the procedure in this manner: “A Jew may be sworn on the Pentateuch or Old Testament, with his head covered; a Mohammedan on the Koran; a Gentoo, touching with his hand the foot of a Brahmin or priest of his religion; a Chinese by breaking a china saucer.” Milhizer, *supra* note 128, at 60 (quoting *United States v. Miller*, 236 F. 798, 799–800 (W.D. Wa. 1916)). However, the competence of the non-Christian believer to testify still depended on the person’s belief that God will reward or punish him in this life or the next. White, *supra* note 313, at 391.

<sup>318</sup> White, *supra* note 313, at 390.

<sup>319</sup> Under *Omychund*, atheists, like adherents to non-Christian religions who did not believe that God punishes and rewards in this life or an afterlife, were considered incompetent to testify. *Id.* In Great Britain, it was not until 1869 that religion was set aside for purposes of determining the competency of witnesses. Paul W. Kaufman, Note, *Disbelieving Nonbelievers: Atheists, Competence, and Credibility in the Turn of the Century American Courtroom*, 15 *YALE J.L. & HUMAN.* 395, 405 & n.59 (2003) (citing the Evidence Further Amendment Act, 1869, 32 & 33 Vict., c. 68). It was not until 1888, with the passage of the Oaths Bill of Charles Bradlaugh, that atheists gained the right to affirm their loyalty to the crown rather than take an oath. Oaths Act, 1888, 51 & 52 Vict., c. 46. See generally Chris Sear, *The Parliamentary Oath*, <http://www.parliament.uk/documents/commons/lib/research/rp2001/rp01-116.pdf> (last visited Mar. 15, 2012). As Professor Milhizer indicates, the Federal Rules of Evidence, developed in the past century, provide some standardization for the states as to witness competence:

Federal Rule 603 codifies the requirement that every witness shall have to swear an oath or affirm that he will testify truthfully. The Rule does not prescribe a particular oath, providing instead that the form used shall be one that is calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so [testify truthfully]. This approach affords the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children . . . .

Milhizer, *supra* note 128, at 33 (footnotes omitted) (internal quotation marks omitted). Nevertheless, it was necessary for the Supreme Court to intercede as late as 1961 to rule that an oath of office containing a narrowly written declaration of belief in God was a violation of freedom of religion and belief. *Id.* at 32 (citing *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961)).

<sup>320</sup> Milhizer, *supra* note 128, at 39.

<sup>321</sup> LEVINSON, *supra* note 272; PAULEY, *supra* note 128.

but on man to remember that He will.”<sup>322</sup> Thus, the oath survives because it may engage the religious scruples or the conscience of the oath taker and therefore provide the State with some leverage in persuading this person to tell the truth or to take seriously the commitments undertaken by the oath. As Silving puts it, “The decisive argument—the one that ultimately prevailed over repeated reform projects—is that the oath affords ‘a particular safeguard to truth finding’ and that ‘the State should not forego utilizing this means of influencing the witness.’”<sup>323</sup>

There is a great deal of evidence that the Framers of the Constitution supported promissory or loyalty oaths. The primary evidence of this support is their inclusion of the presidential oath in Article II and the oath for federal and state officials in Article VI.<sup>324</sup> Thomas Jefferson supported loyalty oaths to control the Tories—those Americans who opposed the Revolution.<sup>325</sup> In 1782, he wrote, “A tory has been properly defined to be a traitor in thought, but not in deed. The only description, by which the laws have endeavoured to come at them, was that of non-jurors, or persons refusing to take the oath of fidelity to the state.”<sup>326</sup> Jefferson goes on to explain that though the Tories were subject to double and triple taxation, the leniency of the American rebels is evidenced by the fact that they were never executed for treason.<sup>327</sup> In an article discussing constitutions as “charters of government,” James Madison wrote, “In Europe, charters of liberty have been granted by power. America has set the example and France has followed it, of charters of power granted by liberty. . . . As truths, none can be more sacred, because they are bound, on the conscience by the religious sanctions of an oath.”<sup>328</sup> Joseph Story, an eminent early scholar of constitutional law,

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<sup>322</sup> Silving, *supra* note 236, at 1371 (citing SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 504 (John Henry Wigmore rev., 18th ed. 1899)).

<sup>323</sup> *Id.* at 1358–59 (citing 1 PROTOKOLLE DER REFORMKOMMISSION 1905 § 47).

<sup>324</sup> U.S. CONST. art. II, § 1, cl. 8; *id.* art. VI, cl. 3.

<sup>325</sup> THOMAS JEFFERSON, *Notes on the State of Virginia, Query XVI, The Measures Taken with Regard of the Estates and Possessions of the Rebels, Commonly Called Tories*, in 4 THE WORKS OF THOMAS JEFFERSON 72–73 (Paul Leicester Ford ed., 1904–05), available at <http://oll.libertyfund.org/title/756/86250> (last visited Mar. 15, 2012). The *Notes* were a response to twenty-two questions which the Secretary to the French Legation to the United States, François Marbois, submitted in order to gather information about the American states.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 73. (“Persons of this description were at one time subjected to double taxation, at another treble, and lastly were allowed retribution, and placed on a level with good citizens. It may be mentioned as a proof, both of the lenity of our government, and unanimity of its inhabitants, that though this war has now raged near seven years not a single execution for treason has taken place.”). For a rather negative assessment of Jefferson’s views on freedom of thought, see LEONARD LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 30 (1963) (“The chief purposes of the oath were to coerce loyalty and to identify for purposes of punishment every person who, in Jefferson’s phrase, was ‘a traitor in thought, but not in deed.’”).

<sup>328</sup> JAMES MADISON, *Constitution*, NAT’L GAZETTE, January 19, 1792, in 6 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING HIS NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 83–84 (Gaillard Hunt ed., 1900).



emphasizes the religious foundation of the presidential Oath of Office in his 1847 *Exposition of the Constitution*:

No man can doubt the propriety of placing the President under the sanction of an oath of office. . . . Let it not be deemed a vain or idle form. . . . In all these things, God will bring us into judgment. A President, who shall dare to violate the obligations of his solemn oath or affirmation of office, may escape human censure, nay, may even receive applause from the giddy multitude. But he will be compelled to learn, that there is a watchful Providence, that cannot be deceived; and a righteous Being, the searcher of all hearts, who will render unto all men according to their deserts. Considerations of this sort will necessarily make a conscientious man more scrupulous in the discharge of his duty; and will even make a man of looser principles pause, when he is about to enter upon a deliberate violation of his official oath.<sup>329</sup>

Story says much the same in discussing the oaths of other federal and state officers.

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. If, in the ordinary administration of justice, in cases of private rights, or personal claims, oaths are required of those, who try the cause, as well as of those, who give testimony, to guard against malice, falsehood, and evasion, surely like guards ought to be interposed in the administration of high public trusts, and especially in such, as may concern the welfare and safety of the whole community.<sup>330</sup>

But among the Founding Fathers, perhaps the strongest supporter of the oath was Washington himself. During the Revolutionary War, Washington advocated for loyalty oaths even before the Declaration of Independence was written. In December of 1775, he wrote,

[I]t is high time a test act was prepared and every man called upon to declare himself; that we may distinguish friends from foes; nor have I any idea of a set of men being exempt from the common duties of society in any country, or community where they have been fostered in the sweet enjoyment of its liberties.<sup>331</sup>

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<sup>329</sup> PAULEY, *supra* note 128, at 224–25 (citing JOSEPH STORY, *A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* 170 (1847)).

<sup>330</sup> *Id.* at 225 (citing STORY, *supra* note 329, at 252).

<sup>331</sup> HYMAN, *supra* note 290, at 74 (quoting Washington to W. Ramsey, Dec., 1775, in 3 JOHN C. FITZPATRICK, *THE WRITINGS OF GEORGE WASHINGTON* 280 (1931–1944)).

In New Jersey, Washington fought so hard for civilian loyalty oaths that state officials accused him of violating state sovereignty.<sup>332</sup> In a report written to John Hancock, the President of the Continental Congress, dated February 5, 1777, Washington stated:

From the first institution of civil government, it has been the national policy of every precedent State to . . . engage its members to the discharge of their duty by the obligation of some oath. Its force and happy influence have been felt in too many instances to need any arguments to support the policy or prove its utility . . . . An oath is the only substitute that can be adopted to supply the defect of principle.<sup>333</sup>

Of greatest import and relevance to this subject are Washington's words upon relinquishing the presidency, which constitute his guidance for the future conduct of the government. In this speech, Washington identified several of the well-known pillars which still support the American political order. He cautioned his audience not to permit "the powers of one department to encroach upon another" and to be vigilant against the dangers of "despotism, . . . that love of power, and proneness to abuse it, which predominates in the human heart," and he recognized the "necessity of reciprocal checks in the exercise of political power," and enjoined "amendment in the way which the Constitution designates," and not by "usurpation."<sup>334</sup> Then, Washington turned to the issue of religion and the oath.

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . 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? . . . . Whatever may be conceded to the influence of refined education on minds of peculiar structure—reason & experience both forbid us to expect that National morality can prevail in exclusion of religious principle.<sup>335</sup>

Finally, of course, Washington's belief in the efficacy of the oath with its religious significance was evident when he kissed the Bible upon assuming the presidency.

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<sup>332</sup> *Id.* at 81–82.

<sup>333</sup> *Id.* at 80; *see also* 1 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES; WITH NOTICES OF ITS PRINCIPAL FRAMERS 108–09 n.1 (N.Y., Harper & Bros. 1854); 8 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 249–53 (Philander D. Chase ed., 1998).

<sup>334</sup> *The Farewell Address, Transcript of the Final Manuscript*, THE PAPERS OF GEORGE WASHINGTON, <http://gwpapers.virginia.edu/documents/farewell/transcript.html> (last visited Mar. 15, 2012).

<sup>335</sup> PAULEY, *supra* note 128, at 238–39 (quoting *Farewell Address*, *supra* note 334, at 20).

## V. THE MEANING OF KISSING THE BOOK

A. *The Corporal Oath*

Aside from categorizing an oath as assertory or promissory, oaths have also been classified as “corporal.”<sup>336</sup> A corporal oath is one in which the oath-taker is in physical contact with an object while taking the oath.<sup>337</sup> For some cultures, the object might be something that threatens vengeance in the event of perjury. White provides the example of a Siberian tribe that uses the head of a wild boar to administer an oath.<sup>338</sup> The oath-taker calls upon wild boars to devour him if he lies.<sup>339</sup> The object might also be something of great value to the oath-taker, which would suffer the injury or destruction of the oath’s conditional curse if the oath-taker is untrue. Silving points out that the Biblical oaths of *Genesis* 24:2–9 and 47:29 were taken on the genitalia of the oath-taker’s father.<sup>340</sup>

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<sup>336</sup> TYLER, *supra* note 236, at 309–15 (discussing this classification).

<sup>337</sup> Tyler argues against a different definition of the corporal oath advanced by Paley, and still current, that the term refers to touching the “corporale” or cloth that covered the Eucharist. *Id.* BLACK’S LAW DICTIONARY 1176 (9th ed. 2009), provides the definition: “An oath made solemn by touching a sacred object, esp. the Bible.—Also termed *solemn oath*; *corporale sacramentum*.” The Dictionary’s reference to the Bible as the object the oath-taker touches is traceable to the definition Sir Edward Coke provided in his *Institutes*. “It is called a corporal oath, because he toucheth with his hand some part of the Holy Scripture.” EDWARD COKE, 3 *INSTITUTES OF THE LAWS OF ENGLAND*, 165 (Brooke ed., London 1797) (1669). Tyler explains,

This is evidently too narrow a definition of the meaning of the word . . . .  
But the lifting up of the hand in Scotland and France, the kissing of the form of the cross in Spain, the casting of a piece of porcelain upon the ground in China, are each of them a genuine kind of corporal oath, just as much as our English form. But the author of the *Institutes* in his definitions, whether of an oath, or of perjury, or in other subordinate questions, confines himself to the English species of the thing which he defines.

TYLER, *supra* note 236, at 312–13.

<sup>338</sup> White, *supra* note 313, at 374.

<sup>339</sup> *Id.*

<sup>340</sup> Silving, *supra* note 236, at 1331.

And Abraham said unto his eldest servant of his house, that ruled over all that he had, Put, I pray thee, thy hand under my thigh: And I will make thee swear by the LORD, the God of heaven, and the God of the earth, that thou shalt not take a wife unto my son of the daughters of the Canaanites, among whom I dwell: But thou shalt go unto my country, and to my kindred, and take a wife unto my son Isaac.

*Genesis* 24:2–4 (King James).

And the time drew nigh that Israel must die: and he called his son Joseph, and said unto him, If now I have found grace in thy sight, put, I pray thee, thy hand under my thigh, and deal kindly and truly with me; bury me not, I pray thee, in Egypt; . . .

With time, religious artifacts representing the gods replaced the physical objects upon which oaths were originally sworn. Milhizer notes,

To invoke a deity when taking an oath in ancient Greece, a person would lay his hand upon the altar while swearing on the honor of that god. This practice was one of the most widespread and well-documented methods of swearing on a religious artifact in the ancient world, and indeed may be representative of the custom's broader usage.<sup>341</sup>

But an oath could be taken on many other objects: a sword, a spear, or a scepter, “proliferating over time to the point of frivolity.”<sup>342</sup> The early Christian oath-taker might have placed her hand on an altar, the relics of a saint, the cross, or a missal or mass book.<sup>343</sup> Tyler suggests that in swearing upon the Gospels, Christians imitated the Jews “who were accustomed to swear laying their hand upon the book of the Law, regarding that as the only binding oath.”<sup>344</sup> Rome's adoption of the corporal oath using the Christian scriptures may have further standardized this practice.<sup>345</sup>

The gesture of kissing the book developed very early in the Christian period. Tyler relates an account from Bishop Arsenius of Orte, who was a contemporary of Pope Nicholas I (858–867). The noblewoman, Ingeltrude, swore an oath to the Pope stating, “I, Ingeltrude, swear to my Lord Nicholas, the chief pontiff and universal pope, by the Father, the Son, and the Holy Ghost, and these four Evangelists of Christ our God, which I *hold in my own hands, and kiss with my mouth . . .*”<sup>346</sup> Already evident are

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*Genesis* 47:29 (King James). Placing the oath-taker's hand under his father's thigh is an obvious euphemism.

<sup>341</sup> Milhizer, *supra* note 128, at 10 (citing TYLER, *supra* note 236, at 116–19).

<sup>342</sup> *Id.* (citing TYLER, *supra* note 236, at 121–23).

<sup>343</sup> See TYLER, *supra* note 236, at 119; Milhizer, *supra* note 128, at 14.

<sup>344</sup> TYLER, *supra* note 236, at 151.

<sup>345</sup> THE ANNOTATED JUSTINIAN, *supra* note 254, at Novel 124:

*Preface.* We enact the present law so that the integrity of the judges may be made apparent and so that litigants may not be able to circumvent the laws by bribery.

c. 1. We therefore ordain that whenever a suit is commenced or appeals are examined, the principals of the litigation . . . must first of all take an oath in the presence of the judge, and in touching the holy gospels, that they have not given or promised anything, for the sake of favoritism, to the judges or for any other purpose, . . . except what they shall pay to their attorneys for assistance, or to other persons to whom something must be given according to law.

<sup>346</sup> TYLER, *supra* note 236, at 151–52 (citing 4 CHARLES DU FRESNE DUCANGE, GLOSSARIUM MEDIAE ET INFIMAE LATINITATIS 455 (L. Favre ed., 1883–87), available at <http://ducange.enc.sorbonne.fr/IURAMENTUM> (last visited Mar. 15, 2012)). DuCange (1610–1688) was an historian and philologist. His *Glossary of Medieval and Low Latin* was published in 1678. The story of Ingeltrude may be found in ANNE NICHOLS & MARTY

the characteristics of the later oath ceremony in which the oath-taker places her hands on the book and kisses it. A fourteenth-century manual entitled *Modus tenendi curiam, The Manner of Keeping Court*, instructs the clerk to administer the frankpledge, or oath to keep the peace, as follows:

[T]he clerk shall charge the boy . . . , saying, “Put thy hand upon the book. Thou shalt be lawful man and bear loyalty to our lord the King and his heirs and to thy lord of this manor and to his heirs and shalt be justiciable by thy chief dozener; so help thee God and His saints.” And then he shall kiss the book . . . .<sup>347</sup>

By the time of the late Middle Ages, the phrase “kiss the book” had already acquired the proverbial meaning of taking an oath on the Bible. The *Middle English Dictionary* provides a definition for “kissen bok”: “to bind an oath by kissing the Bible.”<sup>348</sup> The phrase appears in Shakespeare’s *The Tempest*, in which the comic characters of the play engage in a mock oath:

CALIBAN: I’ll swear upon that bottle, to be thy true subject; for  
the liquor is not earthly.  
STEPHANO: Here; swear, then, how thou escapedst.  
TRINCULO: Swum ashore, man, like a duck: I can swim like a  
duck, I’ll be sworn.  
STEPHANO: Here, kiss the book.<sup>349</sup>

In his article entitled *Books as Totems in Seventeenth-Century England and New England*, David Cressy notes,

Kissing the book was an important part of seventeenth-century court proceedings. A defendant not only swore to speak the truth,

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WILLIAMS, AN ANNOTATED INDEX OF MEDIEVAL WOMEN 227 (1992). Ingeltrude was the wife of Count Boson of Northern Italy who ran off with one of Boson’s vassals in 856. *Id.* Boson enlisted the aid of Pope Nicholas I, who excommunicated her in 860. *Id.* She reached an agreement with the Pope to do penance. *Id.*

<sup>347</sup> THE COURT BARON, BEING PRECEDENTS FOR USE IN SEIGNORIAL AND OTHER LOCAL COURTS, TOGETHER WITH SELECT PLEAS FROM THE BISHOP OF ELY’S COURT OF LITTLEPORT, in 4 PUBLICATIONS OF THE SELDEN SOCIETY 101 (Frederic William Maitland & William Paley Baildon eds., 1891). The editors date this manuscript circa 1342. *Id.* A “dozener” is “A name borne by the constables, watchmen, or other ward-officers, in some borroughs.” 4 OXFORD ENGLISH DICTIONARY 1005 (2d ed. 1989).

<sup>348</sup> MIDDLE ENGLISH DICTIONARY 3(b), <http://quod.lib.umich.edu/m/med/lookup.html> (last visited Mar. 15, 2012). The article on “kissen bok” provides two Middle English quotations from the fifteenth century: “For when he had sworn his oath / And kissed the book before them all, he never rose again”; and “[A] book was brought to swear on, and the barons kissed it.” *Id.* I have taken the liberty of translating the samples from Middle English.

<sup>349</sup> WILLIAM SHAKESPEARE, THE TEMPEST, Act II, Sc. 2, ll. 130–135.

“his hand upon the book,” but also, “must kiss the book, in testimony that he sweareth.” Witnesses had to “lay their hands upon a Bible or Testament,” then, having taken the oath, they “are to kiss the said book.”<sup>350</sup>

William Paley describes the oath-taking process in his 1785 *Principles of Moral and Political Philosophy*:

The juror, whilst he hears or repeats the words of the oath, holds his right hand upon a Bible, or other book containing the four Gospels. The conclusion of the oath sometimes runs, “Ita me Deus adjuvet, et haec sancta evangelia,” or “So help me God and the contents of this book”: which last clause forms a connexion between the words and action of the juror, that before was wanting. The juror then kisses the book . . . .<sup>351</sup>

Milhizer suggests that American practices followed those of the British as illustrated by the following form of oath for criminal cases quoted from Joseph Chitty’s *Criminal Practice*, published in 1816:

The form used at the assizes or sessions is for the clerk of arraigns or the justice of the peace to desire the witness to take the book in his hand, and, when that is done, to say to him, “The evidence you shall give between our sovereign lord the king and the prisoner at the bar shall be the truth, the whole truth, and nothing but the truth. So help you God!”; upon which the witness kisses the book.<sup>352</sup>

To this day, the statutes of three states explicitly refer to the kissing of the book as part of the oath taking procedure.<sup>353</sup>

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<sup>350</sup> David Cressy, *Books as Totems in Seventeenth-Century England and New England*, 21 J. LIBR. HIST. 92, 98 (1986) (citing HENRY CONSET, PRACTICE OF THE SPIRITUAL OR ECCLESIASTICAL COURTS 99–100, 113 (1685)).

<sup>351</sup> PALEY, *supra* note 259, at 112.

<sup>352</sup> JOSEPH CHITTY, 1 A PRACTICAL TREATISE ON THE CRIMINAL LAW 616 (Edward Earle ed., Phila., William Brown 1819) (1816); Milhizer, *supra* note 128, at 29–30.

<sup>353</sup> Milhizer, *supra* note 128, at 36 nn.144, 147, & 150; *see* ARK. CODE ANN. 16-2-101(a) (2007) (“The usual mode of administering oaths practiced by the person who swears, laying his hand on and kissing the Gospels, shall be observed in all cases in which an oath is or may be required by law to be administered, except as otherwise provided in this chapter.”); N.J. STAT. ANN. 41:1–4 (2004) (“It shall not be necessary to the solemnity or obligation of an oath administered in any court of justice or any legal proceeding, civil or criminal, in this state, for the person taking the oath to kiss the holy scriptures, but the taking of such oath, while the hand shall be held upon the book, shall answer all the purposes and requirements of the law, any usage or custom to the contrary heretofore notwithstanding. If any persons so sworn shall

*B. The Loyalty Oath and Kissing the Book*

Thus far, this Article has, for the most part, discussed oaths which are assertory or judicial. However, the promissory oath, which tests loyalty, is ancient as well and includes kissing the book. Thomas Littleton (1407–1481), in his *Treatise of Tenures*, provides the oath by which a landowner swore fealty to his lord in medieval England:

Hear you this my lord, that I shall be faithful and true unto you, and faith to you shall bear for the lands which I claim to hold of you, and that I shall lawfully do to you the customs and services which I ought to do at the terms assigned; so help me God and his saints: And he shall kiss the book.<sup>354</sup>

This oath of fealty is the predecessor to the loyalty oaths that were to come in the subsequent centuries.

John Foxe (1517–1587), author of *Foxe's Book of Martyrs*, relates a first person account of how a religious dissenter was pressured into pledging allegiance to the Catholic Church: "I promised to do as they would have me; but in my heart meant nothing so to do. So I laid my hand on the book, and one of them gave me my oath, and, that done, commanded me to kiss the book."<sup>355</sup> During the reign of Henry VIII, failure to kiss the book upon completion of the Oath of Succession led to the execution of one Laurence Blunham, the sexton at Woburn Abbey. On May 27, 1538, he confessed, "The first time he was sworn, [he] did not kiss the book, but was passed over by reason of much company."<sup>356</sup> Unfortunately, he later boasted about not taking the oath, because he did not kiss the book.<sup>357</sup> As a result, he was tried and executed for

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swear falsely they shall be guilty of perjury as though the book had been kissed."); VA. CODE ANN. 49-10 (2007) ("No officer of this Commonwealth, or any political subdivision thereof, shall, in administering an oath in pursuance of law, require or request any person taking the oath to kiss the Holy Bible, or any book or books thereof, but persons being sworn for any purpose may be required to place their hand on the Holy Bible.").

<sup>354</sup> THOMAS LYTTLETON, *TREATISE OF TENURES* 123 (T.E. Tomlins ed., Garland Publ'g 1978) (1841).

<sup>355</sup> 5 JOHN FOXE, *ACTS AND MONUMENTS* 425 (Rev. Stephen Reed Cattley ed., London, Seeley Burnside & Seeley 1838) (1563). Anthony Dalaber is the narrator of this story. He recounts "The Story of Thomas Garrett or Gerrard, and of his Trouble at Oxford." These events occurred in 1526. *Foxe's Book of Martyrs* specialized in the sufferings of English Protestants during the fourteenth and fifteenth centuries. His book was immensely popular and influential in shaping Protestant opinion towards Catholics over the next two centuries.

<sup>356</sup> *Letters and Papers, Foreign and Domestic, of Henry VIII*, xiii, pt. 1, No. 1086, BRITISH HISTORY ONLINE, <http://www.british-history.ac.uk/report.aspx?compid=75775> (last visited Mar. 15, 2012).

<sup>357</sup> *Houses of Cistercian Monks: The Abbey of Woburn*, in 1 A HISTORY OF THE COUNTY OF BEDFORD 366–70 (1904), available at <http://www.british-history.ac.uk/report.aspx?compid=40037> (last visited Mar. 15, 2012).

treason.<sup>358</sup> The story implies that everyone who took a loyalty oath, such as the Oath of Succession, had to kiss the book just as in a judicial proceeding.<sup>359</sup>

The fact that loyalty oaths required Bible kissing is also suggested by a seventeenth century pamphlet arguing in dialogue format that the scrupulous Christian may take government oaths. It is entitled *The English Manner of Swearing Vindicated*, and it particularly discusses the act of kissing the Bible.<sup>360</sup> An objection is raised, “Some seem to object against Kissing the Book, as having the greater appearance of giving too much to it, or putting some adoration on it . . . .”<sup>361</sup> It is answered, “The Ceremony signifieth that I love & approve the Gospel, and place the hope of my salvation in it.”<sup>362</sup> This is argued within the context of the Oath of Supremacy.<sup>363</sup>

### C. Three Particular Influences

#### 1. The British Coronation Ceremony

Aside from the tradition, outlined above, of kissing the Bible when taking an oath, there were three particular sources of influence that may have motivated Washington’s biblical kiss. By far the most prominent of these was the English coronation ceremony. There is ample evidence that an analogy between the English kingship and the presidency of the new republic weighed on the minds of the recently liberated Americans who needed some figure to unite the states politically, but did not want a king.<sup>364</sup>

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<sup>358</sup> *Id.*

<sup>359</sup> To this day, British Members of Parliament must take an oath or affirmation of loyalty to the Crown. Though not required to kiss the book, they may do so. “Members who so desire may . . . take the oath prescribed in the *Promissory Oaths Act 1868* . . . and kiss the book.” *Swearing in and the Parliamentary Oath*, PARLIAMENT.UK, <http://www.parliament.uk/about/how/elections-and-voting/swearingin/> (last visited Mar. 15, 2012).

<sup>360</sup> THE ENGLISH MANNER OF SWEARING VINDICATED (London 1687).

<sup>361</sup> *Id.* at 4.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* After this exchange, the author addresses the refusal of some religious dissenters to take the Oath of Supremacy because the ceremony appears to involve adoration of the Bible, a practice that suggests papist corruption.

But as some scrupulous brethren in *Scotland* gratify the papists by rejecting the Oath of Supremacy, which is the most thorny hedge against them, and this while they cry out against *Popery*; so others would gratify the Papists, by *suggesting* that we give too much to the Bible, and adore it; when the very sum of *Englands* Protestantism, is their just ascribing to the Holy Scriptures its Sufficiency as to all things necessary to Salvation.

*Id.* Kissing the Bible may have seemed suspiciously Catholic to Protestants who thought, as Paley did, that the kiss “seems rather an act of reverence to the contents of the book (as, in the popish ritual, the priest kisses the Gospel before he reads it) . . . .” PALEY, *supra* note 259, at 112.

<sup>364</sup> See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 74–85 (2009).

Once Washington was elected, many people, including Jefferson, expected that he might be president for life, that he would be a kind of



Washington was the embodiment of that figure.<sup>365</sup> Among these Americans, there was, of course, also a strong antipathy against the pomp and trappings of nobility and kingship.<sup>366</sup> Consistent with this, the first presidential inauguration did not much resemble the formal religious ceremony of the British coronation. But, in retaining the Bible and the biblical kiss, the first inauguration retained some vestige of the king's oath.

In the Coronation Act of 1688, Parliament established the coronation ceremony and oath that would have been in place in Washington's day.<sup>367</sup> At the end of the ceremony, the Act provides for a dialogue by which the Archbishop or Bishop administers the oath:

ArchBishop or Bishop.

Will You to the utmost of Your power Maintaine the Laws of God the true Profession of the Gospell and the Protestant Reformed Religion Established by Law? And will You Preserve unto the Bishops and Clergy of this Realme and to the Churches committed to their Charge all such Rights and Priviledges as by Law doe or shall appertaine unto them or any of them.

King and Queene.

All this I Promise to doe.

After this the King and Queene laying his and her hand upon the Holy Gospels, shall say,

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elective monarch. . . . Many Americans in the 1790s took seriously the prospect of some sort of monarchy developing in America. . . . In fact, many . . . thought that the new American government should at some time or other have a King.

*Id.* at 74 (internal quotation marks omitted).

<sup>365</sup> *Id.* at 75 ("Once Washington accepted the presidency, he inevitably found himself caught up in some monarchical trappings. His journey from Mount Vernon to the capital in New York in the spring of 1789, for example, took on the air of a royal procession. He was saluted by cannons and celebrated in elaborate ceremonies along the way. Everywhere he was greeted by triumphal rejoicing and acclamations of 'Long live George Washington!'").

<sup>366</sup> Medhurst, *supra* note 119, at 61 (quoting MACLAY, *supra* note 115, at 5) ("[N]ot everyone in America was enamoured with kingly ceremony or other rituals which smelled of royalty. The well-known debate over the proper title for the new leader demonstrates the strong convictions which this issue engendered. Some congressmen, like Maclay of Pennsylvania, not only objected to bestowing a special title on the leader but also found ceremonies in general objectionable. . . . 'I have had full opportunity of observing the gentlemen of New England,' he wrote, 'and sorry indeed am I to say it, but no people in the Union dwell more on trivial distinctions and matters of mere form. They really seem to show a readiness to stand on punctillio and ceremony.'").

<sup>367</sup> Coronation Oath Act, 1688, 1 W. & M., c. 6 (Eng.), THE NAT'L ARCHIVES, <http://www.legislation.gov.uk/aep/WillandMar/1/6/contents> (last visited Mar. 15, 2012).

King and Queene.

The things which I have here before promised I will performe and  
Keepe Soe help me God.

Then the King and Queene shall kisse the Booke.<sup>368</sup>

With minor modifications, the ceremony remains much the same today. In a video of her 1953 coronation, Queen Elizabeth may be seen to take the same oath and kiss the book.<sup>369</sup> The ceremony was performed several times in the course of the eighteenth century at the coronations of Queen Anne in 1702, King George I in 1714, King George II in 1727, and King George III in 1760, the last before George Washington was inaugurated in 1789.<sup>370</sup> In fact, the gesture is recalled in the recent movie, “The King’s Speech,” when the Australian speech therapist Lionel Logue encourages the future monarch, the stuttering George VI, that he can successfully repeat the oath. Logue summarizes the ceremony thus: “That’s all you have to say. Four short responses, kiss the book and sign the oath. There you are: you’re King. Easy.”<sup>371</sup>

## 2. New York State Law

The second influence was New York state law. Washington’s inauguration took place in New York City and was administered by the Chancellor of New York State. The *SHMG* article is probably correct in suggesting that the organizers of the inauguration, out of an abundance of caution in their respect for state rights, may have wished to follow New York State procedure in administering the oath.<sup>372</sup> On April 1, 1778, the State passed a statute entitled, “An Act to dispense with the usual mode of administering oaths in favour of persons having conscientious scruples respecting the same.”<sup>373</sup>

<sup>368</sup> *Id.* at c. 6, § 3.

<sup>369</sup> *Queen Kisses the Bible (direct Coronation Only Queen Elizabeth 1953).mov*, YOUTUBE (Mar. 13, 2010), <http://www.youtube.com/watch?v=vBNBfhFncJU> (last visited Mar. 15, 2012).

<sup>370</sup> See *The Hanoverians*, THE OFFICIAL WEBSITE OF THE BRITISH MONARCHY, <http://www.royal.gov.uk/HistoryoftheMonarchy/KingsandQueensoftheUnitedKingdom/TheHanoverians/TheHanoverians.aspx> (last visited Mar. 15, 2012); *The Stuarts*, THE OFFICIAL WEBSITE OF THE BRITISH MONARCHY, <http://www.royal.gov.uk/HistoryoftheMonarchy/KingsandQueensoftheUnitedKingdom/TheStuarts/TheStuarts.aspx> (last visited Mar. 15, 2012).

<sup>371</sup> DAVID SEIDLER, *THE KING’S SPEECH* (screenplay), <http://twcawards.com/assets/downloads/pdf/the-kings-speech1.pdf> (last visited Mar. 15, 2012).

<sup>372</sup> *SHMG*, *supra* note 76 (“Because the first presidential oath ceremony was being administered by the highest judicial official in New York State, some of those involved, including Livingston, may have thought that NY state law should be followed.”). However, the article’s subsequent suggestion—that since the Constitution said nothing of a Bible, its use was foreign to the intents of the Constitution—does not follow. It is evident from this Article that a vast tradition regarding the religious implications of taking an oath informed the use of this term in the Constitution and prompted Washington’s gesture of kissing the Bible.

<sup>373</sup> 1778 N.Y. Laws 49 (1886).

It begins, “Whereas many of the inhabitants of this State having conscientious scruples about the present mode of administering oaths by laying the hand on and kissing the gospels . . . .”<sup>374</sup> The Act provides that to swear an oath, such a person “shall with his her or their hand or hands uplifted swear by the everliving God and shall not be compelled to lay his her or their hand or hands on the Gospels, or kiss the same . . . .”<sup>375</sup> An oath taken in such a manner that is agreeable to the oath taker was valid and subject to punishment for perjury “as if the same had been administered by laying the hand on, and kissing the Gospels.”<sup>376</sup> The law was obviously adopted to accommodate dissenters who did not wish to swear by the Bible,<sup>377</sup> but it indicates that the usual manner of taking an oath in New York State required the oath-taker to kiss the book.

### 3. Freemasonry

The final immediate influence on Washington may have been Freemasonry. As of April 1788, George Washington was a Master in the Alexandria Lodge,<sup>378</sup> the administrator of the oath, Robert Livingston, was the Grand Master of the Grand Lodge of New York;<sup>379</sup> and Jacob Morton, who brought the Bible used in the inauguration, was Master in the St. John’s Lodge.<sup>380</sup> Indeed, the Freemason membership of many revolutionary leaders is well documented.<sup>381</sup> The Bible itself was a Masonic Bible. Its presence was likely planned well in advance, despite the story, which has no contemporary attestation, that the Bible was a last minute afterthought.<sup>382</sup> The ceremonies of Freemasons

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<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> *SHMG*, *supra* note 76 (“This change to the NY oath law in NY was designed to accommodate a minority of citizens, including Puritans, Quakers, Congregationalist Church, Dutch Reformed Church in NY, and Scot[t]ish Presbyterians, who expressed strong religious objections to either placing their hands on the bible or kissing the bible or both.”).

<sup>378</sup> HAYDEN, *supra* note 9, at 112–14.

<sup>379</sup> *Id.* at 124.

<sup>380</sup> *Id.* For more information on Jacob Morton, see 3 MARTHA J. LAMB & MRS. BURTON HARRISON, *HISTORY OF THE CITY OF NEW YORK, ITS ORIGIN RISE AND PROGRESS* 445–46 (N.Y., A.S. Barnes & Co. 1877).

<sup>381</sup> HAYDEN, *supra* note 9, *passim*; see also STEVEN C. BULLOCK, *REVOLUTIONARY BROTHERHOOD* (1996).

<sup>382</sup> The afterthought story may be found in Bowen, *supra* note 9, at 828–29:

Just before the oath was to be administered it was discovered that no Bible was in Federal Hall. Luckily Livingston, a Grand Master of Free Masons, knew that there was one at St. John’s Lodge in the City Assembly Room near by, and a messenger was dispatched to borrow the Bible. . . .

See HAYDEN, *supra* note 9, at 124, for what is probably a more likely account:

On that occasion, General Jacob Morton was marshal of the day. He was the Master of St. John’s, the oldest lodge in the city, and at the same time Grand Secretary of the Grand Lodge of New York. General Morton

involve oaths of loyalty, which include the phrase, “So help me God,” as well as kissing the Bible, as is evident in many websites that discuss Freemason ceremonies.<sup>383</sup>

#### *D. Two Peculiar Features of Bible Kissing*

##### 1. The *Sortes Biblicae*

A discussion of what kissing the Bible meant in regard to taking an oath might be incomplete without a reference to two peculiar features of the custom. The first specifically concerns Washington’s inauguration and, to some extent, subsequent presidential inaugurations. Gutjahr states that at the end of the oath ceremony, “Jacob Morton . . . stepped forward to mark the place Washington had kissed.”<sup>384</sup> This detail may be conjectural, as there is no contemporary attestation for it. But Morton may actually have done this because there is a crease on the particular page of the Bible Washington presumably kissed.<sup>385</sup> Gutjahr is probably right to suggest that this is an example of the *sortes Virgiliae*—that is, the attribution of a significant meaning to a passage of a revered book selected at random.

For centuries, men and women had randomly opened revered cultural texts such as the *Iliad* or the *Aeneid* as oracles of wisdom. In many Christian countries, including the United States, this practice of haphazardly opening a book came to center primarily on the Bible. . . . Such randomly chosen passages were believed to have an almost magical power to reveal the future and answer difficult questions. Washington had kissed Genesis, chapters 49 and 50, passages that include Joseph’s dying reminder that God had promised the Israelites a new land.<sup>386</sup>

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brought from the altar of his lodge the Bible with its cushion of crimson velvet, and upon that Sacred volume, Robert R. Livingston, Chancellor of the State of New York, and Grand Master of its Grand Lodge, administered to Washington his oath of office as President of the United States.

<sup>383</sup> See, e.g., CATALOGUE OF BOOKS ON THE MASONIC INSTITUTION app. at 261–68 (Bos., Damrell & Moore 1852) (purporting to provide several Masonic oaths including the phrase, “So help me God,” and the gesture of kissing the Bible); *Recommitment and the Washington Bible*, SACRED SYMBOLIC, <http://sacredsymbolic.com/recommitment-the-washington-bible/> (last visited Mar. 15, 2012).

<sup>384</sup> GUTJAHR, *supra* note 171, at 39.

<sup>385</sup> The earliest attestation of this detail found by the author is in the 1866 book by HAYDEN, *supra* note 9, at 124–25: “A memorial leaf of the sacred Book was then folded at the page on which Washington had devoutly impressed his lips; and the volume was returned to St. John’s Lodge, and placed again upon its sacred altar.” It seems reasonable to presume that Jacob Morton did the honors. For the photo of the creased page, see Bowen, *supra* note 9, at 829.

<sup>386</sup> GUTJAHR, *supra* note 171, at 41 (citing Cressy, *supra* note 350, at 101).

Cressy collects several examples of this “Bibliomancy” or “*sortes Biblicae*.”<sup>387</sup> Practitioners of the art included King Charles I and Lord George Berkeley.<sup>388</sup> However, Cressy fails to mention the most likely Christian inspiration for the practice, found in St. Augustine’s *Confessions*.<sup>389</sup> In that work, Augustine recounts the intellectual and religious confusion of his early life leading to the “agony of indecision” he experienced as he took a walk in a garden.<sup>390</sup> Augustine says, “I tore my hair and hammered my forehead with my fists; I locked my fingers and hugged my knees.”<sup>391</sup> In this desperate quandary, he heard the voice of a child repeating the refrain, “Take it and read, take

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<sup>387</sup> Cressy, *supra* note 350, at 99–101.

<sup>388</sup> Cressy tells the story of John Dane, whose decision to emigrate to New England in the 1630s was confirmed when, as he says:

I hastily took up the Bible, and told my father if where I opened the Bible there I met with any thing either to encourage or discourage, that should settle me. . . . I opening of it . . . the first I cast my eyes on was “come out from among them, touch no unclean thing, and I shall be your god and you shall be my people.”

*Id.* at 100 (citing JOHN DANE, A DECLARATION OF REMARKABELL PROVEDENSES IN THE CORSE OF MY LYFE, 8 NEW ENGLAND HISTORICAL AND GENEALOGICAL REGISTER 152–54 (Bos., Samuel G. Drake 1854)). Arise Evans, a preacher of the 1630s and 1640s, embarked on his career when a voice told him, “Go to thy book,” and he relates, “I suddenly stared up and to the table went where my Bible lay open, immediately fastening mine eyes upon Ephesians 5. 14, being these words . . . ‘Awake thou that sleepest . . . and Christ shall give thee light.’” *Id.* (citing ARISE EVANS, AN ECHO TO THE BOOK CALLED A VOYCE FROM HEAVEN 10–15 (London 1653)). King Charles I used this custom to decide whether to support the Earl of Stratford, and another time he tried his luck with a copy of Virgil in the Bodleian Library. *Id.* at 101 (citing HOLBROOK JACKSON, THE ANATOMY OF BIBLIOMANIA 179–81 (2001); JAMES WELWOOD, MEMOIRS OF THE MOST MATERIAL TRANSACTIONS IN ENGLAND 106 (London, 3d ed. 1700); William E.A. Axon, *Divination by Books*, 26 MANCHESTER Q. 27 (1907)). In 1660, Lord George Berkeley wrote,

[B]eing sick, and under some dejection of spirit, opening my Bible to see what place I could first light upon which might administer comfort. [His] finger fell on the line in Hosea: “[C]ome, let us return unto the Lord.” and at once he commenced a spiritual as well as medical recovery.

*Id.* at 101 (quoting GEORGE BERKELEY, HISTORICAL APPLICATIONS AND OCCASIONAL MEDITATIONS 90 (London, 1670)). Being an educated man, Berkeley wrote, “I am willing to decline superstition upon all occasions, yet think myself obliged to make this use of such a providential place of scripture.” *Id.* at 101 (quoting BERKELEY, *supra*). Cressy also discusses the folkloric custom of “Bible dipping” which meant to randomly insert a finger into the Bible on New Year’s Day. *Id.* at 102 (citing 12 NOTES AND QUERIES 303 (2d. ser. 1861)). “It is believed that the good or ill fortune, the happiness or misery of the consulting party, during the ensuing year, will be in some way or other described and foreshown by the contents of the chapter.” *Id.* at 102 (citing T.F. THISELTON-DYER, BRITISH POPULAR CUSTOMS 5 (London, George Bell & Sons 1876)).

<sup>389</sup> AUGUSTINE, *supra* note 244, Bk. VIII, chs. 8–12, at 73–77.

<sup>390</sup> *Id.* ch. 8, at 73.

<sup>391</sup> *Id.*

it and read.”<sup>392</sup> Wondering what children’s game could include these words, he picked up the book of Paul’s Epistles, opened it at random, and the passage upon which his eyes chanced to fall changed his life.<sup>393</sup>

The passage Washington kissed by chance appears to be quite appropriate for a religious people who saw themselves, like the Jews of the Old Testament, as God’s chosen people.<sup>394</sup> However, in pursuing this *I Ching*-like custom, it is likely that one could draw some relevant meaning from any randomly chosen passage. This superstitious practice appears to have had a long history in presidential inaugurations. Regarding the inauguration of Warren G. Harding, the *Stevens Point Gazette* on March 9, 1921, printed a note relevant to this tradition.

President Harding introduced an innovation in inaugural ceremonies today when he kissed a verse in the Bible selected beforehand. The custom has been for the Bible to be opened at random, and for the new president to kiss its pages without knowing what verse his lips touched. Some time ago, however, Harding made known his desire to have the Bible belonging to George Washington used, and selected the eighth verse of the sixth chapter of Micah to kiss.<sup>395</sup>

It is somewhat surprising that this superstition, ensconced in the presidential inauguration, should have lasted into the twentieth century.

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<sup>392</sup> *Id.* ch. 12, at 77.

<sup>393</sup> *Id.* Augustine’s eyes fell on the verse, “Not in revelling and drunkenness, not in lust and wantonness, not in quarrels and rivalries. Rather, arm yourselves with the Lord Jesus Christ; spend no more thought on nature and nature’s appetites.” *Id.*; *Romans* 13:13–14 (King James). Augustine continues, “I had no wish to read more and no need to do so. For in an instant, as I came to the end of the sentence, it was as though the light of confidence flooded into my heart and all the darkness of doubt was dispelled.” AUGUSTINE, *supra* note 244, ch. 12, at 77.

<sup>394</sup> Medhurst, *supra* note 119, at 23 (“Concurrent with the renewal of the myth of destiny was the resurgence of the believe [sic] in being a chosen people. Whereas the American myth of chosenness first referred to those messengers of God chosen to spread the light of the gospel into the dark corners of the new world, the reconstructed myth was essentially political in nature. Instead of being chosen for a religious mission, Americans, following the Revolution, believed themselves to be chosen for a political and social mission.”); see also TODD GITLIN & LIEL LEIBOVITZ, *CHOSEN PEOPLES: AMERICA, ISRAEL, AND THE ORDEALS OF DIVINE ELECTION* 67 (2010) (“Decade after decade, all the way to the years of the Revolution, leaders of varying dispositions, ministers and revolutionaries, Congregationalists and Deists, up to and including the Founding Fathers, sought shelter in the idea that the new American population, understood first as part of England and later as a distinct nation, was destined to continue the work of ancient Israel—specifically, that America was repeating the Exodus and the deliverance unto Canaan.”).

<sup>395</sup> *Verse Harding Kissed*, STEVENS POINT GAZETTE (Wis.), Mar. 9, 1921, at 8.

## 2. Thumb-Kissing

Thumb-kissing is another feature of the Bible-kissing custom, though its relevance concerns the oath in general rather than presidential inaugurations. In his *Dissertation on Oaths*, Enoch Lewis relates an anecdote about a woman who had testified under oath in a bankruptcy case that she had given up all her properties.<sup>396</sup> When she was caught selling a property afterwards, she explained she had not really taken the oath because, though she had said the words, she did not kiss the book.<sup>397</sup> A common subterfuge, Lewis indicates, to evade the duty to tell the truth under oath was to kiss the oath-taker's thumb rather than the book.<sup>398</sup> "[I]n such cases, they did not appear to care what falsehoods they told."<sup>399</sup>

The subterfuge is noted by several commentators who discuss the oath. James Endell Tyler writes,

It is notorious, for example, not only at the Old Bailey (though that court has given its name to this particular species of fraud) but elsewhere, that many a witness, if he can but escape the observation of the officer, and kiss his thumb instead of the book, will pledge himself to any falsehood without apprehension of incurring the guilt of perjury.<sup>400</sup>

White addresses this issue as well. "A method . . . has long been in use by mendacious witnesses, *i.e.*, to kiss the thumb instead of the book."<sup>401</sup>

This notion that the oath is not valid without actually kissing the book is by no means limited to the nineteenth or early twentieth century. John S. Beckerman, in an article entitled *Procedural Innovation and Institutional Change in Medieval English Manorial Courts*, compares the role of divine judgment in the medieval trial by ordeal and combat with the need for such divine favor in correctly performing all the formalities of successful oath-swearing.<sup>402</sup> Among these formalities was kissing the book: "If the party withdrew his hand from the gospel book while swearing, used the wrong hand, neglected to kiss the book afterward, or did not say the words clearly

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<sup>396</sup> LEWIS, *supra* note 236, at 73.

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* ("John Stafford, chief clerk of the Bow-street police office, . . . stated that he had observed many witnesses, who would, if not closely watched, evade the oath, by kissing their thumbs, instead of the book.")

<sup>399</sup> *Id.*

<sup>400</sup> TYLER, *supra* note 236, at 47–48. Tyler also mentions other formalistic devices to evade taking the oath, such as not saying the words, not having at least three fingers touching the book, and using a book not stamped with a cross. *Id.* at 48–49.

<sup>401</sup> White, *supra* note 313, at 434.

<sup>402</sup> Beckerman, *supra* note 258, at 203–04.

enough . . . the party offering the proof lost the case.”<sup>403</sup> The reader will recall the case of Laurence Blunham in the time of Henry VIII, who said he did not think he had taken the Oath of Supremacy because he had not kissed the book.<sup>404</sup> In the *Nova et Vetera* section of the *British Medical Journal* for December 18, 1909, the author notes that Nicholas Amhurst, a political writer of the early eighteenth century, in his *Terrae Filius* published in 1726, satirized the oath-taking of new matriculants at Oxford University as follows:

[H]e takes the oaths of allegiance and supremacy, which he is praetaught to evade, or think null: some have thought themselves sufficiently absolved from them by kissing their *thumbs*, instead of the book; others, in the croud, or by the favor of an *honest* beadle, have not had the book given them at all.<sup>405</sup>

The commentators speak of the subterfuge with contempt because of its ignorant and self-serving partiality to form over substance. However, thumb-kissing may warrant a bit more attention. For one thing, its pervasiveness indicates some degree of discomfort that oath-takers experience when they wish to lie under oath and a need to rationalize the invalidity of the oath through the device of not kissing the Bible, flimsy though this rationalization may be. Perhaps placing persons under threat of divine sanction provides some leverage in eliciting the truth. But more importantly, the notion that an oath is not valid without the biblical kiss suggests that the kiss was considered an integral and necessary part of the ceremony—it seals the duty to tell the truth or keep a promise.

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<sup>403</sup> *Id.* at 204 (footnote omitted). Beckerman gives the following citation: “Harvard Law School, MS. 162, fol. 180r; British Library, MS Egerton 656, fol. 191 r–v.” *Id.* at 204 n.29.

<sup>404</sup> See *supra* notes 356–57 and accompanying text.

<sup>405</sup> *The Book Oath, in Nova et Vetera*, 2 BRIT. MED. J. 1764 (Dec. 18, 1909) (citing NICHOLAS AMHURST, *TERRAE FILIUS, OR, THE SECRET HISTORY OF THE UNIVERSITY OF OXFORD* 90 (William E. Rivers ed., 2004) (1726)). In American case law, there are a smattering of cases concerned with the formality of kissing the book. In *Pullen v. Pullen*, 4 A. 82 (N.J. Super. Ct. Ch. Div. 1886), a motion was made to expunge the testimony of a witness who had not kissed the Bible. The court dismissed the appeal stating, “The solemn invocation, affirmation, or declaration is the substance. All else is shadow. The witness in this case was sworn with her hand upon the book. There can be no doubt that, if she made a false statement willfully, she is liable to an indictment for perjury.” *Id.* at 82. In *Preston v. State*, 90 S.W. 856 (Tenn. 1905), the jurymen who were sworn had not kissed the book. The court stated,

While in such matters it is the duty of the officers to follow the forms prescribed by law, and they should always do so, yet mere formalities are not, in cases of this kind, essential to the validity of the act, and, if there is a substantial compliance with the statute, the oath is obligatory and binding, which is all that is required.

*Id.* at 856.



*E. The Meaning of Kissing the Bible*

Henry VIII's Oath of Obedience of 1535 ends with, "So help you God, and all Saints, and the Holy Evangelists."<sup>406</sup> The Elizabethan Oath of Supremacy of 1559 ends with, "So help me God, and by the contents of this book."<sup>407</sup> Thomas Beade's *The Booke of Oaths* provides a number of other oaths ending in similar fashion such as the Oath of the Privy Counselor,<sup>408</sup> Oath of the King's Servants,<sup>409</sup> and the Oath of the Treasurer Clerk of the Exchequer.<sup>410</sup> This linking of "So help me God" with the book occurs in *The English Manner of Swearing Vindicated*<sup>411</sup> and also in Paley's *Moral Philosophy*, in which Paley makes the point that the clause, "'So help me God and the contents of this holy book;' . . . forms a connexion between the words and action of the juror . . . ."<sup>412</sup> It is *The English Manner* pamphlet, however, which provides full insight as to what that connection between the words and the gesture entails:

The published Doctrine of England . . . is that the Holy Scripture contain [sic] all things necessary to Salvation, as being God's Law or Rule of our Faith and Life. All our duty to God is there commanded: All the Promises on which we hope are there contained; all the Punishments which the perjur'd or any sinner must feel and should fear, are there threatened.<sup>413</sup>

The author then explains, "The Laying on the Hand and Kissing the Book, is an Action directly related to the Imprecation . . . ."<sup>414</sup> The imprecation, it seems, is the conditional curse—the divine punishment that the oath-taker will suffer for perjury. The author goes on to provide what he says is the "plaine paraphrase"<sup>415</sup> of the whole.

I do believe that God the Ruler of the world, is the Judge of secrets which are above mans [sic] Judgement, the Searcher of

<sup>406</sup> BEADE, *supra* note 277, at 23.

<sup>407</sup> JONES, *supra* note 273, at 272.

<sup>408</sup> The Privie Counselor Oath, ending, "So God you helpe, and by the holy Contents of this Booke." BEADE, *supra* note 277, at 7.

<sup>409</sup> The King's Servant's Yeoman, ending, "As help you God, and holy *David*, and all Saints, and by this Book, etc." *Id.* at 14.

<sup>410</sup> The Treasurer Clerk, ending, "So help you God, and all Saints, and by the Contents of that Booke." *Id.* at 36. It is difficult to know whether the book was mentioned in many more oaths, because the texts Beade provides often end with "etc." There are also other endings which compete with the book reference, such as reference to the saints.

<sup>411</sup> THE ENGLISH MANNER, *supra* note 360, at 4 ("So help you God, and the Contents of this Book.").

<sup>412</sup> PALEY, *supra* note 259, at 112.

<sup>413</sup> THE ENGLISH MANNER, *supra* note 360, at 3–4.

<sup>414</sup> *Id.* at 4.

<sup>415</sup> *Id.*

hearts, and the hater & avenger of Perjury, according to His holy Word by which he governs us: And to this God I appeal as to the Truth of this my Testimony, consenting my self to lose all the benefit of his promises to the just, and to bear all the punishments here threatened to the Perjured, if I lie.<sup>416</sup>

Thus, by touching and kissing the Bible, the oath-taker is identifying the book as representative of what is most valuable and dear to that person—the entire hope of salvation. The oath itself is an emphatic statement that the oath taker is placing this most valuable object at risk to be lost if the testimony given is false or the promise made is broken.

This Article makes no claim that Washington was aware or thinking of all this when he kissed the Bible. What this Article does assert is that the biblical kiss was no empty gesture. The act was ancient, and it was familiar and significant to Washington and his contemporaries. It was closely associated with the logic of the oath, and in particular with the words, “So help me God.” In fact, kissing the book was widely regarded as a necessary part of the oath. The oath would not be valid without it. To the extent that actions speak louder than words, the gesture of kissing the Bible was as religious and as much a part of the oath as the words, “So help me God.”

#### VI. THE CONSTITUTIONALITY OF PROMPTING THE PRESIDENT WITH “SO HELP ME GOD”

The foregoing historical account provides a basis for arguing that government accommodation of the religious expression in the form of “So help me God,” which Presidents currently include in the presidential Oath of Office, is constitutional under the precedent of *Marsh v. Chambers*.<sup>417</sup> The history of the Oath, its place in the Constitution as an option, along with affirmation, for taking the Oath of Office, and the circumstances under which the President takes the Oath also provide a basis for arguing that the practice of the Chief Justice to prompt the President with the phrase is constitutional under the Establishment Clause tests that have been formulated by the Supreme Court.

##### *A. The Kissing of the Book/“So help me God” Tradition and Marsh*

Primary evidence indicates that Washington probably did not utter “So help me God” at the first inauguration, but the evidence does support his act of kissing the Bible. In Washington’s day, kissing the book was a very old and common part of the Oath and had a close association with the phrase, “So help me God.”<sup>418</sup> *Marsh’s*

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<sup>416</sup> *Id.*

<sup>417</sup> 463 U.S. 783 (1983).

<sup>418</sup> *See supra* Part V.E.

observation that the Framers who wrote the First Amendment did not view legislative prayer as a violation of that Amendment may also be made about the conspicuous presence of the Bible and Washington's biblical kiss at the first inauguration.<sup>419</sup> The act met with the manifest approval of all who witnessed it and received no recorded disapproval from any quarter. Thus, when Washington kissed the book, he anchored religious expression in the Oath of Office at the founding of the country.

There are admittedly two stretches of time, one of forty and the other of twenty-eight years, for which there is no evidence that succeeding Presidents followed Washington's lead.<sup>420</sup> This makes the historical tradition, and hence the argument for its constitutionality predicated on *Marsh*, somewhat weaker than the tradition and argument for legislative prayer and chaplains, a tradition that has been in evidence continuously since the country's founding.<sup>421</sup> However, Washington, Jackson, and Lincoln, perhaps three of the most significant Presidents in the first eighty years of the country's existence, kissed the Bible. And, for ninety-two years afterwards, from Lincoln to Truman, almost all Presidents kissed the Bible.<sup>422</sup> For a while, some Presidents both kissed the Bible and uttered "So help me God."<sup>423</sup> Then, Presidents ceased kissing the Bible but retained

<sup>419</sup> *Marsh*, 463 U.S. at 788.

<sup>420</sup> Andrew Jackson kissed the Bible in the inaugurations of 1829 and 1833, and Lincoln did so in 1861 and 1865. *See supra* notes 193–97 and accompanying text.

<sup>421</sup> In *Marsh*, the Court traces the history of legislative prayer carefully, from the founding of the country to the present day.

[T]he Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain. Although prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer. Thus, on April 7, 1789, the Senate appointed a committee "to take under consideration the manner of electing Chaplains." On April 9, 1789, a similar committee was appointed by the House of Representatives. On April 25, 1789, the Senate elected its first chaplain; the House followed suit on May 1, 1789. A statute providing for the payment of these chaplains was enacted into law on Sept. 22, 1789.

On Sept. 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights. Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.

463 U.S. at 787–88 (footnotes and citations omitted).

<sup>422</sup> The only presidents who did not kiss the Bible during this period were Andrew Johnson in 1865 and Benjamin Harrison in 1893. *See supra* notes 199–200, 207 and accompanying text.

<sup>423</sup> Arthur in 1881, Taft in 1909, Wilson in 1913, Harding in 1921, and Truman in 1945 and 1949 did both. Coolidge in 1925 and Hoover in 1929 only kissed the Bible, and did not say "So help me God." Roosevelt in 1933, 1937, 1941, and 1945 did not kiss the Bible, but uttered "So help me God." *See supra* Table I.

the phrase, so that the phrase essentially replaced the kiss, though the Bible has remained a fixture at the inauguration. Presidents continue to utter “So help me God” to this day.<sup>424</sup> Thus, one might speak of a kiss the book/“So help me God” tradition of religious expression that has accompanied the presidential Oath of Office for most of its history. Though this tradition of religious expression may not be as continuous as the tradition of legislative prayer, the combined tradition of words and gesture probably passes the historical continuity test of *Marsh* due to the presence of religious expression at the first presidential Oath of Office and for most of the nation’s history.

Because “So help me God” and kissing the Bible are closely related historical parts of the oath ceremony and the majority of Presidents from the Framers to the present have used the phrase or the gesture in taking the Oath of Office, the retention of one or the other should be constitutional under the holding of *Marsh v. Chambers*. Presidents today prefer to use the phrase rather than the kiss because the latter has fallen out of fashion, and would appear awkward and anachronistic today.<sup>425</sup> If anything, kissing the Bible today is likely to suggest a greater degree of religious expression, a special devotion to the Christian scriptures, or an unusually demonstrative religiosity. If the precedent of *Marsh* renders either of these customs constitutionally acceptable because of their history, those who object to such expression would probably prefer the routine “So help me God,” found in so many governmental oaths, over kissing the Bible.

Be that as it may, this Article notes that *Marsh* is anomalous in not providing much in the way of principle that would distinguish a historical practice that continues to be constitutional from one that no longer has this sanction under contemporary social mores.<sup>426</sup> The culture of 1789 may have been much more receptive to religious expression in the public forum than today’s culture, and even tolerant of what would be considered an unacceptable violation of the Establishment Clause today.<sup>427</sup> Because of this, and because of the admittedly weaker historical continuity of the kissing the Bible/“So help me God” tradition, it is appropriate to explore an alternate defense of religious expression in the administration of the presidential oath, one which relies

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<sup>424</sup> See *supra* Table I.

<sup>425</sup> Among the reasons that kissing the book fell out of favor as part of the testamentary oath were concerns for hygiene. See *The Book Oath*, *supra* note 405, at 90 (“Many witnesses in English courts have preferred of late to take the ‘sanitary’ oath, as it has been called, and to swear with the right hand raised as is the custom in Scotland.”); *English to Abandon Kissing the Book*, N.Y. TIMES, Jan. 17, 1909 (quoting a judge, “I have given directions to have Books with washable bindings.”); *Kissing the Bible Not Required*, N.Y. TIMES, May 2, 1895 (“[T]he objectionable and unhygienic character [of kissing the book] was recognized by the general Assembly of the province of Pennsylvania four years before that province became a free and independent State, . . . but here the old custom of kissing an often greasy and grimy Bible survives . . .”).

<sup>426</sup> See *supra* notes 36–37 and accompanying text.

<sup>427</sup> See Michael Newdow, *Question to Justice Scalia: Does the Establishment Clause Permit the Disregard of Devout Catholics?*, 38 CAP. U. L. REV. 409, 466–99 (2009) (discussing the treatment of Catholics in American history).

on the principles and tests that the Supreme Court has applied in Establishment Clause controversies.

An alternative defense of religious expression in the administration of the oath may also more fully address a possible objection to analogizing the biblical kiss to “So help me God.” This objection is particularly relevant to the argument the *Newdow* plaintiffs made against the Chief Justice’s addition of the phrase to the Oath of Office: if a President kisses the book as Washington did, that is private expression. A President may include religious expression in such private speech. But when the Chief Justice of the Supreme Court prompts the President with the words, “So help me God,” the government is speaking.<sup>428</sup> To the extent that this is an approval of religious expression, it is a violation of the Establishment Clause. In other words, the *Newdow* plaintiffs could argue that the President may do whatever he would like to do with the Bible, just as he may utter “So help me God” on his own if he wishes. But the administrator of the oath may not prompt him to utter the phrase without offending the Establishment Clause.

### *B. The Kissing of the Book/“So help me God” Tradition and the Establishment Clause Tests*

#### 1. The Oath and Affirmation Choice in the Constitution

From the preceding historical discussion, two principles emerge regarding religious expression related to the President’s Oath of Office. The first is that the Constitution provides a choice to the President as to how he may take the Oath of Office. Article II, section I, clause 8, of the Constitution indicates the President “shall take an Oath or Affirmation.” The Constitution provides this choice not only to the President, but also to state and federal officers under article VI, clause 3.<sup>429</sup> The Constitution goes on to make it explicit that no religious test is required:

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 in any Office or public Trust under the United States.<sup>430</sup>

This statement, coming immediately after the oath requirement, is likely meant to indicate with some emphasis that, unlike the oaths of allegiance that had been required in

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<sup>428</sup> See *supra* notes 15–16 and accompanying text.

<sup>429</sup> Also, Article I, section 3, of the Constitution indicates that Senators have this choice when they serve as jurors in the impeachment of a President: “The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation.”

<sup>430</sup> U.S. CONST. art. VI, cl. 3.

England throughout the seventeenth century, the oath of allegiance to the Constitution is not a religious test.<sup>431</sup> Furthermore, this provision is the only one in the Constitution which uses the word “ever,” underscoring the idea that the Constitution will never require a religious test.<sup>432</sup> The Constitution’s omission of any religious language in the President’s Oath and the removal of religious expression from the oath of federal and state officials provided in the Judiciary Act of 1789 are consistent with this prohibition.<sup>433</sup> It is true that this option to affirm, rather than swear an oath, was not intended to accommodate atheists, but rather religious dissenters who believed that to swear an oath was contrary to Christ’s teaching.<sup>434</sup> However, Supreme Court precedent has appropriately interpreted the Constitution to protect nonbelievers from being coerced to use religious expression, so that the option of affirmation provides a workable accommodation for the atheist or anyone else who does not wish to engage in the religious expression or implications of the oath.<sup>435</sup>

But the other alternative, that of taking an oath, is also in the Constitution. The choice of the oath implies the second principle that emerges in greater detail at the first inauguration when Washington chose to include religious expression by kissing the Bible in taking the presidential Oath of Office. By providing the choice of an oath without either restricting or instructing what, if any, religious expression the President may use in taking the oath, the Constitution permits the President to use the religious expression traditionally associated with the oath, and implicitly permits the government to accommodate this choice as it would the choice of affirmation.

Recently, Seth Barrett Tillman made the following observation about the “Oaths and Affirmations Clause” in the Constitution:

What is the difference between an oath and affirmation? The consensus view—and as far as I know the universal view—is

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<sup>431</sup> Patrick O. Gudridge, *The Office of the Oath*, 20 CONST. COMMENT 387, 390 n.8 (2003) (“The ‘but’ suggests that the Framers considered the constitutional oath a substitute for the religious tests the colonists were familiar with under the English established church.” (emphasis omitted) (quoting Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 18 (1984))). If the Framers did consider this oath a replacement for the English oaths, they were indicating a departure from those oaths as to religion. This oath would not be a religious test, and it would be up to the oath-taker whether to take an oath or affirm his allegiance to the Constitution.

<sup>432</sup> Newdow, *Question to Justice Scalia*, *supra* note 427, at 448 n.217 (“As one renowned legal authority noted, Article VI, clause 3 is the only place in the entire body of the Constitution where the word ‘ever’ is used.”) (citing KENNETH W. STARR, *The Relationship of Church and State: The Views of the Founding Fathers*, in THE SUPREME COURT HISTORICAL SOCIETY YEARBOOK 37 (1987)).

<sup>433</sup> See *supra* notes 141–60 and accompanying text.

<sup>434</sup> See *supra* notes 251, 288 and accompanying text.

<sup>435</sup> *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (“We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion.”).

that the former is taken in God's name, but the latter is not. The purpose of the clause—according to the standard narrative—was to permit Quakers and others having a religious or other conscientious objections to oath-taking to also hold public office. The purpose is one of inclusiveness and tolerance, but it is also a textual reference to God in our public charter—albeit an indirect one.<sup>436</sup>

If the foregoing discussion indicates anything about the Oath, it is that an oath has religious significance and must have had such significance to the Framers of the Constitution. If the Oath did not have this significance, the choice between oath and affirmation would be no choice at all. To choose between a “secular oath” (an oxymoron if ever there was one) or a “secular affirmation” would be meaningless. The difference was important to the Framers of the Constitution and remains important to this day; otherwise, no atheist would object to a President or Supreme Court Justice uttering “So help me God.” To entirely divest the word, “oath,” of its religious significance would be to disregard the plain language of the Constitution, nullifying the distinction between oath and affirmation.

In providing for the presidential Oath of Office, the Constitution says nothing about including or excluding religious expression, supplying a Bible, or having the President place her hand on the book, kiss the book, or say, “So help me God.” Indeed, such explicitness would have been inconsistent with the Establishment Clause because had the Constitution included such provisions, the Constitution itself would have been “making a law respecting an establishment of religion.”<sup>437</sup> The Constitution also did not ban such religious expression in government ceremonies such as the inauguration. That prohibition would likely have contradicted the Free Exercise and Free Speech Clauses of the First Amendment in “prohibiting the free exercise [of religion]; or abridging the freedom of speech.”<sup>438</sup> Such restriction of religious expression was not inconceivable to the period, for even as Washington was taking his Oath of Office, the other great Revolution in France was soon to institute a constitution establishing a calendar that dated from the French Revolution rather than from the birth of Christ.<sup>439</sup>

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<sup>436</sup> Seth Barrett Tillman, *Blushing Our Way Past Historical Fact and Fiction: A Response to Professor Geoffrey R. Stone's Melville B. Nimmer Memorial Lecture and Essay*, 114 PENN ST. L. REV. 391, 395–96 (2009); Seth Barrett Tillman, *Blushing Our Way Past History*, 2009 CARDOZO L. REV. DE NOVO 46, 48 (2009).

<sup>437</sup> U.S. CONST. amend. I.

<sup>438</sup> *Id.*

<sup>439</sup> Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 965–66 (1996) (“The framers resisted the temptation often encountered by architects of new orders and indeed, the course adopted in the French revolutionary constitution, which was to institute a wholly new calendar dated not from the birth of Christ but from the revolutionary moment. The new French calendar commenced with the autumnal equinox, the day after their republic was proclaimed. The

In permitting, without any restrictions, an oath—a word with a clear history of religious significance then as now—the Constitution left open to the President the discretion to take the oath with its customary modicum of religious expression. And, at the event itself, the founding government accommodated Washington's choices by allowing the Bible to be present, indeed, displayed elegantly on a red cushion, by allowing Washington to take the oath with his hand on the Bible, and by allowing him to kiss the Bible before Livingston pronounced him President.

The argument that kissing the Bible is not like “So help me God” because kissing the book doesn't involve any prompt is plainly wrong. If the Chief Justice's prompt is indeed viewed as illicit government sponsorship of religion, then it would be necessary to view the various arrangements the government made in providing a Bible at the first inauguration as illicit religious sponsorship. This also applies to the manner in which the government highlighted the Bible on a red cushion, and the way that Otis held the Bible up to Washington's lips so he could kiss the book. These facts justify the defense which the federal defendants argued in *Newdow*—that the prompt is an accommodation of the President's personal preferences and expression regarding the oath he takes.

[A]n injunction that precludes the Chief Justice from administering the oath of office in a manner consistent with the President-Elect's express wish to affirm his oath with the phrase “so help me God” would violate the President-Elect's desires regarding his inaugural ceremonies, and raises concerns about interfering with his own First Amendment rights.<sup>440</sup>

Such arrangements are evident in dozens of presidential inaugurations in which the Bible makes an appearance.<sup>441</sup> They are accommodations that the government allows

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French, of course, went much further in stripping the public calendar of religious holy days; the Christian Sabbath, for example, was abolished and replaced by a festival every tenth day.” (footnotes and citations omitted).

<sup>440</sup> Federal Defendants' Opposition, *supra* note 43, at 42–43 (citations omitted) (“And more generally, the thought of a federal court in any way restraining the President-Elect from conducting the inauguration ceremony as he sees fit must necessarily give one pause.”).

<sup>441</sup> In the late nineteenth and early twentieth centuries, an exact ritual might have developed regarding the manner in which the President took the oath. *See supra* note 205 regarding the inauguration of Grover Cleveland in 1885 and consider this description of the ceremony accompanying the story of Woodrow Wilson's inauguration:

When the opened book is held up by the clerk, the chief justice places his hand on one side, and the President-elect on the other. It appears that in this formality the President-elect who is unversed in the observance of the elaborate ceremony and has not been coached to play his part, places his hand under the book or anywhere but in the right place. The clerk adjusts it properly and the oath is administered. The clerk then



for the President's choice of taking an oath rather than an affirmation—a choice that is evident, not simply in the precedent that Washington set, but in the founding document itself. Because these arrangements are accommodations predicated on a choice provided in the Constitution, then unlike the tradition of legislative prayer and chaplains—which, according to Justice Brennan, “any group of law students” would find unconstitutional under the *Lemon* test<sup>442</sup>—the religious expression related to the presidential Oath, including the prompt of the Chief Justice, is likely to pass the Establishment Clause tests that the Supreme Court has laid out.

## 2. The Establishment Clause Tests

Commentators and Supreme Court jurists have criticized the Establishment Clause tests that the Court has formulated over the years as too prone to manipulation both in the selection of the tests to be applied and the manner of application.<sup>443</sup> However,

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raises the open volume to the President to be kissed and the verses and chapter his lips chanced to touch are carefully observed.

*Ceremony of Taking the Oath Is Arranged with Greatest Care*, UTICA HERALD-DISPATCH (N.Y.), Mar. 4, 1913, at 3. The article goes on to relate that the clerk of the court marks the verses and inscribes the form of the oath the President has taken on the fly leaf of the book; the wife of the clerk then presents the Bible to the First Lady, and it is kept in the family as a treasured heirloom. *Id.*; see also *supra* notes 217, 223 (providing the videos of inaugurations of Woodrow Wilson in 1913 and Herbert Hoover in 1928, in which the formalities described in the paragraph above appear to be followed).

<sup>442</sup> *Marsh*, 463 U.S. at 800–01 (Brennan, J., dissenting).

<sup>443</sup> When a commentator or jurist wishes to critique some aspect of an Establishment Clause test, the word “manipulative” typically presents itself. See, e.g., Josh Blackman, *This Lemon Comes as a Lemon: The Lemon Test and a Statute's Secular Purpose*, 20 GEO. MASON U. C.R.L.J. 351, 353 (2010) (“*Lemon's* purpose prong consistently yields inconsistent results and allows savvy politicians to manipulate the record to avoid Establishment Clause challenges.”); David W. Cook, *The Un-Established Establishment Clause: A Circumstantial Approach to Establishment Clause Jurisprudence*, 11 TEX. WESLEYAN L. REV. 71, 86 (2004) (“[P]erhaps the most significant problem with the modern state of the Court's Establishment Clause jurisprudence is that there is no clear test, leaving the lower courts to face the dilemma of what test to apply or how to manipulate one or more of the tests to ensure that the same result is reached under each.”); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 219 (2004) (“When speaking to the Court, litigants no longer challenge the basic distinction between private and governmental speech about religion. Instead, they struggle to move or manipulate the boundary.”). Examples from the Supreme Court include: *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 900 (2005) (Scalia, J. dissenting) (“As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve.”); and *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J., concurring) (“The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections.”). See also, e.g., *Lee v. Weisman*, 505 U.S.

a majority of the Supreme Court has never rejected the major tests: the *Lemon* test, the endorsement test, and the coercion test, though one test or another may have received more prominence in a given opinion.<sup>444</sup> The following discussion will address the tests in order of the increasing difficulty of the challenge they present for the inclusion of “So help me God” as a prompt in the President’s Oath of Office.

*a. The Coercion Test*

The Establishment Clause simply states, “Congress shall make no law respecting an establishment of religion.”<sup>445</sup> The coercion test for this provision requires two elements for a violation of the Clause: (1) state action and (2) government coercion.<sup>446</sup> The leading case that applied the coercion test was *Lee v. Weisman*, in which the principal of a public middle school arranged for a rabbi to provide prayers at the school’s graduation ceremony.<sup>447</sup> It is unlikely that the religious prompt at the President’s inauguration will satisfy the state action prong, because the decision to include “So help me God” in the ceremony is not made by the Chief Justice acting in his official capacity, but rather is made by the President as his personal expression regarding the oath he takes.<sup>448</sup> The Constitution permits the President to utter these words because the Constitution gives the President the choice of an oath or affirmation.<sup>449</sup> The Chief

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577, 632 (1992) (Scalia, J., dissenting) (“As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion. . . .”); *Harris v. Zion*, 927 F.2d 1401, 1424 (7th Cir. 1991) (Easterbrook, J., dissenting) (“Line drawing in this area will be erratic and heavily influenced by the personal views of the judges.”).

<sup>444</sup> For instance, in *Lee v. Weisman*, the majority decision rested on the coercion test. 505 U.S. at 587 (“[T]he Constitution guarantees that government may not coerce anyone to support . . . religion.”). Justice Scalia took comfort in what he believed was the death and burial of the *Lemon* test: “The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it . . . and the internment of that case may be the one happy byproduct of the Court’s otherwise lamentable decision.” *Id.* at 644 (Scalia, J., dissenting). However, Scalia was so aghast at *Lemon*’s reappearance in *Lamb’s Chapel v. Center Moriches Union Free School District*, that “the Court’s invocation of the *Lemon* test” appeared to his judicially fevered imagination, “[I]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.” 508 U.S. 384, 388 (1993) (Scalia, J., concurring).

<sup>445</sup> U.S. CONST. amend I.

<sup>446</sup> *Lee*, 505 U.S. at 587.

<sup>447</sup> *Id.* at 581.

<sup>448</sup> The plaintiffs in *Newdow v. Roberts* agreed that it would violate the President’s Free Exercise rights to prohibit him from saying these words. *See supra* note 15 and accompanying text. Such a prohibition is even more likely to violate his Free Speech rights.

<sup>449</sup> U.S. CONST. art. II, § 1 (“Before he enter upon Execution of his Office, he shall take the following Oath or Affirmation . . .”).

Justice may in turn provide the prompt, first, to accommodate the President's wishes to include his personal religious expression in taking the oath, and second, to facilitate the ceremony and avoid the implication that the President is inappropriately improvising. The prompt is not, as in *Lee v. Weisman*, one in which a government official decides to arrange for religious expression at an official government address by inviting a clergyman for the purpose of leading such a prayer. Because of this, there is no state action of a religious nature.

Even if state action were present, there is no coercion even under the very broad understanding of coercion that Justice Kennedy employs in *Lee v. Weisman*.<sup>450</sup> In the case of an oath, there is no imposed group prayer during which a dissenter must take or feign an attitude of respectful silence that may be interpreted as agreement with the prayer.<sup>451</sup> It is the President alone who is taking an oath, not the attending audience. A religious dissenter is not a participant in the oath-taking. Furthermore, even if the dissenter believes that the religious expression is an imposition, it is the President's personal choice that creates the imposition, not that of the government.

*b. The Lemon Test*

The *Lemon* test has three parts: "First, the [government action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."<sup>452</sup> First, in prompting the President, the Chief Justice has the secular purpose of accommodating the President's wishes to take an oath, which the Constitution permits. Aside from this, the Chief Justice is attempting to facilitate the ceremony. If the President wanted to take the oath by affirmation, the Chief Justice would obviously accommodate the President by omitting any religious expression, or by using some nonreligious form of affirmation of the President's choosing to replace "So help me God." The government, represented by the Chief Justice, does not have a religious purpose in accommodating the President's choice.

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<sup>450</sup> The *Lee* opinion includes peer pressure as an impermissibly coercive instrument of the state: "The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction." *Lee*, 505 U.S. at 593.

<sup>451</sup> *Lee* was concerned that religious coercion was implicit in imposing a prayer upon a dissenter who therefore would feel compelled to assume a respectful attitude.

[F]or the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer.

*Id.*

<sup>452</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citations omitted).

Secondly, there may be some effect of advancing religion when the Chief Justice gives the President the prompt, but this advancement of religion is not the “principal or primary effect” required for a violation under the second part of the *Lemon* test.<sup>453</sup> The principal, or primary, effect is to allow the President to take the oath rather than an affirmation as permitted by the Constitution and chosen by the President. Another effect, of greater importance than any advancement of religion, is to make the oath-taking run smoothly and respectfully.

Finally, the government is not entangled in religion because the government is not participating or interfering in the formulation or imposition of any religious policy or controversy.<sup>454</sup> The choice to take an oath is the President’s personal preference, not the government’s. The prompting creates no entanglement with religion other than allowing the President to exercise his choice of taking the oath in a respectful and dignified manner.

*c. The Endorsement Test*

The Endorsement Test, however, presents the closest challenge to the Chief Justice’s prompt. Justice O’Connor is most associated with this test and its application. She stated:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community . . . . Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.<sup>455</sup>

Under this standard, Justice O’Connor reformulated the questions posed by the first and second prong of the *Lemon* Test: the purpose prong asking “whether government’s actual purpose is to endorse or disapprove of religion”; and the effects prong asking “whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.”<sup>456</sup>

Justice O’Connor also formulated an often quoted statement that is quite relevant to the religious expression in the presidential Oath of Office: “[T]here is a crucial

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<sup>453</sup> *Id.*

<sup>454</sup> *Id.*

<sup>455</sup> *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984).

<sup>456</sup> *Id.* at 690.

difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”<sup>457</sup> The objection to the Chief Justice’s prompt in *Newdow v. Roberts* attempts to exploit this “crucial difference.” The argument concedes that the President’s independent and unprompted utterance of “So help me God” may be constitutionally permissible as the President’s private speech, protected by the Free Speech and Free Exercise Clauses. But the argument maintains that the Chief Justice’s use of these words to prompt the President is government speech endorsing religion, which is forbidden by the Establishment Clause.<sup>458</sup> If, under O’Connor’s pronouncement, these words uttered by the Chief Justice do in fact constitute government speech, they fail the Endorsement Test, because they send a message that those who believe in God are political insiders, and those who do not are political outsiders.

The Endorsement Test does not appear to alter *Lemon*’s first prong very much. If, in response to O’Connor’s question, the government’s *actual* purpose is religious endorsement, then the government’s purpose is not secular and the action fails the first prong of the *Lemon* test. Applied to the instant case, there is no evidence that the Chief Justice’s actual purpose in prompting the President was religious. Rather, his purpose was secular: to accommodate the wishes of the President and to facilitate the ceremony. The Endorsement Test, then, does not change the result and does not much change the analysis in applying the first prong of *Lemon*. In contrast, however, the Endorsement Test significantly modifies *Lemon*’s second prong because, as O’Connor subsequently made clear, the conveyance of a message that endorses or approves religion depends upon the perception of a reasonable observer.

In her concurrence in *Capitol Square Review & Advisory Board v. Pinette*, O’Connor elaborated on the role of the reasonable observer.<sup>459</sup> In this case, the city of Columbus, Ohio, created a public forum in front of the Ohio State Capitol Building in which private organizations could place displays subject to the approval of a review board.<sup>460</sup> One group, the Ohio Ku Klux Klan, applied to erect a cross.<sup>461</sup> The Board turned down the application ostensibly because the appearance of the religious message on public property would violate the Establishment Clause.<sup>462</sup> Representatives of the Klan sued, claiming a violation of free speech rights.<sup>463</sup> A splintered Supreme Court ruled in favor of the Klan in a plurality opinion, finding that the city had created

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<sup>457</sup> *Westside Cmty. Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

<sup>458</sup> *See supra* note 15 and accompanying text.

<sup>459</sup> 515 U.S. 753, 780 (1995) (O’Connor, J., concurring) (stating that the reasonable observer is the “personification of a community ideal of reasonable behavior, determined by the collective social judgment”).

<sup>460</sup> *Id.* at 757–58 (plurality opinion).

<sup>461</sup> *Id.* at 758.

<sup>462</sup> *Id.*

<sup>463</sup> *Id.* at 758–59.

a public forum in front of the Capitol Building and, having done that, the government could not discriminate against a point of view because it is religious.<sup>464</sup> Although O'Connor concurred with the result, she argued that even if the religious speech in question was in fact private, and not government, speech, it could still violate the Establishment Clause if a "reasonable observer would view [the] government practice as endorsing religion . . . ."<sup>465</sup> This is because

[the Establishment Clause] imposes affirmative obligations that may require a State . . . to take steps to avoid being perceived as supporting or endorsing a private religious message. . . . [It] forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.<sup>466</sup>

O'Connor found there was no government endorsement because she believed a reasonable observer would know that the area in front of Capitol Square is a forum for private speech; therefore, the cross did not create the appearance that the government was sponsoring religious belief.<sup>467</sup>

O'Connor's position drew criticism from Justice Scalia, who remarked that the position was inconsistent with her previous statement regarding the "crucial difference" between forbidden government speech that endorses religion and protected private speech which does the same.<sup>468</sup> According to Scalia, to prohibit speech when a reasonable observer may mistakenly perceive a private endorsement of religion as government endorsement is "saying in effect that the 'difference between *government* speech . . . and *private* speech' is *not* 'crucial.'"<sup>469</sup> On the other hand, Justice Stevens, who found that the presence of a cross in front of the Capitol Building would lead a reasonable observer to conclude that the government was endorsing religion,<sup>470</sup> dissented and

<sup>464</sup> *Id.* at 769–70.

<sup>465</sup> *Id.* at 777 (O'Connor, J., concurring).

<sup>466</sup> *Id.*

<sup>467</sup> *Id.* at 782 ("In this case, I believe, the reasonable observer would view the Klan's cross display fully aware that Capitol Square is a public space in which a multiplicity of groups, both secular and religious, engage in expressive conduct. . . . On the facts of this case, therefore, I conclude that the reasonable observer would not interpret the State's tolerance of the Klan's private religious display in Capitol Square as an endorsement of religion.").

<sup>468</sup> *Id.* at 765, 766 n.2 (plurality opinion).

<sup>469</sup> *Id.* at 766 n.2.

<sup>470</sup> *Id.* at 801–02 (Stevens, J., dissenting).

The very fact that a sign is installed on public property implies official recognition and reinforcement of its message. That implication is especially strong when the sign stands in front of the seat of the government itself. The "reasonable observer" of any symbol placed unattended in front of any capitol in the world will normally assume that the sovereign—which is not only the owner of that parcel of real estate but also the

criticized O'Connor's reasonable observer as a legal fiction, an ideal who "knows and understands much more than meets the eye. . . . [A] well-schooled jurist," in other words, someone very much resembling Justice O'Connor herself.<sup>471</sup>

This difficulty of defining the reasonable observer—and what such an observer would reasonably perceive—is pertinent to the issue under consideration. If the reasonable observer is Justice Stevens's type of reasonable observer, such a person would not apply any knowledge she may have or which a court might attribute to her about the event. Upon hearing the Chief Justice prompt the President to say, "So help me God," the reasonable observer would come to the logical conclusion that the United States government is sponsoring a religious belief and even imposing it on the President and everyone else by means of the Oath. If, however, the reasonable observer of the inauguration is O'Connor's type, who knows that the presence of these words is the result of a choice that the Constitution gives to the President, and that it is the President who personally chooses to swear an oath rather than make an affirmation, this observer is more likely to perceive the prompting and response as the President's personal expression. The issue is more than a matter of words. As noted earlier, the Constitution does not indicate that the Oath should be given with a Bible or any other religious book. Even if the words were removed, the reasonable observer might still perceive government sponsorship of religion because of the presence of the Bible. In order to protect such a reasonable observer, the courts would have to prohibit any vestige of religious expression. This would take away from the President the choice provided by the Constitution to take the Oath with its religious expression and limit the President to an affirmation, or perhaps a pseudo-oath that is actually an affirmation because it lacks any religious reference. It would also influence the choice of all the members of Congress, limiting them to the affirmation, and do the same for all employees of the federal, state, county, or municipal governments required to make any kind of promise regarding the duties of their work.

### *C. Some Other Religious Precedents of the First Inauguration*

Washington's biblical kiss is not the only historical detail upon which to anchor arguments justifying the President's discretion to include religious expression at the inauguration. There were other religious aspects to the first inauguration. Just before the inauguration, the House of Representatives apparently removed "So help me God" from the oath for federal and state officials.<sup>472</sup> But it was also only a few days before the inauguration, on April 7, 1789, that the Senate appointed a joint committee "to

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lawgiver for the surrounding territory—has sponsored and facilitated its message.

*Id.*

<sup>471</sup> *Id.* at 800 n.5.

<sup>472</sup> *Supra* Part II.D.

take under consideration the manner of electing chaplains.”<sup>473</sup> On April 15, the committee reported,

That two chaplains, of different denominations, be appointed to Congress for the present session, the Senate to appoint one, and give notice thereof to the House of Representatives, who shall, thereupon, appoint the other; which chaplains shall commence their services in the Houses that appoint them, but shall interchange weekly.<sup>474</sup>

On April 25, the Episcopalian Bishop, Samuel Provoost, was elected Chaplain to the Senate.<sup>475</sup> And on April 27, another joint committee, tasked with organizing the inauguration, submitted a report to make a religious service an official part of the inauguration.

That after the oath shall have been administered to the President, he, attended by the Vice-President, and members of the Senate, and House of Representatives, proceed to St. Paul’s Chapel, to hear divine service, to be performed by the chaplain of Congress . . . appointed.<sup>476</sup>

Senator Maclay objected to this resolution because “this is a certain method of creating a dissension between the Houses.”<sup>477</sup> What he meant by “dissension between the Houses” can be surmised from the House amendments to this resolution that were passed on April 29:

That after the oath shall have been administered to the President, the Vice-President and members of the Senate, the Speaker and members of the House of Representatives, will accompany him to Saint Paul’s Chapel to hear divine service performed by the Chaplains of Congress.<sup>478</sup>

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<sup>473</sup> Medhurst, *supra* note 119, at 57 (“Ordered, That Mr. Ellsworth, Mr. Lee, Mr. Strong, Mr. Maclay, and Mr. Bassett, be a committee to prepare a system of rules to govern the two Houses in cases of conference, and to take under consideration the manner of electing Chaplains, and to confer thereupon with a committee of the House of Representatives.” (citing 1 DEBATES AND PROCEEDINGS, *supra* note 145, at 18)).

<sup>474</sup> *Id.* at 58 (citing 1 DEBATES AND PROCEEDINGS, *supra* note 145, at 19).

<sup>475</sup> *Id.*; see also 1 JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 16 (N.Y. 1789) (“The Senate proceeded to the appointment of a Chaplain, in the manner agreed upon the 15th of April: and the right Reverend SAMUEL PROVOOST was elected.”).

<sup>476</sup> Medhurst, *supra* note 119, at 58–59 (citing 1 DEBATES AND PROCEEDINGS, *supra* note 145, at 25).

<sup>477</sup> *Id.* at 59 (citing MACLAY, *supra* note 115, at 4).

<sup>478</sup> *Id.* at 60 (citing 1 DEBATES AND PROCEEDINGS, *supra* note 145, at 241).



The House version inserted the Speaker of the House to balance the reference to the Vice President, who, of course, was the leader of the Senate. The reference to the “Chaplain of Congress” became the “Chaplains of Congress” to include the chaplain chosen by the House as well as the chaplain elected by the Senate.<sup>479</sup> As Medhurst surmises, “throughout the debate the issue is *not* separation of church and state. The issue is the relationship between the two houses of Congress. . . . There is no indication that anyone thought it improper to mix the religious and the political realms.”<sup>480</sup> In the divine service on the day after the inauguration, April 30, however, only Bishop Provoost presided, perhaps because the House did not have time to elect a chaplain.<sup>481</sup> No description of the service survives; all that is known is that the bishop read from the “Proposed” Book of Common Prayer.<sup>482</sup> Washington quite willingly attended the service directly after the inauguration.<sup>483</sup>

Aside from this, there is the religious expression that Washington included in his inaugural address. The speech was given to a joint session of Congress in the Senate Chambers, and not to the general public.<sup>484</sup> However, the speech established the precedent for virtually all future inaugural addresses of including some reference to the

<sup>479</sup> *Id.*

<sup>480</sup> *Id.*

<sup>481</sup> *Id.* at 62–63.

<sup>482</sup> *Id.* at 63. Medhurst explains that the “Proposed” Book of Common Prayer was a version that

had been formulated in 1786 and contained many changes from the English Book of Common Prayer. Several psalms were omitted from the Psalter, the *Benedicite* was omitted . . . the Nicene Creed and the Athanasian were entirely omitted; the clause “He descended into hell” was dropped from the Apostle’s Creed, and many other significant changes occurred.

*Id.* He continues, “Unfortunately, it does not appear that any records of the service or prayers inside of St. Paul’s Chapel are now extant.” *Id.*

<sup>483</sup> Regarding this service, the Plaintiffs in *Newdow v. Roberts* argued,

The prayer at the first inauguration took place after the ceremony, in a separate location. Plaintiffs have never suggested that Barack Obama—along with the Chief Justice and anyone else of his choosing—should not be allowed to walk to some church after his oath has been taken, and worship God to his heart’s content. That was what occurred at George Washington’s inauguration.

Plaintiffs’ Reply to Defendants’ Responses to Plaintiffs’ Motion for Preliminary Injunction at 15, *Newdow v. Roberts*, No. 1:08-CV-02248-RBW (D.D.C. January 10, 2009). It is true that the prayer service took place at a different location, apart from the inauguration ceremony. The resolution to have the President and members of Congress attend the service after the inauguration is offered only to indicate the religious context of the inauguration, the willingness of Congress to arrange for the members of the new government to attend the service, and the connection between the chaplaincy, which is the subject of *Marsh v. Chambers*, and the inauguration.

<sup>484</sup> INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM GEORGE WASHINGTON 1789 TO GEORGE BUSH 1989, at 1 (1989).

Deity in thanksgiving or for help and guidance in the coming years. Of those addresses that followed Washington's over the past 220 years, only two, Washington's second inaugural address (also the briefest of all inaugural addresses) and Theodore Roosevelt's address of March 4, 1905, lack this appeal.<sup>485</sup> Religious rhetoric pervades Washington's first inaugural address. Here are some excerpts:

[I]t would be peculiarly improper to omit in this first official act my fervent supplications to that *Almighty Being* who rules over the universe, who presides in the councils of nations, and whose *providential* aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes, and may enable every instrument employed in its administration to execute with success the functions allotted to his charge. In tendering this homage to the *Great Author* of every public and private good, I assure myself that it expresses your sentiments not less than my own, nor those of my fellow-citizens at large less than either. No people can be bound to acknowledge and adore the *Invisible Hand* which conducts the affairs of men more than those of the United States. Every step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of *providential* agency; and in the important revolution just accomplished in the system of their united government the tranquil deliberations and voluntary consent of so many distinct communities from which the event has resulted cannot be compared with the means by which most governments have been established without some return of pious gratitude, along with an humble anticipation of the future blessings which the past seem to presage. . . .

. . . [W]e ought to be no less persuaded that the propitious smiles of heaven can never be expected on a nation that disregards *the eternal rules of order and right which heaven itself has ordained*; . . .

. . . .

Having thus imparted to you my sentiments as they have been awakened by the occasion which brings us together, I shall take my present leave; but not without resorting once more to the benign *Parent of the Human Race* in humble supplication that, since he has been pleased to favor the American people with opportunities for deliberating in perfect tranquility, and dispositions for deciding with unparalleled unanimity on a form of government for the security of their union and the advancement of their happiness, so *His*

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<sup>485</sup> *Id.* at 6, 209–11.

*divine blessing* may be equally conspicuous in the enlarged views, the temperate consultations, and the wise measures on which the success of this Government must depend.<sup>486</sup>

Though Washington does not refer to Christ, or even use the word “God,” he makes ample use of metaphoric references to the Deity that emphasize the Deity’s guidance over human affairs: the “Almighty Being who rules the universe”;<sup>487</sup> the “Great Author of every public and private good”;<sup>488</sup> the “Invisible Hand which conducts the affairs of men”;<sup>489</sup> “Parent of the Human Race.”<sup>490</sup> He uses the term “providential” twice.<sup>491</sup> The general sense of his religious expression is that his first official act should include thanksgiving to the Deity for ordering the events and destiny that have led to American independence and government—the achievement of which, Washington suggests, evidences God’s present and future favor. “Every step by which [the United States] have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency.”<sup>492</sup>

There is a particular relevance that this discussion about Providence had to the oath Washington had just taken. In declaring American independence and fighting the British, the rebels—and Washington most conspicuously—had broken their oaths of allegiance to the English King.<sup>493</sup> They were traitors. Had they lost the war, they would have hanged. The intervention of some “providential agency”—call it fate, destiny, chance, or good luck—made the difference in determining that the betrayal of former oaths would lead Washington and his colleagues to the distinct honor of founding a nation rather than to the ignominy of a traitor’s execution. A hundred years earlier, in the wake of the Glorious Revolution, as British moral and political philosophers looked back over a century of the oaths of allegiance sworn to King, then to Parliament, then to Commonwealth, to King again, and to a King and Queen designated by Parliament, these thinkers were preoccupied with the issue of when and how subjects who had sworn an oath to one sovereign may in good conscience swear an oath to another sovereign who had taken power.<sup>494</sup> In discussing this casuistry, David Martin-Jones concludes that the Divine Right of Kings, claimed by James I at the outset of the seventeenth century, came to be replaced by what he calls the Divine Right of Providence at the century’s end.<sup>495</sup> In the words of one casuist of the period, “If God’s will preserves

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<sup>486</sup> *Id.* at 2–4 (emphasis added).

<sup>487</sup> *Id.* at 2.

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

<sup>490</sup> *Id.* at 4.

<sup>491</sup> *Id.*

<sup>492</sup> *Id.* at 2.

<sup>493</sup> See *SHMG*, *supra* note 76, for a summary of Washington’s earlier oath history.

<sup>494</sup> See *supra* notes 277–89 and accompanying text.

<sup>495</sup> See JONES, *supra* note 273, at 211–16 (discussing the oath in relation to the Divine Right of Providence).

human societies, . . . we must conclude that when He removes a King out of a throne, He gives his authority to him whom He places there, for without authority human societies must disband.”<sup>496</sup> Or as the poet, Alexander Pope, put it in his *Essay on Man*, a poem which purports to “vindicate the ways of God to Man,” “One truth is clear, ‘Whatever is, is right.’”<sup>497</sup> Similarly, Washington justifies his oath, which represents a final break from his previous allegiance to English sovereignty, by appealing to and thanking Providence for determining the successful outcome of the American Revolution and the establishment of a new government.

#### CONCLUSION

Steve Sheppard made an extremely cogent point in his article, *What Oaths Meant to the Framers’ Generation: A Preliminary Sketch*.

The oath, by definition, is created by a public institution, indeed drafted by officials of those institutions, but it must be taken personally by the individual, who is required to perform the office with particular care and (sometimes impliedly and sometimes explicitly) for the benefit of the public. This duality in [sic] inherent in the “subscription” by which a person takes an oath, and the “office” that requires the oath itself.<sup>498</sup>

An Oath of Office is intensely personal because the individual taking the oath is making a promise, and is expressing to all those interested in whether the promise will be kept

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<sup>496</sup> *Id.* at 216 (quoting WILLIAM SHERLOCK, THE CASE OF ALLEGIANCE DUE TO SOVEREIGN POWER 40 (1691)).

This view achieved growing popularity after 1689. According to this theory, . . . rulers were raised and removed by God’s Providence. The allegiance of subjects therefore was due to the authority that Providence had placed over them for their protection. Sherlock asserted that the necessity of government gave the prince authority and laid an obligation of loyalty upon the subject.

*Id.*

Consequently, a notable feature of the . . . confessional state’s theory of allegiance was . . . acceptance of divine right of Providence. This new orthodoxy meant that whilst oaths continued to be tendered in the Hanoverian period, they no longer bound indefeasibly to the person of the monarch. They were subject to parliamentary revision and constituted a symbolic rather than a conscientious bond.

*Id.* at 266. Jones attributes the phrase, “Divine Right of Providence,” to GERALD STRAKA, THE ANGLICAN REACTION TO THE REVOLUTION OF 1688 (1962). JONES, *supra* note 273, at 208.

<sup>497</sup> ALEXANDER POPE, AN ESSAY ON MAN, Epistle 1, at 6, 19 (1733).

<sup>498</sup> Steve Sheppard, *What Oaths Meant to the Framers’ Generation: A Preliminary Sketch*, 2009 CARDOZO L. REV. DE NOVO 273, 276 (2009); *see also* STEVE SHEPPARD, I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS 105–09 (2009).

how important it is to that individual to keep the promise. In expressing this, it is natural for the oath taker to refer to what is most sacred and valuable to that person, and to what that person thinks is likely to be most sacred and valuable to those interested in the oath. The belief in God is a reasonable choice. On a personal level, it is a matter of free speech to allow the individual taking the Oath to communicate the importance of the promise in the way that individual chooses.

The oath is also intensely public, a creature of government institutions to accomplish administrative ends. The frequency with which oaths are taken and broken may engender cynicism and skepticism as to their effectiveness and reliability. There are, however, few oaths that confer on any person the awesome trust, responsibility, and hope that the presidential Oath of Office confers. The President-elect emerges from the oath with the responsibility of protecting and defending the Constitution, a document which embodies the wisdom and experience of the struggle to find the means by which humans may live together in peace. It is a significant burden to decide for the duration of the presidency what it means to keep this promise to the best of one's ability, "to preserve, protect, and defend the Constitution of the United States." Pauley says it best by describing the presidential oath as the "keystone" of the government created by the Constitution.

[T]he executive branch is ordained and established by Article II, placed between the Articles devoted to the legislative and judicial branches, the three together forming the large governing arch of the sovereign Union of sovereign states. Within Article II, the president, with his prescribed oath, is plainly the center stone, without which . . . the arch of government would almost inevitably have collapsed. . . . [T]he swearing in of a President of the United States may be said to provide . . . the keystone of the nation's governing arch—the stone which . . . being the last put in, is regarded as keying or locking the whole structure together. The President is the keystone not only because the other branches of the government depend on him for . . . "leadership." He is the keystone also because . . . advocates of special points of view tend to look to him for direction and support. . . . [M]ost importantly, the President is the keystone because he is *sworn* to preserve, protect, and defend the whole. Only he must stand before the American people and solemnly swear to safeguard the Constitution, in words which the American people themselves made part of our fundamental law.<sup>499</sup>

The Framers of the Constitution did well to allow an individual who takes the presidential Oath of Office the choice of oath or affirmation, a choice of conscience. And

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<sup>499</sup> PAULEY, *supra* note 128, at 95.

the government acts consistently with the Constitution to support the President in his choice. If the President is a religious individual, the President may choose to imbue the oath with religious significance and utter “So help me God” to demonstrate that the value of the oath rests upon his belief and hope for salvation. If the President is a dissenter as a matter of conscience—whether that conscience supports the belief that one should never swear or the belief that there is no God—then the President may choose to affirm the oath without religious expression. The President-elect must be allowed this choice of conscience because it is the conscience of the individual that will shoulder the responsibility to preserve, protect and defend the Constitution. To paraphrase Aeschylus: It is not the oath or affirmation which makes us believe a person, but the person who makes us believe the oath or affirmation.<sup>500</sup>

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<sup>500</sup> See *supra* note 310.