

October 1992

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### Repository Citation

Jonathan Belcher, *Religion-Plus-Speech: The Constitutionality of Juror Oaths and Affirmations Under the First Amendment*, 34 Wm. & Mary L. Rev. 287 (1992), <https://scholarship.law.wm.edu/wmlr/vol34/iss1/13>

## RELIGION-PLUS-SPEECH: THE CONSTITUTIONALITY OF JUROR OATHS AND AFFIRMATIONS UNDER THE FIRST AMENDMENT

It is written that one need only "render        unto Caesar the things that are Caesar's." Among those things are jury service and truthful testimony. But in assembling juries and in seeking the truth, Caesar's judiciary is constrained by the Constitution. While black-robed centurions may exact some pledge of veridicality, they may not require a protesting citizen to utter what is to her an expression of religious faith.<sup>1</sup>

In certain circumstances, individuals may wish to make a religious statement or communication, or they may wish to refrain from such a statement or communication. An example of the former might be the display of crosses to memorialize the death and resurrection of Jesus Christ.<sup>2</sup> In the latter instance, an objecting juror may wish to refrain from a religious communication by refusing to make an oath or affirmation.<sup>3</sup> These types of cases trigger both the Free Speech<sup>4</sup> and the Free Exercise<sup>5</sup> Clauses of the Constitution.<sup>6</sup> Until recently, however, with a few notable exceptions,<sup>7</sup>

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1. *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1219 (5th Cir. 1991) (quoting *Matthew* 22:21), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116).

2. *See, e.g., Elsaesser v. Hamilton Bd. of Zoning Appeals*, 573 N.E.2d 733, 739 (Ohio Ct. App. 1990) (upholding against a free exercise challenge a zoning ordinance that prohibited plaintiff from erecting three crosses to memorialize the death and resurrection of Jesus Christ).

3. *See, e.g., Herman*, 939 F.2d at 1209 (holding that asking an atheist juror to affirm to tell the truth when the juror felt that such an affirmation was "religious" and therefore against her beliefs violated the Free Exercise Clause).

4. U.S. CONST. amend. I ("Congress shall make no law        abridging the freedom of speech").

5. *Id.* ("Congress shall make no law        prohibiting the free exercise" of religion).

6. *Herman*, 939 F.2d at 1216-17 (holding that asking an atheist juror to affirm to tell the truth triggered both the Free Speech Clause and the Free Exercise Clause); *see also Employment Div. v. Smith*, 494 U.S. 872, 881-82 (1990) (noting that in some cases religiously motivated conduct may trigger both the Free Exercise Clause and some other constitutional guarantee such as the Free Speech or Free Press Clause).

7. Two of the more notable instances of the Court's implied recognition of the nexus between the two clauses were *West Virginia State Board of Education v. Barnette*, 319 U.S.

courts had not developed any special rules for cases in which the two clauses converge, opting instead to treat such cases as either free speech cases or freedom of religion cases. In the recent case of *Employment Division v. Smith*,<sup>8</sup> however, the Supreme Court recognized that a more protective rule applies to such "religion-plus-speech" claims.<sup>9</sup> After *Smith*, more protection is granted to religion-plus-speech cases than to cases involving mere religiously motivated "conduct."<sup>10</sup>

The Fifth Circuit Court of Appeals recently became the first court to apply the Supreme Court's new rule for religious communication to juror oaths and affirmations. In *Society of Separationists, Inc. v. Herman*,<sup>11</sup> Robin Murray-O'Hair<sup>12</sup> was called for jury duty in a Texas trial court and was put on the stand for voir dire.<sup>13</sup> An atheist, she refused to swear an oath to tell the truth containing the phrase "so help me God."<sup>14</sup> She also refused to make an affirmation to tell the truth that contained no reference to God.<sup>15</sup> Eventually, the trial judge held her in civil contempt.<sup>16</sup>

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624, 645 (1943) (Murphy, J., concurring) (striking down mandatory pledges of allegiance in public schools for children with religious scruples against the pledge), and *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that automobile owners could not be compelled to display license plates with the state motto "Live Free or Die" when to do so was against their religious beliefs).

8. 494 U.S. 872.

9. *Id.* at 881-82 (noting in dicta that absent compelling state interests, neutral, generally applicable laws may not burden religiously motivated action involving the Free Exercise Clause when another constitutional protection, such as the Free Speech Clause or the Free Press Clause, is also affected).

10. *See id.*

11. 939 F.2d 1207 (5th Cir. 1991), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116).

12. Robin Murray-O'Hair, editor of the *American Atheist* magazine, is the granddaughter and adopted daughter of veteran atheist leader Madalyn Murray-O'Hair. *O'Hair's Daughter Sues for Being Jailed After Refusing Jury Oath*, UPI, Nov. 16, 1989, available in LEXIS, Nexis Library, UPI File.

13. *Herman*, 939 F.2d at 1209.

14. Transcript of Contempt Hearing at 2, attached to Plaintiff's Motion for Summary Judgment, *Society of Separationists, Inc. v. Herman*, No. A-89-CA-1021 (W.D. Tex. 1990) (No. A-89-CA-1021), *rev'd*, 939 F.2d 1207 (5th Cir. 1991), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116) [hereinafter Plaintiff's Motion].

15. *Id.* at 3.

16. *Id.* at 4.

She subsequently brought a civil rights action against the trial judge and other defendants alleging an infringement upon her right to the free exercise of religion.<sup>17</sup> The district court rejected her claim as frivolous,<sup>18</sup> but the court of appeals reversed, holding that the judge could not compel her to affirm to tell the truth when to do so would offend her beliefs as an atheist.<sup>19</sup> The appellate court protected her belief that an affirmation to tell the truth was "religious" and declared unconstitutional the requirement that she utter such an affirmation.<sup>20</sup> By distinguishing her claim as one involving "religion-plus-speech," rather than one simply concerning religiously motivated conduct, the appellate court suggested that her individual rights were tantamount to the government interests at stake.<sup>21</sup>

In response to pressures from atheists and other religious objectors, courts in recent years have gone beyond traditional oaths and affirmations and have allowed other alternative formulations such as "declarations" or "promises" to tell the truth.<sup>22</sup> *Herman*, however, represents the most extreme approach so far, holding that judges must allow an objecting juror or witness to draft his own personalized commitment to tell the truth whenever he finds the usual oath or affirmation offensive.<sup>23</sup> Additionally, the court in *Herman* applied the Supreme Court's new exemption for "religion-plus-speech," thereby affording objectors a new weapon to challenge traditional oaths and affirmations.<sup>24</sup>

This Note analyzes the recent trend of expanding oaths and affirmations to include personalized formulations and suggests that such an expansion is both unwarranted and unnecessary. In mak-

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17. *Herman*, 939 F.2d at 1210.

18. Order at 16-17, *Herman* (No. A-89-CA-1021) [hereinafter Order].

19. *Herman*, 939 F.2d at 1215. Plaintiff believed that, as an atheist, she could not utter any oath which included a reference to God. *Id.* at 1209.

20. *Id.* at 1215-16. On rehearing, the appellate court affirmed its ruling, but withdrew the declaratory order because of lack of standing. *Society of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1288-89 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116).

21. *Herman*, 939 F.2d at 1219 ("While black-robed centurions may exact some pledge of veridicality, they may not require a protesting citizen to utter what is to her an expression of religious faith.").

22. See *infra* notes 146-228 and accompanying text (discussing such cases).

23. *Herman*, 939 F.2d at 1219.

24. See *id.* at 1216-17.

ing this determination, several factors merit consideration. The first concerns whether an oath or affirmation is the type of communication the Supreme Court designed its new religion-plus-speech exception to protect. Because religion-plus-speech would apply only if a juror is compelled to make a religious statement, a question arises as to whether an "affirmation" is even religious. In answering this question, this Note examines the history of the oath and the treatment of oaths and affirmations in the Constitution. It also discusses judicial analysis of oaths and affirmations from the perspective of both the Establishment Clause<sup>25</sup> and the Free Exercise Clause<sup>26</sup> of the Constitution.

This Note then examines the effects of an expansion to other alternative guarantees of truthfulness, such as a "declaration" to tell the truth. The fifth section seeks to flesh out the parameters of the new religion-plus-speech rule and explains why oaths and affirmations are constitutional under that rule when the alternative of a nonreligious affirmation is available. Finally, this Note concludes by arguing that the expansion of oaths and affirmations to include other alternatives is unnecessary and that most existing federal and state juror oath statutes are constitutional.

#### HISTORY OF OATHS AND AFFIRMATIONS

In deciding the constitutionality of oaths and affirmations, and whether expansion to encompass personalized formulations is allowable, the history of oaths and affirmations is relevant. For instance, the court of appeals in *Herman* relied on the long history of affirmations in holding that Judge Herman was judicially immune from liability, even though his actions had violated the Free Exercise Clause.<sup>27</sup> Moreover, history and tradition often play key roles in Supreme Court decisions involving the Religion Clauses.<sup>28</sup>

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25. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion").

26. *Id.* ("Congress shall make no law . . . prohibiting the free exercise" of religion).

27. *Herman*, 939 F.2d at 1218 (holding that the unlawfulness of Judge Herman's conduct would not be apparent to a reasonable official because affirmations historically have been viewed as sufficient to accommodate religious objectors).

28. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (upholding the use of prayers in legislatures because of their long historical use).

The earliest record of an oath with an appeal to God is in the book of *Genesis*.<sup>29</sup> Oaths were very popular among the Egyptians, Carthaginians, Greeks, Persians, Romans, and Jews as a means of ensuring truthfulness.<sup>30</sup> American Indians swore oaths by placing one hand on their heart while raising the other in an appeal to the sun.<sup>31</sup> The theory that swearing an oath promoted truth rested in the belief that a deity, called upon to judge the oathtaker's testimony, would be angry and outraged if the oathtaker lied while under the sanctity of the oath and would punish the oathtaker for his lies and blasphemy.<sup>32</sup>

In ancient Greece, the oath was a critical part of judicial proceedings.<sup>33</sup> The Greeks viewed the oath as an appeal to their god "Oath."<sup>34</sup> The oath served three functions: first, as a solemn promise or declaration to tell the truth; second, as an appeal to a god or gods who would guarantee the promise; and third, as a "religious sanction" in the nature of a threat of punishment if the oathtaker committed perjury.<sup>35</sup> To the Greeks, the oath was a manifestation by the oathtaker that he made his statement or testimony while under a present feeling of duty to a god or gods.<sup>36</sup> This tripartite function historically has been inherent in oathtaking, even in the United States.<sup>37</sup>

The oath has also long been a part of the English common law.<sup>38</sup> The use of the oath in English trials predates the development of the jury system; from the earliest records, courts required both ju-

29. *Genesis* 21:23-24 (New International) ("Now swear to me here before God that you will not deal falsely with me or my children or my descendants. . . . Abraham said, 'I swear it.'").

30. Thomas R. White, *Oaths in Judicial Proceedings and Their Effect Upon the Competency of Witnesses*, 51 U. PA. L. REV. 373, 375 (1903). The Code of Hammurabi also used the oath extensively. *Id.* at 385.

31. BEN C. McCARY, *INDIANS IN SEVENTEENTH-CENTURY VIRGINIA* 59, 68 (1957). George Percy, one of the settlers at Jamestown, Virginia in the early 1600s, noted that the Indians recognized the binding effect of their oath. *Id.* at 59. Percy stated, "[N]o Christian will keep their oath better upon this promise." *Id.* He attributed this to the great reverence these Native Americans had for their deity, the sun. *Id.*

32. White, *supra* note 30, at 380.

33. JOSEPH PLESCIA, *THE OATH AND PERJURY IN ANCIENT GREECE* 39 (1970).

34. *Id.* at 33.

35. *Id.* at 3.

36. *Id.*

37. See 6 JOHN H. WIGMORE, *WIGMORE ON EVIDENCE* § 1813 (4th ed. 1976).

38. White, *supra* note 30, at 386.

rors and witnesses to swear an oath to the Christian God.<sup>39</sup> Because Christianity was the prevailing religion in England during the developmental stages of the common law, the oath was modelled upon the assumption that the oathmaker was a Christian.<sup>40</sup> For example, one early court required jurors to swear using the phrase "So help me God and the Saints."<sup>41</sup>

Because the purpose of the oath was to frighten the juror into telling the truth through the threat of supernatural vengeance, the common law developed the notion that only one who believed in a deity could swear an oath and testify.<sup>42</sup> Old English common law maintained that atheists would not feel bound by an oath because they did not believe in the existence of a supernatural being who would punish perjury.<sup>43</sup> The court in the English case *Omychund v. Barker*<sup>44</sup> definitively stated the common law rule that only believers in a god were competent to serve as witnesses and jurors.<sup>45</sup> Chief Justice Willes opined that anyone who believed in a deity that could inflict future rewards and punishments could be sworn as a witness;<sup>46</sup> the rule excluded atheists because an oath could have no binding power over them, as they believed in nothing that would punish a falsehood.<sup>47</sup> Allowing a person to testify without the oath was not feasible because, without the oath, there would be no guarantee that a person would tell the truth.<sup>48</sup>

Courts in both England and the United States uniformly followed the rule of *Omychund* well into the nineteenth century, op-

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39. *Id.*; see also 3 WILLIAM BLACKSTONE, COMMENTARIES \*342-44 (discussing the use of oaths in the medieval English "trial by wager of law" (also called trial by oath)).

40. White, *supra* note 30, at 386-87.

41. *Id.* at 387.

42. *Id.* at 380-81.

43. *Id.* See generally Virgil W. Duffie, Jr., *The Requirement of a Religious Belief for Competency of a Witness*, 11 S.C. L.Q. 548 (1959) (discussing the common law rule and its subsequent modifications).

44. 26 Eng. Rep. 15 (1744).

45. *Id.* at 31. The common law rule, however, excluded only persons, such as atheists, who believed in no supernatural being. Members of non-Christian religious sects could be sworn according to the particular form of their religion. White, *supra* note 30, at 390.

46. *Omychund*, 26 Eng. Rep. at 31. See generally Kevin Anderson, *Oaths Are as Old as a Belief in God*, 61 L. INST. J. 502, 502-03 (1987) (discussing the history of the oath and procedures used to swear in members of non-Christian religions in Australia).

47. *Omychund*, 26 Eng. Rep. at 31.

48. White, *supra* note 30, at 392.

erating to prohibit atheists from testifying and serving as jurors.<sup>49</sup> Some evidence suggests that the Founding Fathers of the United States thought that only Christians and others who believed in God were competent to serve as witnesses and jurors.<sup>50</sup> For example, in stressing the importance of religion and morality in his Farewell Address, George Washington posed the question: "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?"<sup>51</sup> Likewise, John Locke and Thomas Jefferson excluded atheists from public office because they would not swear an oath to God and, therefore, were not trustworthy.<sup>52</sup>

Eventually, courts abandoned the common law rule and granted atheists the capacity to testify and serve as jurors.<sup>53</sup> In England, during the reign of Queen Victoria, the British Parliament first authorized the making of a declaration, and then later, an affirmation to tell the truth.<sup>54</sup> These alternatives allowed atheists and other nonbelievers to testify.<sup>55</sup> By the 1940s, almost every American state had departed from the common law rule and enacted statutes granting all persons the capacity to testify.<sup>56</sup>

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49. *Id.* at 390; *see, e.g.*, *State v. Washington*, 22 So. 841, 842 (La. 1897) (holding that a belief in God is absolutely necessary for competency of witnesses); *Priest v. Nebraska*, 6 N.W. 468, 469-70 (Neb. 1880) (requiring a witness to demonstrate a belief in God before allowing him to testify); *see also* 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 507-10 (15th ed. 1892) (discussing the use of the oath in 1892 and the nature of religious faith required).

50. *See* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 195-96 (1986) (noting that Founding Fathers such as Luther Martin, Henry Abbot, and others believed that only Christians were competent for public duties).

51. GEORGE WASHINGTON, *Farewell Address*, in GEORGE WASHINGTON: A COLLECTION 512, 521 (W.B. Allen ed., 1988).

52. PAT ROBERTSON, THE NEW WORLD ORDER 219 (1991).

53. By the early 1900s, American courts began moving away from the common law requirement to some degree by creating a presumption that a witness believed in God and was, therefore, competent. *See, e.g.*, *Pumphrey v. State*, 122 N.W. 19, 20 (Neb. 1909) (holding that witnesses are presumed competent and the burden is on the objecting party to show lack of religious belief).

54. White, *supra* note 30, at 394 n.40.

55. *Id.*

56. *See* 6 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1828 (3d ed. 1940); Duffie, *supra* note 43, at 549-51 (discussing the modification of the common law rule).



Similarly, Congress drafted the modern Federal Rules of Evidence to accommodate nonbelievers and religious objectors.<sup>57</sup> Rule 603 states: "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."<sup>58</sup> The Advisory Committee Note to Rule 603 explains that the Rule was drafted "to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children."<sup>59</sup>

The history of oaths and affirmations indicates that the affirmation was devised to rectify many of the complaints of religious objectors.<sup>60</sup> Granting atheists the capacity to testify and to serve as jurors has also solved part of the problem.<sup>61</sup> Despite these modifications, however, objections to oaths have continued. Within the last three decades, both believers and nonbelievers have brought establishment of religion and free exercise of religion challenges against witness and juror oath statutes that they believe are unconstitutional.<sup>62</sup> *Society of Separationists, Inc. v. Herman*,<sup>63</sup> the most recent of these cases, rejected the historical evidence that affirmations are sufficient to accommodate objectors.<sup>64</sup>

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57. See FED. R. EVID. 603 advisory committee's note. One court has suggested that the inclusion of the "affirmation" in federal and state rules was largely a result of pressures that Quakers and other religious groups exerted in the past. See *Biklen v. Board of Educ.*, 333 F. Supp. 902, 905 (N.D.N.Y. 1971) (noting that Quakers historically have been opposed to oaths since their founder renounced oaths of allegiance in 1663), *aff'd*, 406 U.S. 951 (1972); see also DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 40-48 (1958) (discussing the Quaker opposition to oaths).

58. FED. R. EVID. 603.

59. *Id.* advisory committee's note.

60. See White, *supra* note 30, at 421-22 (discussing how the English Parliament enacted affirmation laws in response to complaints by Quakers, Moravians, and Separatists).

61. *Id.*

62. See *infra* notes 92-98 and accompanying text (discussing cases challenging the constitutionality of oaths and affirmations under the Establishment Clause); *infra* notes 129-34 and accompanying text (discussing challenges brought under the Free Exercise Clause).

63. 939 F.2d 1207 (5th Cir. 1991), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116).

64. *Id.* at 1219-20 ("We acknowledge the popular view that affirmation-taking is not a religious exercise, but we do not labor within a majoritarian jurisprudence.").

## OATH AND AFFIRMATION STATUTES

Discussion of the constitutionality of oaths and affirmations<sup>65</sup> should begin with an examination of the Constitution and federal and state statutory law. From these sources one can glean some idea of the Framers' views on oaths and affirmations, as well as the views that federal and state legislative bodies have taken.

*Federal Statutes*

In *Herman*, the Fifth Circuit held that an affirmation without reference to God could be just as religious as an oath, because the two terms had become interchangeable.<sup>66</sup> The court cited the General Provisions section of the United States Code<sup>67</sup> and two law dictionaries for support.<sup>68</sup> The General Provisions section, which is a list of general rules of statutory construction, states that "'oath' includes affirmation, and 'sworn' includes affirmed."<sup>69</sup> However, for three reasons, the General Provisions section does not amount to a legislative statement that both terms contain some religious component.

First, as originally worded in 1947, the General Provisions section stated that "a requirement of an 'oath' shall be deemed complied with by making affirmation in judicial form."<sup>70</sup> Congress later amended this section and rewrote it in its current abbreviated form.<sup>71</sup> Many federal statutes refer only to an "oath" and do not mention the alternative of an "affirmation."<sup>72</sup> Arguably, the defini-

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65. For the sake of simplicity, most discussion henceforth will be limited to juror oaths and affirmations, although the same principles apply equally well to witness oaths and affirmations. See *id.* at 1217 (relying on cases involving free exercise challenges by witnesses to support free exercise claim brought by a juror).

66. *Id.* at 1215-16.

67. See 1 U.S.C. § 1 (1988).

68. *Herman*, 939 F.2d at 1216 nn.42-43. The definition of "affirmation" that the court used was near the last in a list of alternative definitions of the term. See BLACK'S LAW DICTIONARY (5th ed. 1983). The court also cited a long list of other dictionaries and encyclopedias that defined "affirmation" *without* referring to religion. See *infra* note 228.

69. 1 U.S.C. § 1.

70. Act of July 30, 1947, Pub. L. No. 80-278, § 1, 61 Stat. 633, 633 (codified as amended at 1 U.S.C. § 1).

71. See Act of June 25, 1948, Pub. L. No. 80-772, § 6, 62 Stat. 683, 860 (codified at 1 U.S.C. § 1).

72. See, e.g., 5 U.S.C. § 303 (1988) (requiring oaths of witnesses in Executive Department investigations); 8 U.S.C. § 1357(b) (1988) (permitting immigration officers to give aliens

tion in the General Provisions section was intended merely as a rule of statutory construction to require that the term "oath" be construed to include "affirmation." Thus, a court should interpret the word "oath" in a federal statute to mean "oath or affirmation."

Second, the current wording of the General Provisions section ensures that affirmations fall within the ambit of the federal perjury statute, which recites the penalty for perjury after taking an oath.<sup>73</sup> By defining an affirmation as an acceptable substitute for an oath, Congress guaranteed that witnesses who affirmed would also be subject to the perjury statute if they failed to tell the truth.

Third, congressional intent that oaths and affirmations be the same, in a religious sense, would circumvent the rationale for having the affirmation option. Logically, Congress would not have provided an alternative that was not truly an alternative.

### *Constitution*

Oaths and affirmations should be considered constitutional because the two terms are used repeatedly throughout the Constitution, the text of which indicates that "oaths" and "affirmations" are religiously and ideologically separate.<sup>74</sup> Because the Oath or Affirmation Clause states "Oath or Affirmation,"<sup>75</sup> separating the two terms with the word "or," basic rules of statutory construction indicate that "Affirmation" is an alternative to "Oath" and there-

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oaths); 11 U.S.C. § 727(a)(4)(A) (1988) (prohibiting debtors in bankruptcy from making false oaths); 12 U.S.C. § 73 (1988) (requiring Federal Reserve Board directors to swear an oath of office); 15 U.S.C. § 78(o)(4)(b)(i) (1988) (requiring a stock broker not to have made a false oath).

73. See 18 U.S.C. § 1621 (1988).

74. The Oath or Affirmation Clause of Article VI provides:

The Senators and Representatives before mentioned and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by *Oath or Affirmation*, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. CONST. art. VI, cl. 3 (emphasis added).

75. *Id.* (emphasis added).

fore is not the same as "Oath."<sup>76</sup> In the Constitution, the Framers specified "Oath or Affirmation" on at least three other occasions.<sup>77</sup>

Judge Garwood, dissenting in *Herman*, pointed out that in deciding the constitutionality of oaths and affirmations, the Constitution is controlling.<sup>78</sup> According to him, a strict reading of the Constitution indicates that although oaths may be religious, affirmations are not.<sup>79</sup> One can read the Constitution as mandating that all government officers *must* take an oath or an affirmation, and by implied extension, jurors and witnesses must also.<sup>80</sup> Judge Garwood reasoned that although the Constitution does not explicitly state the exact words or procedures for an affirmation, it implies that an affirmation requires the same kind of solemn, formal promise to tell the truth as is involved in swearing an oath, albeit without an oath's reference to a deity.<sup>81</sup> Therefore, he concluded, oaths and affirmations must be constitutional.<sup>82</sup>

Judge Garwood's reasoning is persuasive. Logically, the Framers would not have provided the alternative of an affirmation if they viewed affirmations as religiously or ideologically identical to oaths.<sup>83</sup> The fact that the Constitution repeatedly requires oaths or

76. A well-recognized rule of construction holds that the actual language of a statute is the best indication of its intent. *Browder v. United States*, 312 U.S. 335, 338 (1941); see also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1473-76 & nn.323-24 (1990) (discussing the drafting of the Oath or Affirmation Clause during the Constitutional Convention).

77. The Constitution requires that when the Senate tries impeachment cases, "they shall be on Oath or Affirmation." U.S. CONST. art. I, § 3, cl. 6 (emphasis added). Before taking office, the President of the United States "shall take the following Oath or Affirmation—"I do solemnly swear (or affirm) that I will faithfully execute the Office . . . ." *Id.* art. II, § 1, cl. 8 (emphasis added). Concerning search warrants, the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation." *Id.* amend. IV (emphasis added).

78. *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1220 (5th Cir. 1991) (Garwood, J., dissenting), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116) ("[W]hat the Constitution says on the subject of oaths and affirmations should be at least the starting point for our consideration.").

79. *Id.* at 1221.

80. *Id.*

81. *Id.*

82. *Id.* at 1220-21.

83. See *Murray v. Buchanan*, 720 F.2d 689, 694 (D.C. Cir. 1983) (MacKinnon, J., dissenting) (noting that because the Framers recognized that oaths were religious, they included affirmations as a nonreligious alternative).

affirmations indicates that the Framers thought both were constitutional.

### *State Juror Oath Statutes*

State juror oath statutes generally fall into four categories: (1) oath statutes that refer to God;<sup>84</sup> (2) oath statutes that refer to God with the alternative of a nonreligious affirmation;<sup>85</sup> (3) oath statutes that refer to God with the alternative of an affirmation that refers to God;<sup>86</sup> or (4) nonreligious statutes which provide for swearing or affirming without reference to God.<sup>87</sup> The second type of statute, which allows the alternative of a nonreligious affirma-

84. See CONN. GEN. STAT. ANN. § 1-25 (West, Supp. 1991); GA. CODE ANN. §§ 15-12-132, -138, -139 (Michie 1990) (voir dire oath, civil juror oath, and criminal juror oath); N.J. STAT. ANN. § 2A:69-1.1 (West 1976) (petit juror oath); N.C. GEN. STAT. § 11-11 (1986) (grand juror oath).

85. See ARIZ. R. CIV. P. 47(a)(3) (West 1991) (civil); ARIZ. R. CRIM. P. 18.6(b) (West 1991) (criminal); COLO. REV. STAT. §§ 24-12-101 to -102 (1988); IDAHO CODE §§ 9-1402, -1405 (1990); ILL. ANN. STAT. ch. 101, paras. 3-4 (Smith-Hurd 1987) (juror may affirm without reference); KAN. STAT. ANN. § 54-104 (1983); ME. REV. STAT. ANN. tit. 14, § 1206 (West 1980) (civil juror); ME. REV. STAT. ANN. tit. 15, §§ 1253-1254 (West 1980) (grand and petit jurors); MD. CTS. & JUD. PROC. CODE ANN. § 2-104 (1989); MASS. GEN. LAWS ANN. ch. 278, §§ 4-5 (West 1981); MICH. COMP. LAWS §§ 768.14-.15 (1982); MINN. STAT. ANN. §§ 358.07-.08 (West 1991); MO. ANN. STAT. § 492.030 (Vernon 1952); NEB. REV. STAT. § 25-2220 (1989); NEV. REV. STAT. §§ 16.070, 169.115 (1986); N.H. REV. STAT. ANN. § 500-A:18 (1983) (civil jurors); N.M. STAT. ANN. § 14-13-2 (Michie 1988); N.D. CENT. CODE §§ 1-1-49, 28-14-08 (1991); OHIO REV. CODE ANN. § 2945.28 (Baldwin 1986) (petit jurors); R.I. GEN. LAWS § 9-10-20 (1985); S.D. CODIFIED LAWS ANN. § 15-14-11 (1984); TEX. R. CIV. P. ANN. rr. 226, 236 (West 1991); TEX. PENAL CODE ANN. § 1.07(a)(22) (West 1974); VT. STAT. ANN. tit. 12, §§ 5802-4, 5851 (1973); VA. CODE ANN. §§ 49-1, -9 (Michie 1989); VA. CODE ANN. § 19.2-197 (Michie 1990) (grand jurors); W. VA. CODE § 2-2-7 (1990).

86. See ALA. CODE §§ 12-16-170 to -171 (1986) (jurors swear or affirm with reference); ALASKA R. CIV. P. 47(g) (West 1991) (civil jurors swear or affirm with reference to God); ALASKA R. CRIM. P. 24(f) (West 1991) (criminal jurors swear or affirm with reference); FLA. STAT. ANN. § 905.10 (West 1985); IOWA R. CIV. P. 187(j) (West 1991) (civil); MISS. CODE ANN. § 13-5-71 (1972); N.H. REV. STAT. ANN. § 606:2 (Supp. 1990) (criminal); TENN. R. CRIM. P. 6(4) (1990) (grand jurors); WIS. STAT. ANN. § 756.098 (West Supp. 1991).

87. See ARK. CODE ANN. § 16-30-103 (Michie 1987); CAL. CIV. PROC. CODE § 604 (West 1976) (civil); CAL. PENAL CODE §§ 911, 1046 (West 1985) (criminal); DEL. CODE ANN. tit. 10, §§ 4517, 5323-5324 (Michie 1975); D.C. CODE ANN. § 16-1313 (1989); HAW. CONST. art. XVI, § 4 (1985); IND. CODE ANN. § 34-1-20-6 (Burns 1986); IND. R. TRIAL P. 43(D); KY. REV. STAT. ANN. §§ 29A.240, .300 (Michie/Bobbs-Merrill 1985); LA. CODE CIV. PROC. ANN. art. 1762 (West 1990); MONT. CODE ANN. § 25-7-207 (1991); N.Y. CIV. PRAC. L. & R. 2309 (Consol. 1978) (civil); N.Y. CRIM. PROC. LAW § 190.20 (Consol. 1986) (criminal); S.C. CODE ANN. § 14-7-1130 (Law. Co-op. Supp. 1990); UTAH R. CIV. P. 47(h) (Michie 1991) (civil); UTAH R. CRIM. P. 18(i) (Michie 1991) (criminal); WASH. REV. CODE ANN. § 4.44.260 (West 1988) (civil); WASH.

tion, is the plurality approach.<sup>88</sup> In twenty-three states, an oath that includes the words "so help you God," with the alternative of an affirmation without reference to God for religious objectors, is the primary method used to guarantee unbiased juries and truthfulness in the voir dire process.<sup>89</sup> Michigan's statute is fairly typical:

The following oath shall be administered to the jurors for the trial of all criminal cases: "You shall well and truly try, and true deliverance make, between the people of this state and the prisoner at bar, whom you shall have in charge, according to the evidence and the laws of this state; so help you God."<sup>90</sup>

Any juror shall be allowed to make affirmation, substituting the words "This you do under the pains and penalties of perjury" instead of the words "so help you God."<sup>91</sup>

### ESTABLISHMENT OF RELIGION

Some cases involving objections to oaths or affirmations have challenged the oath or affirmation as an establishment of religion,<sup>92</sup> while others have examined the issue as a potential violation of the Free Exercise Clause.<sup>93</sup> Establishment claims and free exercise

REV. CODE ANN. § 10.27.070 (West 1990) (criminal); WYO. STAT. § 1-11-201 (1988) (civil); WYO. STAT. § 7-11-107 (1987) (criminal).

88. Twenty-three states allow a juror to make a nonreligious affirmation in lieu of an oath. *See supra* note 86. Another 14 states allow a juror either to swear or affirm without any reference to God. *See supra* note 87. Therefore, a total of 37 states use juror affirmations of the kind *Herman* deemed unconstitutional as applied to objecting jurors.

89. The phrase "so help me God," a popular component of grand and petit juror oath statutes, is actually an abbreviated form of the oath, "So may God help me at the judgment day if I speak true, but if I speak false, then may He withdraw His help from me." White, *supra* note 30, at 379-80 n.10.

90. MICH. COMP. LAWS § 768.14 (1991).

91. *Id.* § 768.15.

92. *See, e.g.,* Murray v. Travis County Dist. Ct., 898 F.2d 150 (5th Cir.) (unpublished opinion), *cert. denied*, 111 S. Ct. 75 (1990) (holding that an affirmation without reference to God did not violate the Establishment Clause); People v. Velarde, 616 P.2d 104, 106 (Colo. 1980) (holding that an oath referring to the "everliving God" did not violate the Establishment Clause); Commonwealth v. Callahan, 519 N.E.2d 245, 252 (Mass. 1988) (holding that no establishment problem existed with an oath concluding with "so help me God").

93. *See, e.g.,* Ferguson v. Commissioner, 921 F.2d 588, 590-91 (5th Cir. 1991) (holding that an affirmation burdens free exercise); Gordon v. Idaho, 778 F.2d 1397, 1401 (9th Cir. 1985) (holding that an oath or affirmation burdens free exercise); United States v. Looper,

claims are governed by entirely different legal standards.<sup>94</sup> Both types of claims are relevant, however, because a religious objector may raise both challenges. For example, the plaintiff in *Herman*, who was claiming a free exercise violation, had litigated and lost an Establishment Clause claim.<sup>95</sup>

Courts generally have held that an oath or affirmation does not pose an establishment problem, even if it contains an appeal to God.<sup>96</sup> They reason that an oath that includes "so help me God" is just one example of permissible governmental acknowledgment of religion—much like "In God We Trust" on U.S. coins.<sup>97</sup> As permissible governmental acknowledgments of religion, oaths and affirmations do not violate the Establishment Clause.<sup>98</sup>

### *Juror Oaths Distinguished from Religious Test Oaths*

At the outset, juror oaths and affirmations must be distinguished from religious "test oaths," which the Constitution prohibits.<sup>99</sup> For example, in *Torcaso v. Watkins*,<sup>100</sup> the government had appointed the plaintiff as a notary public, but denied him his commission when he refused to declare a belief in God as the Maryland Consti-

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419 F.2d 1405, 1407 (4th Cir. 1969) (holding that an oath or affirmation with a reference to God burdens free exercise); *Nicholson v. Board of Comm'rs*, 338 F. Supp. 48, 56-57 (M.D. Ala. 1972) (holding that an oath or affirmation with a reference to God burdens free exercise); *Pierce v. Commonwealth*, 408 S.W.2d 187, 188 (Ky. 1966) (holding that neither an oath nor an affirmation violates the Religion Clauses).

94. See *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1212 (5th Cir. 1991), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116).

95. *Id.* at 1210-12; see *infra* note 205 (discussing briefly the plaintiff's previous Establishment Clause challenge).

96. See *supra* note 92; see also *Velarde*, 616 P.2d at 106 ("It is not a violation of the first amendment establishment clause to require jurors either to take an oath or to affirm.").

97. See, e.g., *Commonwealth v. Callahan*, 519 N.E.2d 245, 252 (Mass. 1988) (holding that a juror oath concluding with the phrase "so help me God" was a permissible governmental acknowledgment of religion); see also *infra* text accompanying notes 123-27 (discussing this reasoning).

98. *Callahan*, 519 N.E.2d at 252; see also *School Dist. v. Schempp*, 374 U.S. 203, 212-13 (1963) (referring to "So help me God" oaths as an inseparable part of our nation's history and government).

99. See U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States").

100. 367 U.S. 488 (1961).

tution required.<sup>101</sup> The Supreme Court struck down the test oath requirement as an establishment of religion because requiring a public officer to swear an oath of belief in God as a precondition to appointment was explicitly prohibited under the United States Constitution.<sup>102</sup> The distinction between the oath that *Torcaso* had to swear and the typical oath that jurors swear lies in the nature of the oath itself. A test oath asks one to swear to a belief in God, whereas a juror oath merely asks the juror to uphold the law and try the case fairly or to tell the truth during voir dire questioning.<sup>103</sup> The fact that juror oaths may contain the words "solemnly swear" and "So help me God" does not amount to a requirement of belief in God.<sup>104</sup> Moreover, most juror oaths usually allow the alternative of a nonreligious affirmation so as not to exclude jurors who do not believe in God.<sup>105</sup> The plaintiff in *Torcaso* was offered no such alternative and was therefore excluded from his public office.<sup>106</sup>

*Schowgurow v. State*<sup>107</sup> also involved a challenge to Maryland's requirement that public officials swear an oath of belief in God.<sup>108</sup> In *Schowgurow*, a Buddhist was convicted of homicide<sup>109</sup> and appealed his conviction on the ground that the court had required the jurors to swear an oath demonstrating a belief in God, pursuant to Article 37 of the Maryland Declaration of Rights.<sup>110</sup> The Court of Appeals of Maryland reversed the conviction because,

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101. *Id.* at 496. Article 37 of the Maryland Declaration of Rights provided, *inter alia*, that "no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God." *Id.* at 489.

102. *Id.* at 496.

103. See, e.g., *supra* text accompanying note 91 (Michigan's juror oath).

104. *United States v. Oliver*, 363 F.2d 15, 19 (7th Cir.), *cert. denied*, 385 U.S. 904 (1966).

105. The availability of an affirmation for jurors who object to oaths has been held to be one factor in determining that jurors oaths do not violate the Establishment Clause. *Murray v. Travis County Dist. Ct.*, 898 F.2d 150 (5th Cir.) (unpublished opinion), *cert. denied*, 111 S. Ct. 75 (1990), *discussed in* *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211-12 (5th Cir. 1991), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116).

106. See *Torcaso*, 367 U.S. at 489.

107. 213 A.2d 475 (Md. 1965).

108. *Id.* at 478-79.

109. *Id.* at 477. Buddhists do not acknowledge the existence of God. *Torcaso*, 367 U.S. at 495 n.11. Other religions in the United States that do not recognize the existence of God are Taoism, Ethical Culture, and Secular Humanism. *Id.*

110. *Schowgurow*, 213 A.2d at 478.



under *Torcaso*, the juror test oath violated the Establishment Clause of the United States Constitution.<sup>111</sup> Like the test oath in *Torcaso*, the oath in *Schowgurow* differed fundamentally from typical juror oaths because it actually required jurors to believe in the existence of God.<sup>112</sup> Typical juror oaths merely ask the juror to be fair and truthful, and the alternative of an affirmation without reference to God is available for jurors who object to oaths.

*Juror Oaths as Permissible Acknowledgments of Religion*

The Supreme Court has either stated or implied on several occasions that juror oaths, even those containing a reference to God, do not violate the Establishment Clause.<sup>113</sup> In *Zorach v. Clauston*,<sup>114</sup> Justice Douglas, writing for the majority, stated that:

The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. . . . Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. . . . Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; “so help me God” in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: “God save the United States and this Honorable Court.”<sup>115</sup>

*Zorach* was one of the Court’s earliest cases recognizing that some forms of religious symbolism should be “accommodated” by the

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111. *Id.* at 482.

112. See *supra* note 101 for the text of Maryland’s test oath requirement.

113. See *In re Griffiths*, 413 U.S. 717, 726 n.18 (1973) (implying that oaths and affirmations referring to God are permissible); *School Dist. v. Schempp*, 374 U.S. 203, 212-13 (1963) (referring to “So help me God” oaths as an inseparable part of our nation’s history and government); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 468-71 (1892) (holding that oaths and affirmations are examples of “organic utterances” that are unquestionably constitutional).

114. 343 U.S. 306 (1952) (upholding against an Establishment Clause challenge the constitutionality of a New York education law permitting early release of public school children from school so they could attend religious instruction at nearby religious centers).

115. *Id.* at 312-13 (dictum).

government.<sup>116</sup> According to the dicta quoted above, juror oaths, even those containing a reference to God, qualify as the type of symbolism that the government should accommodate.<sup>117</sup> In this prophetic statement<sup>118</sup> the Court also suggested that the Constitution does not require government to prefer the views of an atheist or agnostic over the views of mainstream American religious principles.<sup>119</sup>

More recently, the Supreme Court has decided that a government practice does not violate the Establishment Clause unless it has "the effect of communicating a message of government endorsement or disapproval of religion."<sup>120</sup> Furthermore, some acts are simply governmental acknowledgments of religion and therefore do not endorse religion by virtue of their long history and use.<sup>121</sup> Examples of such permissible acknowledgments are opening court sessions with "God save the United States and this honorable court" and using "In God We Trust" on coins.<sup>122</sup>

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116. *Id.* at 313-14 (holding that governmental cooperation with religious authorities in aiding and encouraging religious instruction "respects the religious nature of our people and accommodates the public service to their spiritual needs" (emphasis added)). See generally Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1 (examining the doctrine of accommodation of religion and the Supreme Court's use of that doctrine).

117. *Zorach*, 343 U.S. at 312-13.

118. The quoted dicta was prophetic in that exactly four decades later, an atheist actually did object to the use of God in juror oaths. See *infra* note 192 and accompanying text (discussing plaintiff's request in *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207 (5th Cir. 1991), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116), that further use of "so help me God" oaths be prohibited).

119. *Zorach*, 343 U.S. at 314. A 1987 study indicates that out of a total population of 240 million, about 80% of United States citizens acknowledge or profess some formal religious belief or affiliation. Henry J. Abraham, *Religion, the Constitution, the Court, and Society*, in *How Does the Constitution Protect Religious Freedom?* 15, 16 (Robert A. Goldwin & Art Kaufman eds., 1987). Protestants account for 135 million (56% of the population). *Id.* at 17. Individuals identifying themselves as Roman Catholics number approximately 53 million (22% percent of the population). *Id.* About six million Americans profess to be Jewish. *Id.* In all, approximately 239 Judeo-Christian sects exist in the United States, augmented by approximately 1,300 other religious organizations. *Id.* at 16-17.

120. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) (upholding the display of a nativity scene on public property). The Court later adopted Justice O'Connor's endorsement test in *County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989).

121. *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring).

122. *Id.*

Oaths and affirmations with a reference to God were recently held to qualify as permissible governmental acknowledgments of religion in *Commonwealth v. Callahan*.<sup>123</sup> In that case, the defendant appealed his murder conviction, alleging that the words "so help me God" in the oaths administered to the jurors and witnesses violated the federal and Massachusetts Constitutions.<sup>124</sup> The Massachusetts court rejected the defendant's establishment claim, holding that the words "so help me God" in the juror oaths did not constitute an establishment of religion.<sup>125</sup> The court reasoned that such words are simply "examples of many permissible, secular 'references to the Almighty that run through our laws, our public rituals, [and] our ceremonies.'"<sup>126</sup> Implicit in the reasoning of *Callahan* is the notion that oaths, as a permissible government acknowledgment of religion, much like "In God We Trust" on U.S. coins, have very little endorsement effect.<sup>127</sup>

Every court that has addressed the constitutionality of juror oaths with respect to an establishment of religion claim has held that such oaths do not violate the Establishment Clause.<sup>128</sup> The

123. 519 N.E.2d 245, 252 (Mass. 1988).

124. *Id.*

125. *Id.* The court also upheld the use of "in the year of our Lord" on the indictment form on the same grounds. *Id.*

126. *Id.* (quoting *Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952); citing *Lynch v. Donnelly*, 465 U.S. 668, 675-77 (1984)).

127. *See id.* (citing *Lynch*, 465 U.S. at 675-77 (holding in dicta that "In God We Trust" on U.S. coins and "One nation under God" in Pledge of Allegiance are two illustrations of permissible government acknowledgment of religious heritage)).

128. At least two other cases specifically have upheld the constitutionality of juror oaths against Establishment Clause challenges. In *People v. Velarde*, 616 P.2d 104 (Colo. 1980), the defendant sought vacation of his sentence for aggravated robbery and conspiracy on the ground that the jurors had been required to swear an oath "by the everliving God." *Id.* at 105-06. The Supreme Court of Colorado held that the oath was constitutional, because jurors with conscientious scruples against oaths could make a solemn affirmation or declaration to tell the truth instead. *Id.* at 106. Likewise, an Establishment Clause challenge was also brought against juror oaths that refer to God in *Murray v. Travis County District Court*, 898 F.2d 150 (5th Cir. 1990) (unpublished opinion), *cert. denied*, 111 S. Ct. 75 (1990), *discussed in* *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211-14 (5th Cir.), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116). In that case, the appellate court held that the juror oath did not violate the Establishment Clause. The court reasoned:

jurors are not required to swear an oath to a deity; rather, jurors are free to simply make an affirmation that the testimony which they are about to present will be the truth. An affirmation is no more than a solemn declaration made

court's application in *Callahan* of existing Supreme Court doctrine in all likelihood represents the position that the current Supreme Court would hold concerning juror oaths and the establishment of religion issue: juror oaths are simply permissible acknowledgments of religion with a minimal endorsement effect.

### FREE EXERCISE OF RELIGION

Plaintiffs have had more success challenging oaths and affirmations under the Free Exercise Clause than under the Establishment Clause.<sup>129</sup> The general basis of these claims is that requiring a person to swear or affirm, when doing so is offensive to that person's beliefs, burdens the free exercise of religion.<sup>130</sup> A few courts have considered this argument unpersuasive, finding no free exercise violation.<sup>131</sup> Other courts, however, have been more willing to find a free exercise violation.<sup>132</sup> Some of the more recent cases have attempted to accommodate objecting oattakers by allowing alternatives other than oaths or affirmations, such as "declarations" to

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under the penalties of perjury. We do not consider, as plaintiffs would have us do, an affirmation to be the same as an oath to a deity.

*Id.* at 1212.

129. *See, e.g.,* *Gordon v. Idaho*, 778 F.2d 1397, 1401 (9th Cir. 1985) (reversing the dismissal of a civil rights action brought by plaintiff imprisoned for failing to swear or affirm to tell the truth).

130. *See, e.g.,* *Ferguson v. Commissioner*, 921 F.2d 588, 590-91 (5th Cir. 1991) (holding that requiring a witness to swear or affirm, when swearing or affirming is against that person's sincerely held beliefs, violates the Free Exercise Clause).

131. *See, e.g.,* *Biklen v. Board of Educ.*, 333 F. Supp. 902, 906-07 (N.D.N.Y. 1971), *aff'd*, 406 U.S. 951 (1972) (holding that requiring an oath or affirmation does not violate the First Amendment); *Pierce v. Commonwealth*, 408 S.W.2d 187, 188 (Ky. 1966) (holding that requiring an oath or affirmation does not violate freedom of religion); *Jones v. State*, 585 P.2d 1340, 1341 (Nev. 1978) (holding that requiring an oath or affirmation does not violate the First Amendment); *State v. Nuckols*, 166 S.E.2d 3, 11 (W. Va. 1969) (holding that requiring an oath or affirmation does not violate the First Amendment); *see infra* notes 135-45 and accompanying text (discussing cases in which courts did not recognize free exercise violations).

132. *See, e.g.,* *Herman*, 939 F.2d at 1215-17 (holding that requiring an atheist juror to swear or affirm violates the Free Exercise Clause); *Ferguson*, 921 F.2d at 590-91 (holding that requiring that a witness swear or affirm violates free exercise); *Gordon*, 778 F.2d at 1401 (holding that requiring a witness to swear or affirm violates the Free Exercise Clause); *United States v. Looper*, 419 F.2d 1405, 1407 (4th Cir. 1969) (recognizing free exercise violation where witness was asked to swear or affirm with an appeal to God); *see infra* notes 146-228 and accompanying text (discussing cases in which courts recognized a free exercise violation).

tell the truth.<sup>133</sup> How courts have dealt with oaths and affirmations prior to the Supreme Court's new rule for religion-plus-speech may shed some light on how such oaths should be treated after *Employment Division v. Smith*.<sup>134</sup>

### *Cases Upholding Oaths and Affirmations*

In several cases, courts have upheld juror oaths concluding with "so help me God." For example, in *Pierce v. Commonwealth*,<sup>135</sup> the defendant appealed his conviction because the jurors had been sworn using an oath concluding with the words "so help me God."<sup>136</sup> The Supreme Court of Kentucky rejected the defendant's challenge, ruling that because a juror may affirm instead of swearing an oath, the requirement did not violate the Free Exercise Clause.<sup>137</sup> In addition, the court ruled that if a juror did believe in God, demanding that he guarantee his truthfulness by invoking that belief did not violate his religious freedom.<sup>138</sup> The court reasoned that when the alternative of a nonreligious affirmation is available, an oath or affirmation requirement does not violate free exercise of religion.<sup>139</sup>

An oath with an appeal to God was also upheld in *Jones v. State*.<sup>140</sup> The defendant in *Jones* sought to have his conviction overturned because the court had required jurors to take an oath to God, thereby excluding all nonbelievers from the jury.<sup>141</sup> The Supreme Court of Nevada held that because the jurors could have affirmed to tell the truth instead of swearing, the trial judge's action did not violate the Free Exercise Clause.<sup>142</sup> Thus, in cases upholding oaths with an appeal to God, the availability of a nonreli-

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133. See, e.g., *Staton v. Fought*, 486 So. 2d 745 (La. 1986) (crafting a "declaration" to tell the truth which trial judges may give in lieu of an oath).

134. 494 U.S. 872 (1990); see *infra* notes 239-98 and accompanying text (discussing the new religion-plus-speech standard).

135. 408 S.W.2d 187.

136. *Id.* at 188. No juror had objected to the oath. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. 585 P.2d 1340, 1341 (Nev. 1978).

141. *Id.*

142. *Id.* ("Where an affirmation is permitted in lieu of an oath, a juror's freedom of religion is not violated.").

gious affirmation was critical.<sup>143</sup> When such an affirmation was available, the government did not infringe upon the free exercise of religion.<sup>144</sup> The court in *Herman* did not discuss the holdings of these cases but held that the availability of an affirmation did not resolve the constitutional objection.<sup>145</sup>

### *Cases Striking Down Oaths and Affirmations*

In *Herman*, the Fifth Circuit relied on the reasoning in cases such as *United States v. Looper*,<sup>146</sup> one of the earliest decisions to prohibit the use of an oath with a reference to God because the free exercise rights of an objecting witness had been burdened.<sup>147</sup>

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143. The court in *State v. Nuckols*, 166 S.E.2d 3, 11 (W. Va. 1969), also upheld the constitutionality of juror oaths. In *Nuckols*, a convicted defendant contended that the trial court had erred in swearing in the jurors. *Id.* at 11. In upholding the conviction, the court held that the state oath statute permitted affirming as well as swearing; therefore the statute was constitutional. *Id.*

144. See *Pierce v. Commonwealth*, 408 S.W.2d 187, 188 (Ky. 1966); *Jones*, 585 P.2d at 1341; *Nuckols*, 166 S.E.2d at 11. At the federal level the court in *Biklen v. Board of Education*, 333 F. Supp. 902 (N.D.N.Y. 1971), *aff'd*, 406 U.S. 951 (1972), declared oaths and affirmations constitutional, holding that a statute requiring teachers to swear or affirm to support the Constitution did not violate the First Amendment in light of considerable Supreme Court precedent upholding such "support oaths." *Id.* at 906-07.

145. *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1219-20 (5th Cir. 1991), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116).

146. 419 F.2d 1405 (4th Cir. 1969).

147. *Id.* at 1406. Another early case striking down an oath with an appeal to God as a burden on the free exercise of religion was *Nicholson v. Board of Comm'rs*, 338 F. Supp. 48, 58-59 (M.D. Ala. 1972). The alternative of a nonreligious affirmation was not available. See *id.* at 51. In *Nicholson*, the plaintiff, a recent law school graduate, challenged Alabama's state bar requirement that applicants swear or affirm an oath of office concluding with "so help me God." *Id.* at 56. The plaintiff brought suit on both establishment and free exercise grounds. *Id.* The court rejected the establishment claim, but held that the requirement had violated the plaintiff's free exercise rights. *Id.* at 56-57. Applying the "compelling-interest" test of *Sherbert v. Verner*, 374 U.S. 398, 403, 406 (1963) (holding that a substantial infringement on an individual's free exercise rights may stand only upon a showing of a compelling state interest), the district court held that Alabama had no compelling interest in demanding an oath with an appeal to God. *Nicholson*, 338 F. Supp. at 58. The court suggested that alternative forms of oaths existed that would provide the necessary solemnity to the occasion. *Id.* *Nicholson*, however, recognized that Justice Douglas and a majority of the United States Supreme Court had implied in *Zorach v. Clauson*, 343 U.S. 306, 312-13 (1951), that oaths concluding with "so help me God" do not violate the First Amendment. *Id.* at 57 n.12. Nonetheless, the court discounted Douglas' statement as dicta that had no impact on the present case. *Id.*

Looper, a conscientious objector, was convicted of draft dodging.<sup>148</sup> He appealed his conviction on the ground that the trial judge did not permit him to testify in his own defense because he would not swear or affirm with a reference to God.<sup>149</sup> In finding reversible error, the appellate court stated that the trial court should have made "inquiry as to what form of oath or affirmation would not offend defendant's religious beliefs but would give rise to a duty to speak the truth."<sup>150</sup> The court added that any form of declaration that impressed upon the defendant the need to tell the truth would be sufficient under Federal Rule of Evidence 603.<sup>151</sup> Unlike the defendants in *Pierce v. Commonwealth*<sup>152</sup> and *Jones v. State*,<sup>153</sup> Looper did not have the opportunity to make a nonreligious affirmation.<sup>154</sup> The lack of such an alternative resulted in the court finding a burden on free exercise.<sup>155</sup>

The court in *Herman* also explicitly relied on *Gordon v. Idaho*,<sup>156</sup> in which the Ninth Circuit found a burden on free exercise even though the alternative of a nonreligious affirmation had been available.<sup>157</sup> Gordon brought a civil rights action against the state for imprisoning him for civil contempt when he refused to comply with a discovery order requiring him to take an oath or

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Although decisions like those in *Looper* and *Nicholson* recognized the burden on free exercise created by an oath that contains an appeal to God, a few other cases have found a burden based upon other grounds. For example, in *United States v. Moore*, 217 F.2d 428, 430 (7th Cir. 1954), *rev'd per curiam*, 348 U.S. 966 (1955), the defendant, a member of the Harshmanite religion, refused to use the word "solemnly" in affirming to tell the truth. *Id.* He claimed that to do so would be against his religion. *Id.* The Supreme Court agreed, holding that "[t]here is no requirement that the word 'solemnly' be used in the affirmation." *Moore*, 348 U.S. at 966.

148. *United States v. Looper*, 419 F.2d 1405, 1405 (4th Cir. 1969).

149. *Id.* at 1405-06.

150. *Id.* at 1407.

151. *Id.* Federal Rule of Evidence 603 requires only that the form of the oath or affirmation "awaken the witness' conscience" and impress upon the witness the need for truthfulness. FED. R. EVID. 603.

152. 408 S.W.2d 187 (Ky. 1966).

153. 585 P.2d 1340 (Nev. 1978).

154. *See Looper*, 419 F.2d at 1406. Furthermore, the judge asked the defendant to raise his hand and appeal to God while placing his other hand on a Bible. *Id.*

155. *Id.* at 1407.

156. 778 F.2d 1397 (9th Cir. 1985).

157. *Id.* at 1399-400.

affirmation to tell the truth.<sup>158</sup> The basis of his claim was that he believed that all men are liars; therefore, he could not truthfully swear or affirm to tell the truth, because doing so would constitute a lie.<sup>159</sup> The Ninth Circuit reversed the trial court's dismissal of his action, holding that the oath requirement had violated Gordon's sincerely held religious beliefs.<sup>160</sup> However, the opinion was unclear as to why a nonreligious affirmation was insufficient. The appellate court stated that the trial court "should have explored the least restrictive means of assuring that Gordon would testify truthfully."<sup>161</sup> In other words, the trial court should have asked Gordon what form of affirmation or declaration he was willing to make. The court liberally construed Federal Rule of Evidence 603 as requiring only some sort of promise on Gordon's part to state the facts accurately.<sup>162</sup> The court deemed the use of the word "affirm" in the witness' affirmation or declaration unnecessary.<sup>163</sup>

### *The Slippery Slope of Alternative Formulations*

The dissent in *Gordon* made a compelling argument that the majority's approach "trivializes the vital purposes of the free exercise clause" and "tends to invite demands for special formulations in future cases [which would] cause needless delay in the administration of justice."<sup>164</sup> Until *Gordon*, courts generally had upheld oaths and affirmations when the alternative of a nonreligious affirmation was available.<sup>165</sup> *Gordon* went a step farther, however, and granted challenging witnesses and jurors the right to object to even a nonreligious affirmation.<sup>166</sup> Arguably, the dissent pointed out, the majority may have opened up the floodgates for continual requests

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158. *Id.* at 1398. The Federal Rules of Civil Procedure require an oath or a solemn affirmation for certain pretrial discovery, such as depositions. See FED. R. CIV. P. 30(c), 43(d).

159. *Gordon*, 778 F.2d at 1401 n.2. Gordon based this belief on a phrase in the Bible: "Let God be true though every man be a liar." *Id.*

160. *Id.* at 1401.

161. *Id.*

162. See *id.* at 1400.

163. *Id.*

164. *Id.* at 1402 (Weigel, J., dissenting).

165. See, e.g., *Pierce v. Commonwealth*, 408 S.W.2d 187, 188 (Ky. 1966); *Jones v. State*, 585 P.2d 1340, 1341 (Nev. 1978).

166. See *Gordon*, 778 F.2d at 1401.



for special formulations in the future.<sup>167</sup> In effect, the court created a "slippery slope," with the next likely challenges being objections to these other alternative promises or declarations.

*Gordon's* expansive doctrine also may prove to be problematic under the Supreme Court's new rule for religion-plus-speech.<sup>168</sup> Under the religion-plus-speech rule, a plaintiff must always show a concrete burden on religion, but, as Judge Weigel pointed out, plaintiffs sometimes base their objections to oaths on trivial grounds.<sup>169</sup>

### *The Staton Declaration*

Primarily as a result of *Gordon*, a few courts have begun the unwarranted expansion of oaths by creating alternative formulations such as "declarations." A declaration is essentially an affirmation, but without use of the word "affirm." In *Staton v. Fought*,<sup>170</sup> the Supreme Court of Louisiana held that Louisiana state trial judges could offer the following alternative: "I, \_\_\_\_\_, do hereby declare that the facts I am about to give are, to the best of my knowledge and belief, accurate, correct and complete."<sup>171</sup>

At least one federal court has attempted to utilize the *Staton* declaration. In *Kaltenbach v. Breaux*,<sup>172</sup> the defendant sought a writ of habeas corpus when the court did not allow one of his witnesses to testify because the witness would not swear or affirm to tell the truth.<sup>173</sup> The federal district court denied the writ, stating that the witness' exclusion from the stand had not infringed upon the defendant's rights.<sup>174</sup> The court emphasized the importance of having the witness affirm to tell the truth.<sup>175</sup> Furthermore, the trial court had given the witness an opportunity to use the *Staton* declaration, but he had refused.<sup>176</sup> The court stated that whether the

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167. *Id.* at 1402.

168. See *infra* notes 299-315 and accompanying text (applying the religion-plus-speech rule to expansive alternative formulations such as those in *Gordon* and *Herman*).

169. See *Gordon*, 778 F.2d at 1402 (Weigel, J., dissenting).

170. 486 So. 2d 745 (La. 1986).

171. *Id.*

172. 690 F. Supp. 1551 (W.D. La. 1988).

173. *Id.* at 1552-53.

174. *Id.* at 1556.

175. *Id.*

176. *Id.*

statement or promise by the witness is called an "affirmation" or a "declaration" did not matter.<sup>177</sup>

Whether the *Staton* declaration complies with Federal Rule of Evidence 603 is debatable. The text of the Rule, which states that a witness must "declare . . . by oath or affirmation,"<sup>178</sup> seemingly requires either an oath or an affirmation. However, the Advisory Committee Note states that Rule 603 requires no special verbal formula for an affirmation, indicating that the language is not exclusive.<sup>179</sup>

The slide down the slippery slope continued in the recent case of *Ferguson v. Commissioner*,<sup>180</sup> in which a federal court held that courts should allow witnesses to make their own alternative formulations.<sup>181</sup> The plaintiff had filed a petition in tax court and was granted a hearing.<sup>182</sup> At the hearing, she would not swear or affirm to tell the truth because of her religious beliefs and, as a result, the tax court dismissed her claim for lack of prosecution.<sup>183</sup> The plaintiff asserted that an affirmation had become so synonymous with an oath that they were both religious in nature.<sup>184</sup> She offered to make the *Staton* declaration instead, but the tax court judge refused her request.<sup>185</sup> On appeal, the Fifth Circuit reinstated the plaintiff's petition, holding that the tax court judge's action had violated her free exercise rights.<sup>186</sup> The court, relying on *Gordon*, stated that the tax court judge should have inquired into the plaintiff's objections and considered her proposed alternative.<sup>187</sup>

*Society of Separationists, Inc. v. Herman*

In August 1991, the Fifth Circuit continued the judicial expansion of oaths and affirmations in *Society of Separationists, Inc. v.*

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177. *Id.*

178. FED. R. EVID. 603.

179. See *id.* advisory committee's note.

180. 921 F.2d 588 (5th Cir. 1991).

181. *Id.* at 590-91.

182. *Id.* at 588.

183. *Id.* at 589.

184. *Id.* at 588.

185. *Id.* at 588-89.

186. *Id.* at 590-91.

187. *Id.*

*Herman*,<sup>188</sup> the most far-reaching and controversial of the oath and affirmation cases.<sup>189</sup> It was the first case to apply religion-plus-speech doctrine to oaths and affirmations, although arguably the court applied that doctrine incorrectly. At issue in *Herman* was whether a potential juror can be compelled to make a nonreligious affirmation prior to voir dire questioning.<sup>190</sup>

Robin Murray-O'Hair, an atheist, was called for jury duty in Travis County, Texas.<sup>191</sup> At the impanelling, Judge Herman asked Murray-O'Hair, who had brought along her attorney, if she would take the juror oath.<sup>192</sup> When she refused, Judge Herman explained

188. 939 F.2d 1207 (5th Cir. 1991), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992), *petition for cert filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116).

189. Newspapers gave an unusual amount of coverage to an intermediate court's decision. *See, e.g., Court: Can't Make Atheist Juror Swear on Stack of Bibles*, CHI. TRIB., Sept. 1, 1991, at 14; *Judges Can't Require Oath of Atheist Jurors*, WASH. TIMES, Aug. 30, 1991, at A2.

190. *Herman*, 939 F.2d at 1209-10.

191. *Id.* at 1209.

192. *Id.* The transcript of the hearing between Judge Herman and the plaintiff reads as follows:

THE COURT: Ms. Murray-O'Hair, you have been called for impanelling here for the county courts here in Travis County, and at this time I am going to have you take the oath for a juror. Do you wish to do so?

MS. MURRAY-O'HAIR: I cannot take the oath, sir.

THE COURT: And your reasoning for that, ma'am?

MS. MURRAY-O'HAIR: The oath is a religious affair that an atheist cannot participate in.

THE COURT: And I respect your right to exercise your constitutional rights to freedom of religion and, therefore, I will offer an affirmation without any recognition or any statement, any reference to God or anything of that nature, and at this time I would like you to raise your hand and be affirmed by the Court as to your qualifications as a juror.

MS. MURRAY-O'HAIR: I cannot affirm, sir. That is just as religious as an oath.

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THE COURT: [T]he Court is not requesting that you take an oath and swear to God as to your qualifications for jury service. I am merely asking you to affirm that whatever questions would be propounded to you, that you will give true answers.

MS. MURRAY-O'HAIR: I am not trying to evade my jury duty service, sir. I am trying to evade participating in a religious statement.

THE COURT: And you understand what I have told you, that I am not asking you to participate in a religious statement?

MS. MURRAY-O'HAIR: An affirmation, my understanding, is a religious statement.

Transcript of Contempt Hearing at 2-4, attached to Plaintiff's Motion, *supra* note 14.

that he respected her constitutional rights to freedom of religion, and therefore, he would offer an "affirmation without any recognition or any statement, any reference to God or anything of that nature."<sup>193</sup> When Murray-O'Hair again refused, Judge Herman explained that he was not asking her to take an oath and swear to God or participate in any type of religious statement.<sup>194</sup> He then instructed her that if she did not take an oath or make an affirmation, he would have to hold her in civil contempt.<sup>195</sup> After briefly discussing with Murray-O'Hair the "religiousness" of an affirmation without reference to God and giving her another chance to affirm, Judge Herman ordered her to jail for three days after she again refused.<sup>196</sup> She was released on bond about six hours later.<sup>197</sup>

Murray-O'Hair proceeded to bring a civil rights action under 42 U.S.C. § 1983, requesting six million dollars in damages, a declaratory judgment, and permanent injunctive relief prohibiting any future use of oaths concluding with "so help me God" or any affirmation using the word "affirm."<sup>198</sup> The complaint named Judge Herman, one other county judge, the county court clerk, the county sheriff, all of the county court bailiffs, and Travis County as defendants.<sup>199</sup> The plaintiff claimed violations of her "constitutional right" to serve on a jury and of her right to free exercise of religion.<sup>200</sup> She filed the case as a class action, although apparently only two people—the plaintiff and another unnamed individual—were members of the class.<sup>201</sup> The district court decided the case on cross motions for summary judgment.<sup>202</sup> In ruling in favor of the defendants, the district judge dismissed the plaintiff's class

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193. *Id.* at 2-3.

194. *Id.* at 3.

195. *Id.*

196. *Id.* at 4.

197. *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1210 (5th Cir. 1991), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (en banc), *petition for cert filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116).

198. See Plaintiff's Motion, *supra* note 14, at 3-4; Defendant's Memorandum in Support of Motion to Dismiss for Failure to State a Claim or for Summary Judgment at 2, *Herman* (No. A-89-CA-102) [hereinafter Defendant's Memorandum].

199. See Defendant's Memorandum, *supra* note 198, at 1-2.

200. Plaintiff's Memorandum and Points of Authority in Support of Summary Judgment at 3, 10, *Herman* (No. A-89-CA-102).

201. Order, *supra* note 18, at 5-6.

202. *Herman*, 939 F.2d at 1211.

action and found that most of the defendants had been named improperly.<sup>203</sup> The district court further ordered that due to the plaintiff's previous loss in *Murray v. Travis County District Court*,<sup>204</sup> res judicata barred the free exercise claim.<sup>205</sup> The court dismissed the claims against the remaining defendants, including Judge Herman, under absolute or qualified judicial immunity.<sup>206</sup> Additionally, the district court found the suit frivolous and imposed Rule 11 sanctions against the plaintiff.<sup>207</sup>

On appeal, a three-judge panel of the Fifth Circuit reversed the district court's dismissal of Murray-O'Hair's § 1983 action and held that the oath or affirmation requirement had violated her free exercise rights.<sup>208</sup> The appellate court distinguished the prior judgment in *Murray*, calling it an Establishment Clause case and labeling the present case a free exercise challenge.<sup>209</sup> The court reasoned that an affirmation without reference to God could be "religious," and to ask a juror to make such an affirmation against her will burdened that juror's rights to freedom of speech and free exercise of religion.<sup>210</sup> In other words, the affirmation requirement impinged the juror's religion-plus-speech rights.<sup>211</sup> The court stated that "[w]e acknowledge the popular view that affirmation-taking is not a religious exercise, but we do not labor within a majoritarian jurisprudence. Our responsibility is to apply not the majority ethos, but the Constitution."<sup>212</sup> The majority then said

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203. *Id.* The judge emphasized that two known members were insufficient to warrant certification as a class action. Order, *supra* note 18, at 6.

204. 898 F.2d 150 (5th Cir.) (unpublished opinion), *cert. denied*, 111 S. Ct. 75 (1990).

205. *Herman*, 939 F.2d at 1211. Plaintiff's prior suit was primarily an Establishment Clause challenge arising from the contempt hearing with Judge Herman. In that case, the Fifth Circuit Court of Appeals affirmed the dismissal of the claim, finding no constitutional right to serve on a jury and no establishment problem with the Texas juror oaths and affirmations. *See id.* at 1211-14 (discussing plaintiff's prior suit in *Murray*); *see also supra* note 128 (discussing the prior case).

206. Order, *supra* note 18, at 11-16.

207. *Id.* at 16-17.

208. *Herman*, 939 F.2d at 1215.

209. *Id.* at 1212-13. Actually, the plaintiff filed three separate law suits arising out of the incident with Judge Herman. In addition to *Murray* and *Herman*, the plaintiff brought a habeas corpus proceeding which the state court dismissed as moot. *Id.* at 1210.

210. *Id.* at 1216-17.

211. *Id.*

212. *Id.* at 1219-20.

that the plaintiff's claim—that an affirmation without reference to God is a “religious statement”—was not farfetched or bizarre.<sup>213</sup>

The Fifth Circuit then issued a broad declaratory order stating that

when a judge is confronted with a prospective juror's refusal, on grounds of constitutionally protected beliefs, to swear or affirm to answer voir dire questions truthfully, the judge should either allow the person to withdraw from jury duty without penalty or allow the prospective juror an alternative that requires him or her to make some form of serious public commitment to answer truthfully that does not transgress the prospect's sincerely held beliefs. . . . Beliefs may be rejected only if they are patently insincere, bizarre, or not related to the free exercise of religion.<sup>214</sup>

The appellate court, however, affirmed the district court's dismissal of the defendants other than Judge Herman and affirmed the denial of damages and injunctive relief based on judicial immunity.<sup>215</sup>

Judge Garwood dissented, characterizing the plaintiff's conduct as nothing more than a “generic objection” to the affirmation process.<sup>216</sup> The dissent distinguished the case from the precedent upon which the majority relied—*Looper, Gordon, and Ferguson*—and criticized the use of such an all-inclusive declaratory judgment:<sup>217</sup> “[I]t is wholly inappropriate for this Court to grant [the plaintiff] declaratory relief against Judge Herman. Judge Herman is the sole defendant, and O'Hair is the sole plaintiff . . . . No one else is benefitted or bound thereby.”<sup>218</sup> In the dissent's view, the trial judge's behavior was perfectly permissible in that Judge Herman had made repeated attempts to accommodate the plaintiff's religious beliefs and had explicitly stated that he respected her rights.<sup>219</sup> Moreover, the Constitution relies on oaths or affirma-

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213. *Id.* at 1215-16.

214. *Id.* at 1219.

215. *Id.* at 1220.

216. *Id.* at 1222 (Garwood, J., dissenting).

217. *Id.* at 1223-24 (“There is simply no warrant in principle or authority for transmuting an ‘abuse of discretion’ into a constitutional mandate.”).

218. *Id.* at 1224.

219. *Id.* at 1222, 1224 (“[Judge Herman] was faced with a situation and dealt with it as best he could.”).

tions in several places, indicating their constitutionality.<sup>220</sup> Judge Garwood also stressed that the plaintiff neither informed Judge Herman that she was willing to make *any* type of declaration or personal commitment to tell the truth, nor offered any alternatives.<sup>221</sup>

In a recent en banc rehearing of the case, the Fifth Circuit affirmed its judgment, but withdrew its broad declaratory order.<sup>222</sup> A majority of the judges believed that Murray-O'Hair lacked standing to obtain prospective relief because the likelihood was slim that she would ever appear before Judge Herman again or that she was suffering any continuing harm.<sup>223</sup> The rehearing affirmed the rest of the panel opinion, including, apparently, its religion-plus-speech holding.<sup>224</sup> Thus, although the panel opinion maintained that an affirmation requirement may burden free exercise, the en banc opinion found that available remedies are probably quite limited, perhaps nonexistent.<sup>225</sup>

Although Judge Garwood did not discuss the point, the panel opinion's holding that an affirmation is "religious" is also problematic.<sup>226</sup> The court's only apparent authority that affirmations implicate religion was an alternate definition listed in two law dictiona-

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220. *Id.* at 1220-21 (citing U.S. CONST. art. I, § 3, cl. 6; U.S. CONST. art. II, § 1, cl. 8; U.S. CONST. art. VI, cl. 3; and U.S. CONST. amend. IV).

221. *Id.* at 1224.

222. *Society of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1288-89 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116). Upon rehearing the court also held that the Society of Separationists lacked standing. *Id.*

223. *Id.* at 1288.

224. *Id.* at 1284, 1289.

225. *Id.* at 1285-86.

226. Judge Garwood conceded that to some individuals the word "affirm" may have some religious significance, but concluded that the plaintiff in *Herman* was not one of those individuals. *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1221-22 (5th Cir. 1991) (Garwood, J., dissenting), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116). In contrast to these persons, Judge Garwood asserted, the plaintiff was one of those individuals who objected to any kind of commitment to tell the truth. *Id.* at 1222. Garwood referred to these persons as "generic objectors." *Id.* He did not address the majority's holding that an affirmation was a religious exercise.

ries.<sup>227</sup> One can just as easily, however, compile a larger list of sources that define affirmation *without* reference to religion.<sup>228</sup>

### *Effect of Herman on State and Federal Courts*

Although it is not mandatory authority outside the Fifth Circuit, the holding in *Herman* questions the constitutionality of most state juror oath statutes.<sup>229</sup> The plurality of states have oaths that conclude with "so help me God," with the alternative of a nonreligious affirmation—the same type of alternative struck down in *Herman*.<sup>230</sup> Most of these statutes provide only for either swearing an oath or making an affirmation. Under *Herman*, these types of oath statutes may be unconstitutional in situations involving objectors such as atheists.<sup>231</sup> Most state juror oath statutes do not explicitly allow alternative formulations such as declarations or promises, although it is true that as a matter of practice some states broadly interpret their statutes as not requiring any particular form of words.<sup>232</sup> Nevertheless, out of fear that their oath statutes may be subject to challenges, states may feel compelled to redraft their statutes to comply with the *Herman* rule.

The primary effect of *Herman*, however, is to continue the slide down the slippery slope of alternative formulations that *Gordon*

227. *Id.* at 1216 n.43 (citing *Black's Law Dictionary* and *Bouvier's Law Dictionary* as defining an affirmation with reference to religion).

228. In fact, the majority compiled such a list, which includes AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 22 (New College ed. 1976); 67 C.J.S. *Oaths & Affirmations* § 2 (1978); 1 ENCYCLOPEDIA BRITANNICA 233 (1965); 16 ENCYCLOPEDIA BRITANNICA 815-16 (1965); 1 OXFORD ENGLISH DICTIONARY 40 (compact ed. 1971); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 61 (1990); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 35 (unabridged ed. 1967). *Herman*, 939 F.2d at 1216 n.43.

229. Federal Rule of Evidence 603 appears to be intact after the decision in *Herman* because, although the rule explicitly calls for an "oath or affirmation," it requires no special verbal formulation. See FED. R. EVID. 603 advisory committee's note. However, the problems caused by allowing expansion still exist. See *infra* notes 321-28 and accompanying text for these problems.

230. See *supra* note 85 listing the states with these types of oath statutes. See generally *supra* notes 84-91 and accompanying text (discussing state juror oath statutes).

231. See *Herman*, 939 F.2d at 1215.

232. The courts of some states have construed their oath and affirmation statutes liberally as not requiring any particular form of words. See *Society of Separationists, Inc., v. Herman*, 959 F.2d 1283, 1286 n.3 (5th Cir. 1991) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116). However, in states with statutes that recite the exact text of the oath, such a liberal interpretation is presumably impermissible.



initiated by making practically any type of declaration or promise easier to request.<sup>233</sup> As a collateral matter, this liberalizing of oath requirements could also result in belittling the Free Exercise Clause with trivial requests and causing unwarranted delays in the pretrial and trial processes.<sup>234</sup>

Some might argue that the judicial expansion of oaths to other alternative formulations is not problematic. In addition to arguments that the federal perjury statute may not apply to such alternative promises and that some state juror oath statutes would require amendment,<sup>235</sup> however, the problem is that this expansion is simply unnecessary, for several important reasons. First, the Framers of the Constitution recognized that the alternative of an affirmation was sufficient; the Constitution itself relies exclusively on oaths or affirmations.<sup>236</sup> Second, we should not trivialize the Free Exercise Clause with such generic objections or allow such requests to slow down the judicial system, especially considering the overwhelming dockets of most federal courts.<sup>237</sup> Finally, and perhaps most importantly, contrary to what the court in *Herman* suggested, under the Supreme Court's religion-plus-speech rule, the traditional affirmation to tell the truth *without* reference to God does not burden free exercise of religion.<sup>238</sup>

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233. See *Herman*, 939 F.2d at 1219.

234. *Gordon v. Idaho*, 778 F.2d 1397, 1402 (9th Cir. 1985) (Weigel, J., dissenting).

235. Whether the federal perjury statute's wording is broad enough to cover declarations other than an "oath" or an "affirmation" is currently uncertain. See 18 U.S.C. § 1621 (1988). The statute explicitly applies to sworn oaths, and through 1 U.S.C. § 1 (1988), to affirmations. Allowing alternate vows raises the issue of whether the breach of a "declaration" or a "promise" could be punishable under the statute. Several cases have arisen in which courts have overturned perjury convictions because no oath was given. See *Ferguson v. Commissioner*, 921 F.2d 588, 590 (5th Cir. 1991) ("The government has cited a number of cases invalidating perjury convictions where no oath was given.").

236. See *supra* text accompanying notes 74-81 (discussing Framers' intent).

237. See *Gordon*, 778 F.2d at 1402 (Weigel, J., dissenting).

238. See *infra* notes 304-311 and accompanying text (discussing why affirmations do not burden free exercise).

## RELIGION-PLUS-SPEECH

In *Employment Division v. Smith*,<sup>239</sup> the Supreme Court made extensive revisions to its free exercise doctrine.<sup>240</sup> The case involved the constitutionality of a criminal statute prohibiting possession of the drug peyote, as applied to Native Americans who used the drug for religious purposes.<sup>241</sup> The Court held that such generally applicable statutes that incidentally burden or prohibit religiously motivated conduct are permissible under the Free Exercise Clause.<sup>242</sup> Although government action may not interfere with religious beliefs and opinions, it may interfere with practices.<sup>243</sup> Under *Smith*, when religious belief inspires conduct, the absolute protection of the Free Exercise Clause vanishes.<sup>244</sup>

239. 494 U.S. 872 (1990).

240. See *id.* at 878-79. For commentary on *Smith*, see Kenneth Marin, *Employment Division v. Smith: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431 (1991); Ronald Mykkeltvedt, *Employment Division v. Smith: Creating Anxiety by Relieving Tension*, 58 TENN. L. REV. 603 (1991); Rebecca Rains, Note, *Can Religious Practice Be Given Meaningful Protection After Employment Division v. Smith*, 62 U. COLO. L. REV. 687 (1991).

241. *Smith*, 494 U.S. at 874.

242. *Id.* at 878-79.

243. *Id.*

244. See Vance M. Croney, Note, *Secondary Right: Protection of the Free Exercise Clause Reduced by Oregon v. Smith*, 27 WILLAMETTE L. REV. 173, 185 (1991). The author believes the Court's decision in *Smith* took much of the "bite" out of the Free Exercise Clause:

By narrowing its interpretation of *Sherbert* to apply only to "hybrids" and unemployment compensation cases in which the religiously motivated conduct was not criminal under neutral, generally applicable state laws, the Court had essentially taken the free exercise clause out of the first rank of constitutionally secured rights. In avoiding *Sherbert*, the Court signalled a return to the *Reynolds* doctrine.

*Id.* at 189 (discussing the Court's limitation of the compelling interest test of *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), in favor of returning to the less rights-protective rule of *Reynolds v. United States*, 98 U.S. 145, 166 (1878)). Another commentator maintains, however, that merely following pre-*Smith* precedent would be insufficient:

Although the *Smith* decision renders the free exercise clause virtually meaningless, merely returning to the balancing test as previously used would not be sufficient to give meaningful protection to religion. In order to protect the free exercise of religion, the Court must apply the *Sherbert* balancing test utilizing a centrality analysis and must also define "religion" more narrowly and more clearly.

Rains, *supra* note 240, at 707 (discussing an alternative to *Smith* by proposing a modified form of the compelling interest test of *Sherbert*).

The Court recognized, however, that when religiously motivated action involved the Free Exercise Clause and another constitutional guarantee, such as freedom of speech or freedom of the press, higher interests were at stake.<sup>245</sup> In such "hybrid" cases, the balancing test of *Sherbert v. Verner*<sup>246</sup> must be satisfied.<sup>247</sup> Under the *Sherbert* balancing test, if government action burdens a sincerely held religious belief, the court must balance the rights of the individual against any compelling interests asserted by the state.<sup>248</sup> Essentially, the test requires that when a plaintiff shows a burden on religion, a court must subject the government action to strict scrutiny.<sup>249</sup> When a free exercise claim is connected with "any communicative activity"<sup>250</sup> or the "communication of religious beliefs,"<sup>251</sup> a religion-plus-speech case exists and the court must apply the balancing test.<sup>252</sup>

Religion-plus-speech cases may arise in two very different ways. "Voluntary" religion-plus-speech may result when government action hinders an individual's ability to make a religious communica-

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245. *Smith*, 494 U.S. at 881-82.

246. 374 U.S. 398, 403.

247. *Smith*, 494 U.S. at 881-84; see also Croney, *supra* note 244, at 186-89 (discussing the Court's confinement of the *Sherbert* balancing test to "hybrid" cases and unemployment compensation cases). However, both Justice O'Connor and Justice Blackmun criticized the majority's characterization of "hybrids" as a departure from the Court's free exercise precedent. *Smith*, 494 U.S. at 896 (O'Connor, J., concurring); *id.* at 908-09 (Blackmun, J., dissenting). In O'Connor's view, the *Sherbert* balancing test should apply across the board to every free exercise case. *Id.* at 898-99 (O'Connor, J., concurring). Justice O'Connor rejected the majority's position that *Sherbert* is inapplicable in some situations. *Id.* Similarly, in dissenting, Justice Blackmun stated that the balancing test was the applicable standard in all free exercise cases. *Id.* at 908-10 (Blackmun, J., dissenting). Blackmun viewed the majority's reading of precedent in this area as "distorted." *Id.* at 908.

For more on the Supreme Court's new exception for "hybrid" cases, see Marin, *supra* note 240, at 1467-70; Mykkeltvedt, *supra* note 240, at 612-24; Karin M. Rebesch, Note, *The Illusory Enforcement of First Amendment Freedom: Employment Division, Department of Human Resources v. Smith and the Abandonment of the Compelling Governmental Interest Test*, 69 N.C. L. REV. 1332, 1346-48 (1991).

248. *United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981); *Sherbert*, 374 U.S. at 403; see also Craig A. Mason, Comment, "Secular Humanism" and the Definition of Religion: Extending a Modified "Ultimate Concern" Test to *Mozart v. Hawkins County Public Schools* and *Smith v. Board of School Commissioners*, 63 WASH. L. REV. 445, 448 (1988) (discussing the balancing test).

249. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987).

250. *Smith*, 494 U.S. at 882.

251. *Id.*

252. *Id.*

tion or statement.<sup>253</sup> “Involuntary” religion-plus-speech may occur when the government compels a person to make a religious statement or communication against the person’s free will or belief.<sup>254</sup> In both situations, a burden on religion exists and the court must balance the interests of the individual against the compelling interests of the state.<sup>255</sup>

### “Involuntary” Religion-Plus-Speech

In *Smith*, the Court cited two examples of “involuntary” religion-plus-speech:<sup>256</sup> *West Virginia State Board of Education v. Barnette*<sup>257</sup> and *Wooley v. Maynard*.<sup>258</sup> In both cases the government had compelled plaintiffs to assert or display statements that the plaintiffs found offensive. *Barnette* involved a challenge by a group of Jehovah’s Witnesses to a West Virginia statute mandating that public school children recite the Pledge of Allegiance.<sup>259</sup> The gravamen of the complaint was that religious beliefs prohibited the plaintiffs from bowing down or saluting any “graven image”<sup>260</sup> such as a flag. In striking down the recital of the pledge and mandatory flag salute, the Court stated, “[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>261</sup> The Court recognized that implicit in the right to believe and profess whatever religion an individual so chooses is the right to refrain from speaking when doing so would offend an individual’s beliefs.<sup>262</sup>

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253. See *infra* notes 270-90 and accompanying text (discussing “voluntary” religion-plus-speech).

254. See *infra* notes 256-69 and accompanying text (discussing “involuntary” religion-plus-speech).

255. See Croney, *supra* note 244, at 187-89.

256. *Smith*, 494 U.S. at 882.

257. 319 U.S. 624 (1943).

258. 430 U.S. 705 (1977).

259. *Barnette*, 319 U.S. at 629.

260. *Id.* This belief arises from a literal interpretation of a biblical mandate: “Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.” *Id.* (quoting *Exodus* 20:4-5).

261. *Id.* at 642.

262. See *id.* at 645-46 (Murphy, J., concurring).

At issue in *Wooley v. Maynard*<sup>263</sup> was the constitutionality of New Hampshire's requirement that all noncommercial vehicles bear license plates embossed with the state motto, "Live Free or Die."<sup>264</sup> The plaintiffs, members of the Jehovah's Witnesses, brought a section 1983<sup>265</sup> challenge against the state after their arrest for covering up the slogan.<sup>266</sup> They based their complaint on the repugnance to their religious beliefs of the compelled display of the slogan on their automobiles.<sup>267</sup> The Supreme Court agreed that the state could not compel the plaintiffs to disseminate an ideological message averse to their religious beliefs and struck down New Hampshire's mandatory requirement.<sup>268</sup> The Court's decision rested on the "right not to speak" that emanates from the First Amendment.<sup>269</sup>

### "Voluntary" Religion-Plus-Speech

In *Smith*, the Court also identified examples of "voluntary" religion-plus-speech cases in which individuals wished to make religious statements or communications but government action impaired their ability to do so.<sup>270</sup> In *Cantwell v. Connecticut*,<sup>271</sup> members of the Jehovah's Witnesses were arrested for violating a statute that prohibited the solicitation of funds.<sup>272</sup> The defendants had been going door to door, requesting that people purchase their religious books and pamphlets.<sup>273</sup> The Supreme Court reversed the convictions and held the solicitation regulation unconstitutional,<sup>274</sup> maintaining that the regulation had deprived the defendants of their rights to free exercise of religion and free speech.<sup>275</sup>

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263. 430 U.S. 705 (1977).

264. *Id.* at 706-07.

265. 42 U.S.C. § 1983 (1988).

266. *Wooley*, 430 U.S. at 709.

267. *Id.* at 707.

268. *Id.* at 713.

269. *Id.* at 714.

270. *See Employment Div. v. Smith*, 494 U.S. 872, 881 (1990).

271. 310 U.S. 296 (1940).

272. *Id.* at 300.

273. *Id.* at 301. The defendants also carried a portable phonograph, on which they played a record with a religious message to their listeners. *Id.*

274. *Id.* at 303, 307.

275. *Id.* at 307.

Similarly, in *Murdock v. Pennsylvania*,<sup>276</sup> the government assessed a license tax against petitioners on their distribution of the Bible and other religious materials.<sup>277</sup> Upon their failure to pay the tax, they were arrested and convicted of violating the tax ordinance.<sup>278</sup> The petitioners appealed to the Supreme Court, alleging violations of their right to free speech, press, and religion.<sup>279</sup> The Court agreed with the plaintiffs, holding that such an ordinance may not burden the exercise of these freedoms.<sup>280</sup> The Court said that such a burden might jeopardize religious minorities and might be used to suppress dissemination of religious beliefs.<sup>281</sup>

Another potential example of voluntary religion-plus-speech occurred in *Elsaesser v. Hamilton Board of Zoning Appeals*,<sup>282</sup> although an Ohio court of appeals found otherwise.<sup>283</sup> In that case, the government required the plaintiff to remove three crosses, ranging in height from twelve to sixteen feet, from her front

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276. 319 U.S. 105 (1943). The Court in *Smith* referred to *Follett v. Town of McCormick*, 321 U.S. 573 (1944), as another example of a "hybrid" case. *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990). *Follett* was almost identical to *Murdock*; the petitioner was a Jehovah's Witness who went door to door selling religious books and materials. *Follett*, 321 U.S. at 574. Under the same rationale as *Murdock*, the Court held that the government could not impose a flat license tax upon the distribution of these religious materials without offending the First Amendment. *Id.* at 577.

Arguably, *Murdock* and *Follett* rested more on the Free Press Clause of the First Amendment than the Free Speech Clause, which would make them religion-plus-press cases rather than religion-plus-speech cases. Free speech overtones, however, exist in both cases, and the same concept of governmental burden on voluntary dissemination is involved.

277. *Murdock*, 319 U.S. at 106-07. Petitioners were members of the Jehovah's Witnesses who went door to door distributing religious information and requesting that people purchase certain religious books and brochures. *Id.* They charged 25 cents for each book and five cents for each pamphlet. *Id.* at 167. The amount of the license tax was \$1.50 per day, or seven dollars per week. *Id.* at 106.

278. *Id.* at 107.

279. *Id.*

280. *Id.* at 108. The Court stressed that its holding was not meant to grant a tax exemption to every religious group. *Id.* at 112. Rather, the Court said the nature of the tax is controlling: "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon." *Id.* The flat license tax ordinance fell into the latter category in the Court's view, creating a requirement that the Jehovah's Witnesses pay the tax as a condition of the exercise of their constitutional privileges of free speech and religion. *Id.* The Court found such a condition to be clearly unconstitutional. *Id.* at 114.

281. *Id.* at 115.

282. 573 N.E.2d 733 (Ohio Ct. App. 1990).

283. *Id.* at 739.

yard.<sup>284</sup> She had erected these crosses as "a memorial to the death and resurrection of Jesus Christ."<sup>285</sup> In finding that the crosses were "structures" subject to county set-back zoning requirements, the court ruled that the plaintiff's erection of the crosses was mere conduct and therefore was not entitled to First Amendment protection.<sup>286</sup> Following the Supreme Court's decision in *Smith*, the court drew a distinction between the freedom to believe and the freedom to act.<sup>287</sup> Although the court called the display of the crosses a "religious message,"<sup>288</sup> the opinion did not discuss the potential religion-plus-speech issue. Such an issue may have been present if the display of crosses constituted "speech."<sup>289</sup> Assuming *arguendo* that displaying crosses qualifies as speech, and that the motive behind the speech was religious, voluntary religion-plus-speech may have existed.<sup>290</sup>

### *The Religion-Plus-Speech Test*

According to *Smith*, courts should use the compelling interest balancing test in religion-plus-speech cases.<sup>291</sup> Under this test, once a plaintiff establishes a burden on religion as a threshold matter, the government action is subject to strict scrutiny, which requires a showing of compelling state interest in support of the government action.<sup>292</sup>

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284. *Id.*

285. *Id.* at 735.

286. *Id.* at 739 ("Appellant's freedom to believe as she chooses has not been abridged. The zoning ordinance burdens only her religious conduct.").

287. *Id.*

288. *Id.*

289. The argument that the plaintiff erected the crosses to communicate her reverence for Jesus Christ, and that her action thus amounted to protected religion-plus-speech, rests on a finding that the plaintiff's action was actually "speech"—more accurately, expressive conduct. The display of crosses is arguably as expressive as burning the United States flag—an action the Supreme Court labelled "expressive conduct" entitled to First Amendment protection. See *Texas v. Johnson*, 491 U.S. 397, 420 (1989).

290. One author has asserted, in fact, that if the government prohibited an individual from burning crosses, that prohibition would be an unconstitutional establishment of religion. See Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L.J. 511, 532 n.129 (1991).

291. See *Employment Div. v. Smith*, 494 U.S. 872, 881-82 (1990); see also Croney, *supra* note 244, at 187-89.

292. See *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987).

In the context of a free exercise challenge to a denial of unemployment compensation benefits that did not involve religion-plus-speech, the Supreme Court defined a burden on religion:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.<sup>293</sup>

Although this definition bears some relevance to religion-plus-speech cases, a burden may be more properly defined in the "involuntary" religion-plus-speech context as a governmental compulsion to affirm verbally a belief or disbelief in a religion.<sup>294</sup> A burden on "voluntary" religion-plus-speech exists when the government restrains or suppresses the dissemination of religious beliefs.<sup>295</sup> These definitions raise the question of how best to define "religion" or "religious." Most commentators argue that, to qualify as religious, beliefs must be at least "arguably religious,"<sup>296</sup> if not a

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293. *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981).

294. See *Wooley v. Maynard*, 430 U.S. 705, 713 (1977); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). More specifically, an involuntary religion-plus-speech claim consists of two distinct components. First, the government must have *compelled* the claimant to make some statement against his or her will. See *Smith*, 494 U.S. at 877; *Torcaso*, 367 U.S. at 495; *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943) (holding that the validity of compulsory flag salutes hinged on the ability of "public authorities to compel [a plaintiff] to utter what is not in his mind"). Second, the statement must be an unconstitutional affirmation of belief or disbelief in a *religion*. *Smith*, 494 U.S. at 877; *Torcaso*, 367 U.S. at 495. The compulsion prong requires the government to have forced the claimant to make the statement without having offered him a suitable alternative.

295. See *Murdock v. Pennsylvania*, 319 U.S. 105, 114-15 (1943).

296. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 828 (1978).



matter of ultimate concern to religion.<sup>297</sup> Courts must reject claims that are so bizarre as to be clearly nonreligious in motivation.<sup>298</sup>

### *Application of Religion-Plus-Speech to Oaths and Affirmations*

Because asking a juror to swear or affirm to tell the truth is "involuntary" religion-plus-speech if the juror finds the oath or affirmation offensive, courts must apply the religion-plus-speech balancing test.<sup>299</sup> At the outset, the plaintiff must show a burden on religion.<sup>300</sup> In the case of "involuntary" religion-plus-speech, a burden exists when the government compels an individual to affirm verbally a belief or disbelief in a religion.<sup>301</sup> The Supreme Court and other courts have recognized that the government cannot compel a witness or juror to swear an oath that refers to God.<sup>302</sup> How-

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297. See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1078-79 (6th Cir. 1987) (Boggs, J., concurring) (noting that to find a burden on free exercise, the governmentally compelled belief or disbelief must at least be something "arguably religious," if not something involving matters of ultimate concern to religion), *cert. denied*, 484 U.S. 1066 (1988). In *Mozert*, the court held that requiring school children to read from textbooks that they found offensive to their religion was not a burden on free exercise. *Id.* at 1070. The plaintiffs in *Mozert* claimed that, as fundamentalist Christians, they found reading about evolution, one-world government, magic, the occult, and other views objectionable. *Id.* at 1061-62. The court rejected their claim, however, because it found that the readings contained no religious or antireligious messages. *Id.* at 1069. Had the children been required to say that "all religions are merely different roads to God," the court said a different case would exist. *Id.*

For more discussion on the definition of religion, see Ben Clements, Note, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532 (1989); Mason, *supra* note 248, at 454-62 (arguing for a definition of religion that would include matters of ultimate values and ultimate meanings).

298. *Thomas*, 450 U.S. at 715.

299. See *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1216-17 (5th Cir. 1991), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116).

300. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 139-41 (1987).

301. See *supra* note 294 and accompanying text (discussing burdens when "involuntary" religion-plus-speech exists).

302. See *Torcaso v. Watkins*, 367 U.S. 488 (1961) (prohibiting the use of an oath of office that required notary public to swear a belief in God); *Nicholson v. Board of Comm'rs*, 338 F. Supp. 48 (M.D. Ala. 1972) (striking down an attorney oath of office that concluded with "so help me God"). But see *Zorach v. Clauson*, 343 U.S. 306, 312-14 (1952) (implying that "so help me God" oaths may be permissible even as applied to objectors such as atheists or agnostics).

ever, this problem is remedied and no such compulsion is present if a nonreligious affirmation is available as an alternative.<sup>303</sup>

Historically, the word "affirm" was designed to alleviate the concerns of persons with religious objections to swearing an oath to a deity.<sup>304</sup> Contrary to what *Gordon v. Idaho*<sup>305</sup> and *Society of Separationists, Inc. v. Herman*<sup>306</sup> suggest, the evidentiary witness and juror affirmation requirements do not involve a compelled statement of belief or disbelief in a religion.<sup>307</sup> These statutes require only a solemn promise to tell the truth or try the case fairly.<sup>308</sup> Nowhere do these statutes mandate that witnesses and jurors declare a belief or disbelief in a religion. Furthermore, as the *Herman* decision indicated, most sources define "affirmation" without reference to religion, and most Americans do not associate any religious belief with the affirmation.<sup>309</sup>

More importantly, statutes that specify an oath or an affirmation are uniquely constitutional because the United States Constitution mandates the use of oaths and affirmations.<sup>310</sup> The Framers of the Constitution did not view affirmations as "religious" and included them in the Constitution as nonreligious alternatives to oaths.<sup>311</sup> In any event, the need for truthful testimony and fair trials is a compelling government interest and may override burdens on a wit-

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303. See *Pierce v. Commonwealth*, 408 S.W.2d 187, 188 (Ky. 1966) (upholding a juror oath statute when the alternative of nonreligious affirmation was available); *Jones v. State*, 585 P.2d 1340, 1341 (Nev. 1978) ("Where an affirmation is permitted in lieu of an oath, a juror's freedom of religion is not violated.").

304. *Biklen v. Board of Educ.*, 333 F. Supp. 902, 905 (N.D.N.Y. 1971), *aff'd*, 406 U.S. 951 (1972); see also FED. R. EVID. 603 advisory committee's note.

305. 778 F.2d 1397, 1401 (9th Cir. 1985).

306. 939 F.2d 1207, 1215 (5th Cir. 1991), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116).

307. *Cf. id.* at 1222-24 (Garwood, J., dissenting) (asserting that witness and juror affirmations do not offend religious and expressive freedom).

308. See *supra* notes 90-91 and accompanying text for the text of a typical juror oath and affirmation statute.

309. See *Herman*, 939 F.2d at 1219-20 ("We acknowledge the popular view that affirmation-taking is not a religious exercise").

310. *Biklen v. Board of Educ.*, 333 F. Supp. 902, 907 (N.D.N.Y. 1971), *aff'd*, 406 U.S. 951 (1972); see also *supra* notes 74-83 and accompanying text (discussing the Constitution's use of oaths and affirmations).

311. *Herman*, 939 F.2d 1220-21 (Garwood, J., dissenting).

ness' or juror's free exercise rights, unless a situation involves a religious test oath or the nonreligious affirmation is unavailable.<sup>312</sup>

Therefore, the judicial expansion of oaths begun in *Gordon* and more recently demonstrated in *Herman* is unnecessary. Oath statutes that provide the alternative of a nonreligious affirmation do not burden "involuntary" religion-plus-speech rights. For example, in *Herman*, the judge offered the plaintiff an opportunity to affirm to tell the truth without any reference to a deity, explicitly stated that he was not asking the plaintiff to make a religious statement, and told her that he understood her constitutional right to object.<sup>313</sup> Moreover, the plaintiff was free to request an excusal from jury duty at any time, rather than make a nonreligious affirmation.<sup>314</sup> For these reasons, the court should have found no burden on religion in *Herman*. Indeed, courts should never find such a burden when a nonreligious affirmation is available. Such an affirmation is available in the majority of American states.<sup>315</sup>

#### RECOMMENDATIONS ON EXPANSION OF OATHS

Some guarantee that a juror or witness will tell the truth is essential to the orderly working of the American judicial system.<sup>316</sup> Professors McCormick and Weissenberger have suggested two reasons why the oath is so important: first, it impresses upon the witness the need and duty to tell the truth;<sup>317</sup> second, the oath alerts

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312. See *United States v. Turnbull*, 888 F.2d 636, 640 (9th Cir. 1989) (holding that the government has a compelling interest in a fair and orderly trial), *cert. denied*, 111 S. Ct. 78 (1990).

313. See *supra* note 192.

314. See TEX. CODE CRIM. PROC. ANN. art. 35.03, § 3 (West 1989) (stating that a juror may be discharged or postpone his jury service because of religious beliefs or observation of religious holiday); see also Affidavit of Keith Haley, attached to Plaintiff's Motion, *supra* note 14. Keith Haley, another atheist, was offered the same alternatives as the plaintiff in *Herman*. *Id.* Haley, however, was also offered the opportunity to ask to be excused from jury duty rather than swearing or affirming. *Id.* The plaintiff in *Herman* was not told she could be excused, although this option would have been available to her had she asked. *Id.*

315. Thirty-seven states have juror oath statutes that provide the alternative of a nonreligious affirmation. See *supra* notes 85, 87 (listing these states).

316. In addition to ensuring truthfulness and fair juries, oaths play a vital function in the operation of the hearsay rule. See FED. R. EVID. 801(d)(1)(A) (defining prior statements of witnesses under oath as nonhearsay).

317. EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 245 (3d ed. 1984); GLEN WEISSENBERGER, WEISSENBERGER'S FEDERAL EVIDENCE § 603.1 (1987).

the witness that false testimony could result in punishment for perjury.<sup>318</sup>

The juror oath and affirmation statutes of most American states are constitutional and require no changes.<sup>319</sup> The small minority of states that have statutes providing only for oath swearing<sup>320</sup> may need to amend their statutes to allow affirmations, thus avoiding constitutional objections.

In no circumstance does the Constitution require a state to expand its statute legislatively or judicially to allow other alternative formulations such as a "declaration." Such an expansion of oath statutes would invite a myriad of problems. First, expanding the oath to allow "personalized" alternative forms of ensuring truthfulness is in direct opposition to the history of the oath. The sole purpose of devising the "affirmation" was to accommodate persons who objected to swearing an oath.<sup>321</sup> Historically, the affirmation has been the preferred solution to the problem of religious objections. For thousands of years, society has found the use of oaths and affirmations sufficient for guaranteeing truthfulness.<sup>322</sup> There is no reason to change the method now.

Second, expanding oaths would constitute blatant disregard for the views of the Founding Fathers of our nation. The Framers of the Constitution included the affirmation in the Constitution as the only permissible alternative to the oath.<sup>323</sup> The Constitution requires either an oath or an affirmation in no less than four places;<sup>324</sup> the document textually permits nothing else. The Framers included the affirmation in the Constitution for the very purpose of protecting religious objectors.<sup>325</sup>

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318. WEISSENBERGER, *supra* note 317.

319. *See supra* notes 85, 87 (listing the thirty-seven states with juror oaths statutes that provide the alternative of a nonreligious affirmation).

320. *See supra* note 84 (listing states with this type of juror oath statute). These states could also adopt a rule of statutory construction similar to that in 1 U.S.C. § 1 (1988), which declares that the word "oath" includes "affirmations." *See supra* notes 67-73 (discussing this federal rule of statutory construction).

321. *See supra* note 304 and accompanying text.

322. *See supra* notes 27-62 and accompanying text (discussing the history of oaths and affirmations).

323. *See supra* note 74 and accompanying text.

324. *See supra* notes 74-77 and accompanying text.

325. *See supra* notes 74-83 (discussing the Framers' intent regarding oaths and affirmations).

Third, allowing each individual witness or juror to formulate his own personalized commitment would trivialize the Free Exercise Clause.<sup>326</sup> The Free Exercise Clause was meant to guarantee that government would not interfere with religion, not to permit generic objections to the oath process.<sup>327</sup> Allowing such alternative formulations would also add more delay to the already burdened dockets of state and federal courts.<sup>328</sup>

As a final matter, use of oaths including the phrase "so help me God" should continue because of their centrality and historical purpose as a guarantee of truthfulness and fairness.<sup>329</sup> Statistics indicate that most people prefer swearing an oath to affirming.<sup>330</sup> Furthermore, the Constitution requires the provision of an "oath."<sup>331</sup>

### CONCLUSION

In *Society of Separationists, Inc. v. Herman*,<sup>332</sup> the Fifth Circuit sustained a free exercise challenge to Texas' juror oath statute, using the Supreme Court's new exception for religion-plus-speech cases.<sup>333</sup> The case represents the extreme in a recent trend of judicial expansions of the oath, allowing objecting witnesses and jurors to craft their own "personalized" commitment to tell the truth. This expansion of oaths is unnecessary and unwarranted. The affirmation, consistent with the Framers' intent, has been sufficient for accommodating those who, because of their religious beliefs, object to oaths. Moreover, contrary to the decision in *Herman*, an affirmation without reference to God is not "religious" and does not

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326. *Gordon v. Idaho*, 778 F.2d 1397, 1402 (9th Cir. 1985) (Weigel, J., dissenting).

327. *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1222 (5th Cir. 1991) (Garwood, J., dissenting), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3061 (U.S. July 14, 1992) (No. 92-116).

328. *Gordon*, 778 F.2d at 1402 (Weigel, J., dissenting).

329. *See supra* notes 317-18 and accompanying text (discussing the dual purposes which such oaths serve).

330. *See Murray v. Buchanan*, 720 F.2d 689, 695 (D.C. Cir. 1983) (MacKinnon, J., dissenting) (observing that 99% of state and federal officers required to take an "oath" choose to swear an oath with a reference to God instead of affirming).

331. *See Herman*, 939 F.2d at 1221 (Garwood, J., dissenting) (noting that the Constitution mandates the use of either an oath or an affirmation).

332. 939 F.2d 1207.

333. *Id.* at 1215; *see supra* notes 239-90 (discussing the new rule for religion-plus-speech).

burden religion-plus-speech rights. Such an affirmation does not involve any compelled utterance of belief or disbelief in a religion. Therefore, to require expansion of the oath to include other alternative formulations is unwarranted and only trivializes the Free Exercise Clause, inviting generic objections to the oath process. This type of expansion is contrary to what the Supreme Court and the Constitution require. Finally, the Supreme Court and other courts have held definitively that oaths and affirmations, even those with a reference to God, raise no Establishment Clause problems.

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