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ON EVIDENCES AND INTENTIONS: "THE MORE PROOF, THE MORE DOUBT"*

by Carol Weisbrod**

Discussions of church and state seem, by their nature, to be historical. A large sense of history informs many judicial opinions. That history sometimes means remembering what cannot be allowed to be forgotten. Thus, Justice Jackson spoke of the "unanimity of the graveyard," and Justice Frankfurter spoke as a member of "the most vilified and persecuted minority in history." At other times, history is a tool in problem solving. In this mode, history may provide an example to be followed or rejected, or it may be the basis for interpreting governing texts "in the light of our whole experience" or according to "the intention of the framers." It is this last, known currently as


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Author's note on sources: The present discussion is based on relatively accessible sources. I don't doubt that a specialist in Connecticut history would find more relevant material in newspapers, journals, sermons, and letters. Such material would, I assume, add complexity and texture, without affecting the central point.

2. Id. at 646 (Frankfurter, J., dissenting).

[When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Id.

4. For recent discussions of this theory and its problems, see Dworkin, The Forum of Princi-
“originalism,” that is addressed here by way of a case study.

This essay considers one historical question: What meaning did the Connecticut Constitution of 1818 have for general issues of religious liberty in Connecticut? Part I of the paper describes the religious establishment and the changes made by the 1818 Constitution. In part II, the interpretation of the constitution by conservative federalists, represented by David Daggett, is contrasted with that of others with reference to the problem of the qualification of witnesses in the period immediately after disestablishment. Using the views of Daggett to illuminate the ideas of Joseph Story and Thomas Cooley, part III illustrates a difficulty with the assumption that using general rather than specific intentions to represent the intention of the framers will significantly reduce historical problems.

I. DIESTABLISHMENT IN CONNECTICUT

This much is relatively clear: Before 1818, the Congregationalist Church in Connecticut received special privileges from the state. Other forms of religious worship were also recognized, and to a degree accorded comparable privileges. The federalists took considerable


6. The first amendment to the federal Constitution was understood to have no application to Connecticut and its religious establishment. Indeed, one reading of the clause “Congress shall make no law respecting an establishment of religion” sees that language as designed to protect such establishments. Connecticut ratified the first amendment to the federal Constitution in 1939.

7. In 1791, Connecticut had passed a Certificate Act “securing equal rights and privileges to Christians of every denomination in this State.” Conn. Gen. Stat. tit. CXXXVIII (1808). The idea was that dissenters would record their membership in a denomination other than the established one, by lodging a certificate with the clerk of an ecclesiastical society, and would thus be exempt from taxes for the support of public worship or the ministry. Dissenting congregations were allowed to tax themselves. But, as the Baptist John Leland pointed out in his attack on the law, the excuse related only to members of Protestant-Christian denominations. “[F]or heathens, deists, Jews and papists, are not indulged in the certificate law; all of them, as well as Turks, must therefore be taxed to the standing order, though they never go among them or know where the meeting house is.” J. LELAND, THE RIGHTS OF CONSCIENCE INalienable, AND THEREFORE RELIGIOUS OPINIONS NOT COGNIZABLE BY LAW; OR, THE HIGH-FLYING CHURCH-MAN, STRIPPED OF HER LEGAL ROBE, APPEARS A YWHO 30 (1791), quoted in J. TRUMBULL, HISTORICAL NOTES ON THE CONSTITUTIONS OF CONNECTICUT 1639-1818, at 34 (1873). A Connecticut court (in 1844) de-
pride in the state's commitment to religious toleration, and did not view the statutory offenses against religion as incompatible with that commitment. Thus, in his 1804 pamphlet, *Count the Cost*, federalist scribed the system before 1818 in these terms:

During the early history of the state, and before the adoption of our present constitution, all ecclesiastical societies having territorial limits, were considered to be, and in fact were, municipal and public corporations. To support and maintain religious instruction and worship, through the agency of these societies, was a public duty, enjoined by the law. And every individual residing within the limits of any such society, was considered by law as much a member of it, as each resident of a town was deemed its inhabitant. . . .

Jewett v. Thames Bank, 16 Conn. 511, 515-516 (1844).

Looking at the system of alternatives available to dissenters in Connecticut, Levy states that the Congregational and Episcopalian churches received government support, "without specified preference to either." L. LEVY, JUDGMENTS, ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 196 (1972). Levy concludes as a general matter: "The uniqueness of the American experience justifies defining an establishment of religion as any support of religion by government, whether the support be to religion in general, to all churches, some churches, or one church." Id. at 202. Yet in viewing Connecticut as a multiple establishment we should not minimize the discontent of those who were not part of the Federalist-Congregationalist standing order. Consider, for example, the long struggle of the Episcopalians to obtain a charter for Trinity College, or the 1816 response of the Glastonbury Methodists to the federalist attempt to buy them off. See M. GREENE, THE DEVELOPMENT OF RELIGIOUS LIBERTY IN CONNECTICUT 469-70 (1905). Trumbull noted:

It is not surprising that the federal majority—members of the "standing order" and warmly attached to the school of the prophets at New Haven—hesitated to contribute from the State treasury to the maintenance of a bishop or for the establishment of an episcopal rival to Yale. It is not more strange that the episcopalians, as a body, became associated with the republican party, from which they received assurances of support. J. TRUMBULL, supra, at 33.

8. Zephaniah Swift compared the laws of Connecticut with those of other nations and particularly addressed the issue of historical persecution. As he saw it, Connecticut came out quite well:

It is with the highest pleasure that we compare our laws with other nations in this respect. Tho our ancestors on flying from the hand of persecution, into this asylum of liberty, were anxious to preserve a uniformity of religious opinion, and public worship, yet they never attempted to effect their design by severe laws and sanguinary punishment. . . . At an early period, our laws began to exempt sect after sect from any penalty, and then by degrees extended to all the full blessing of toleration.


9. See CONN. GEN. STAT. tit. LXVI, ch. I, § 7 (1808). Connecticut had a law that dealt with the "crimes against religion." Id. See also Z. SWIFT, supra note 8. Swift discussed these crimes, stressing first that they were "not punishable by the civil arm, merely because they are against religion." Id. at 320. Clearly, the deity was capable of "maintaining the dignity of his moral government, and avenging the violations of his holy laws." Id. Rather, the point here was that the crimes were punished as they "respect the peace, and happiness of civil society." Id. It was on "this ground only, that civil tribunals are authorized to punish offenses against religion." Id.

The particular crimes against religion outlined in the statute were blasphemy, atheism, polytheism, unitarianism, apostasy, breach of the sabbath, and profane swearing. Blasphemy as defined under the statute was punished by whipping and the pillory. (From 1642 until 1784, the death penalty was authorized. See CONN. GEN. STAT. tit. LXVI, § 7 (1808)). The penalties for
David Daggett challenged the proposal by reformers for a new Connecticut Constitution that would repeal the laws that supported religious institutions.

"The language of those favoring the measure," Daggett stated, is "that religion will take care of itself—that no external aid is necessary—that all legislative interference is impious." The reformers "intended to throw down all the barriers which Christianity has erected against vice." They were "determined to banish from the public mind all affection and veneration for the Clergy, all respect for the institutions of religion." Finally, the reformers intended "to reduce Connecticut to that condition which knows no distinction between him who serveth God and him who serveth him not." Daggett concluded that the reformers "wish to see a Republic without religion." Daggett believed, however, that "a great majority of the people, and the Legislature insist that every man in the community who is able should contribute in some way toward the support of the institutions of religion." He stressed that the laws of Connecticut "permit every man to worship God when, where and in the manner most agreeable to his principles or to his inclination and not the least restraint is imposed. All ideas of dictating to the conscience are discarded and every man sits under his vine and fig tree."

blasphemy were reduced in 1821, though the offense remained. Conn. Gen. Stat. tit. 22, § 67 (1821). Atheism, polytheism, unitarianism and apostasy were from 1750 punished in the following way: For the first offense, the offender was incapable of having or enjoying any offices or employments, ecclesiastical, civil or military; on the second offense, a person was disabled from suing, prosecuting, pleading, or maintaining any action in law or equity, and from being a guardian, executor, or administrator.

For an argument that Connecticut's blasphemy statute was unconstitutional under the 1818 constitution, see T. Schroeder, Constitutional Free Speech Defined and Defended in an Unfinished Argument in a Case of Blasphemy (1919) (in connection with Connecticut's 1916 prosecution of Michael Mockus). To get at intent, Schroeder used Daggett's 1804 view of those favoring a constitution. Schroeder quoted from D. Daggett, Count the Cost (1804), and insisted that that purpose—the purpose imputed by Daggett to his opponents years before the convention—"became dominant by the adoption of the Connecticut constitution." T. Schroeder, supra, at 361. Schroeder concluded that "[i]t was this purpose which is the key for the interpretation of the Connecticut constitution was adopted and supplies us with the key for its proper interpretation." Id.

But why, in general, take the views of one side or the other as determinative? The 1818 constitution was, as Purcell reminds us, "essentially a compromise, although in principle [its views] were distinctly those of moderate Republicans." R. Purcell, Connecticut in Transition 1775-1818, at 409 (1918).

The Connecticut prosecution of Mockus did not result in an appellate opinion. A prosecution in Maine did. State v. Mockus, 120 Me. 84 (1921).

10. For a discussion of Daggett's background, see infra notes 39-40 and accompanying text.
12. Id. at 5-6.
In 1814, Timothy Dwight interpreted Connecticut's situation as being already essentially free of sect preferences. "All classes of Christians are here invested with the same privileges," he said. "They are left to their own choice of the mode and manner of worship; but they are required to contribute to the support of some public worship or other." Yet others disagreed with this benign view of Connecticut's situation. Reviewing the history in 1959, Maclear suggested that the appearance of the Republican party and the coalition between political radicals and dissenters transformed disestablishment "from a visionary ideal into an imminent possibility." These set the stage for a "final assault on the ancient New England ideal of a Christian republic." Baptists, Methodists, and Episcopalians felt that it was urgent that state and church be fully and rapidly separated. The issue became a major topic at the Constitutional Convention held in 1818 to frame Connecticut's first modern constitution.

The Constitution of 1818, ratified by a narrow margin, provided that

[t]he exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in this state; provided, that the right hereby declared and established, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state.

It also provided that "no preference shall be given by law to any christian sect or mode of worship." Further:

It being the duty of all men to worship the Supreme Being,

13. Address by Timothy Dwight to the senior class of Yale College (1814), quoted in Maclear, "The True American Union" of Church and State: The Reconstruction of the Theocratic Tradition, 28 CHURCH HIST. 41, 46 (1959). In short, as Maclear puts it, "a public ecclesiastical system was defended as support to the gospel in general rather than to Congregationalism." Id. at 47.

14. Maclear, supra note 13, at 45.

15. Greene notes that the Baptists and Methodists resolved during the constitutional convention "that no constitution of civil government should receive their approbation and support unless it contained a provision that should secure the full and complete enjoyment of religious liberty." The Episcopalians "were ready to second such resolutions." M. GREENE, supra note 7, at 487. See generally J. TRUMBULL, supra note 7.

16. Before 1818, the state was formally operating under a codified version of its 17th century Royal charter. See generally Collier, The Connecticut Declaration of Rights Before the Constitution of 1818: A Victim of Revolutionary Redefinition, 15 CONN. L. REV. 87 (1982).

17. CONN. CONST. art. I, § 3 (1818).

the Great Creator and Preserver of the Universe, and their right to render that worship, in the way most consistent with the dictates of their consciences; no person shall, by law, be compelled to join or support, nor be classed with, or associated to, any congregation, church or religious association. But every person now belonging to such congregation, church, or religious association, shall remain a member thereof, until he shall have separated himself therefrom in the manner herein-after provided. And each and every society or denomination of Christians in this state, shall have and enjoy the same and equal powers, rights, and privileges; and shall have power and authority to support and maintain the ministers or teachers of their respective denominations, and to build and repair houses for public worship, by a tax on members of any such society only. . . . 19

Much later the achievement represented by these provisions was described as follows: "The battle for religious liberty was won, Church and State divorced, politics and religion torn asunder. The day of complete religious liberty had dawned in Connecticut. . . ."20 A few years after the adoption of the constitution, "the strongest adherents of the old system . . . acknowledge[d] the superiority of the new."21 Thus, Lyman Beecher, looking back, said, "For several days, I suffered what no tongue can tell for the best thing that ever happened to the state of Connecticut."22

Obviously, religious freedom under the 1818 Constitution had limits. Thus, Richard Purcell, writing in 1916, noted that although the law protected religious forms consistent with morality and law, "Christianity was emphasized as the state's belief."23 In fact, the word "Christian" had been adopted in the new constitution in section four in a formal amending process as a replacement for the word "religious."24

19. Id. art. VII, § 1.
20. M. Greene, supra note 7, at 496.
21. Id.
22. Quoted in id. at 496. The year after disestablishment, however, Beecher was "lecturing the civil magistrates on their duties to the church as if nothing had happened." Maclear, supra note 13, at 54.
23. R. Purcell, Connecticut in Transition 1775-1818, at 385 (1918). Purcell suggested that there was "a hint of discrimination against the Hebrew and possibly the Unitarian." Id.
24. See J. Trumbull, supra note 7, at 54; M. Greene, supra note 7, at 488.

The debate over this provision as reported in the Connecticut Courant indicates that some in the Convention thought that there were no Jews or Mohammedans in Connecticut and there prob-
It was not until 1843 that Jews were accorded rights to form religious societies, and not until 1965 that the specifically Christian reference was abandoned. Nevertheless, the new day of complete religious liberty was said to have dawned with this 1818 change. Thus it is worth asking what the constitution meant with respect to matters that were more subtle than the direct financial aspects of disestablishment, and less difficult than the concerns of non-Christians. But how do we get at the meaning of the language of the 1818 document? The new constitution clearly was controversial. We are told that the "federalists opposed the disestablishment section at every point, and succeeded in changing the first draft in important ways." Writing in 1855, Hollister observed that deep divisions over the new constitution engendered libel trials, abusive pamphlets and bad feelings carried on to the next generation. If the ably never would be any. However, if there should be any, one speaker commented, "the amendment would not infringe their privileges and he was therefore in favor of it." Conn. Courant, Sept. 8, 1818, at 3, col. 1. It is possible that some of the support for the Christian amendment came from those who assumed the universality of Christianity. That is, some might have voted against the Christian preference on a demonstration that there were in fact non-Christians in the state. On Jews in Connecticut, see Marcus, Light on Early Connecticut Jewry in 1 Critical Studies in American Jewish History: Selected Articles from the American Jewish Archives 1 (1971); 5 J. Marcus, The Colonial American Jew 424-25 (1970).


The journal of the convention explained the 1965 revisions on religion as follows:

In the revised Article Seventh, a proposed amendment makes it a right rather than a duty to worship a Supreme Being as a person's conscience dictates. It prohibits preference by law of any religion, guarantees equal rights and powers to all religions and eliminates obsolete requirements concerning membership, termination of membership and taxation of membership of any religious organization.


27. On the latter point, see generally M. Borden, Jews, Turks and Infidels 28 (1984) (reading the 1818 religious toleration language (§ 3) as establishing that Jews were from this point on eligible for public office); C. Antieau, D. Carroll & T. Burke, Religion Under the State Constitution (1965) (indicating that general constitutional language had been used in other states to eliminate religious restrictions on suffrage); Conn. Courant, Sept. 8, 1818, at 3, col. 1 (one speaker at the 1818 Convention suggested that the change in § 4 might create a religious test for office).

28. See J. Trumbull, supra note 7, at 54.

language reflected a consensus, what exactly was it?

Some evidence suggests that certain issues were not agreed upon. Very shortly after the 1818 change, a judge of the Connecticut Supreme Court indicated that he had "not had leisure" to examine whether a law making the denial of certain Christian beliefs criminal was now unconstitutional and impliedly repealed. To that judge, then, the meaning of the constitution was not so clear that the matter could be treated as altogether obvious. Another example of disagreement relates to the issue of witness qualification.

II. INTERPRETATIONS

Issues of the qualification of witnesses in court, whether they involve the oath or the capacity to take the oath, touch both the free exercise and establishment aspects of the separation of church and state. Examination of the witness qualification question in the period immediately after disestablishment should be useful in surfacing ideas about the constitution and the arguably new relationship between religion and the enforcement of social morality.

The main point here is that for many in the framing generation, morality was a branch of religion. Thus, as Timothy Dwight explained, "where there is no religion, there is no morality." Dwight elaborated the point:

Moral obligation has its sole ground in the character and gov-

30. See Stow v. Converse, 3 Conn. 325, 341 (1820). The case was a libel action in which the libel published by the editor of the (New Haven) Connecticut Journal was, in essence, that the plaintiff was an infidel. Daggett (assumed to be David), and another representing the defendant, argued that the language used (to the effect that the state could no more order support of God than of the devil) was not defamatory. It was, roughly, the position of the Baptists and was "perfectly consistent with the Constitution of the state." Id. Further, Daggett said, the instructions to the jury were erroneous in suggesting that these views were criminal, because the statute on deism and unitarianism had been abrogated with the adoption of the new constitution. Id. The issue of implied repeal was not significant in any real (as opposed to legal) sense, because the statute was legislatively repealed in 1821 in a revision of the laws of Connecticut that sought to bring them in line with the new constitution. See Swift, Whitman, & Day, Preface to THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT iii-x (1821). Loomis and Calhoun indicate that there had been no convictions under the statute. D. LOOMIS & J. CALHOUN, THE JUDICIAL AND CIVIL HISTORY OF CONNECTICUT 55 (1895).


32. See generally Torcaso v. Watkins, 367 U.S. 488 (1961) (oath required of Maryland's notaries understood to have violated both the federal establishment clause and the free exercise clause).

ernment of God. But, where God is not worshipped, his character will soon be disregarded; and the obligation, founded on it, unfelt, and forgotten. No duty, therefore, to individuals, or to the public, will be realized, or performed. Justice, kindness and truth, the great hinges on which free Society hangs, will be unpracticed, because there will be no motives to the practice, or sufficient forces to resist the passions of men. Oaths of office, and of testimony, alike without the sanctions of religion, are merely solemn farces.34

Dwight, a Congregational minister who was President of Yale, was hardly alone in these sentiments. The issue of a religious test for witnesses was one area in which certain propositions about religion, morality, and law were made visible in the legal system.

Connecticut had considered the issue of the qualification of witnesses once before disestablishment under the new constitution. The 1809 opinion in Curtiss v. Strong35 stated that "[e]very person who does not believe in the obligation of an oath, and a future state of rewards and punishments, or any accountability after death for his conduct, is by law excluded from being a witness."36 The court said that the essence of the oath was the religious sanction; the fear of offending God was the witness's principal inducement to speak the truth. Because this sanction would not operate on those who disregarded the oath, such persons were excluded from being witnesses.

Ten years after the constitutional change, the Connecticut high court considered the issue again. David Daggett, as a judge on the Connecticut Supreme Court, delivered the majority opinion in Atwood v. Welton.37 Daggett was a man of "the old school of Connecticut politics.38 He was a Yale graduate, a lawyer, and "a man belonging in spirit to the eighteenth century."39 His views were intensely conserva-

34. Id.
35. 4 Day 51 (1809). See also Beardsley v. Foot and Son, 2 Root 399 (1796) (evidence of atheism proved by witnesses). See generally Z. Swift, DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES 47-51 (1810).
36. Curtiss, 4 Day at 55. The point was that "for such a person the law presumes no credit is to be given. . . ." Id.
37. 7 Conn. 66 (1828).
38. J. Morse, A NEGLECTED PERIOD IN CONNECTICUT HISTORY 1818-1850, at 73 (1933).
39. Id. Morse writes: "Even his dress was of the earlier mode, as he kept to white-topped boots and long white stockings after others had assumed the more drab habiliments of the modern era." Id. at 74. When Daggett ran for governor in 1824, he was not, it seems, seen as a great threat. His "political antecedents were rooted in the Standing Order," and he was thought by his opponents to be "better suited to be a judge, or a teacher of Bible School. . . ." Id.
tive. Those opposing Daggett in the gubernatorial election of 1824 "painted unpleasant pictures of the religious intolerance and civil persecution which would attend a return of Federalism." 40

Atwood v. Welton was a suit to recover the value of money loaned by the defendant to one Scott on the basis of a usurious contract. 41 The central issue was not usury, however, but the status of Scott as a witness. The defendant objected to Scott's testimony on the ground that Scott was not a believer in divine revelation. When this objection was overruled, the defendant then raised a second objection to the effect

40. Id. For a discussion of Daggett's opposition to disestablishment, see supra text accompanying notes 10-11. Daggett may be recalled unhappily as the judge in the trial of Prudence Crandall. See State v. Crandall, 10 Conn. 339, 371 (1834) (Daggett, J., dissenting) (conviction under statute forbidding instruction of blacks who were not inhabitants of the state reversed because of defect in the information).


Jefferson, in turn, expressed an equally scathing view of Daggett and other Connecticut leaders. In 1801, he wrote privately: "Their steady habits exclude the advances of information, and they seem exactly where they were when they separated from the Saints of Oliver Cromwell." Letter from Thomas Jefferson to Pierpoint Edwards (July 21, 1801), quoted in Adams, History of the United States During the Administration of Thomas Jefferson 315 (1889). In May, 1817, following the election of Oliver Wolcott, Jefferson wrote to John Adams: "I join you therefore in sincere congratulations that this den of the priesthood is at length broken up, and that a protestant popedom is no longer to disgrace the American history and character." 2 The Adams-Jefferson Letters 512 (L. Cappon ed. 1959). In a lecture given at the University of Virginia, Edward Corwin suggested that Jefferson's famous Danbury letter (Wall of Separation) was "not improbably motivated by an impish desire to heave a brick at the Congregationalist-Federalist hierarchy of Connecticut, whose leading members had denounced him two years before as an 'infidel' and 'atheist.' " Corwin, The Supreme Court as National School Board, in A Constitution of Powers in a Secular State 106 (1951).

For further information on Daggett, see: Lipson, "More Proof, More Doubt," 19 Yale L. Rep. 9 (1972). See also 4 F. Dexter, Biographical Sketches of the Graduates of Yale College 260-64 (1907); 5 Dictionary of American Biography 26-27 (A. Johnson & D. Malone eds. 1930); Dutton, Preface to 20 Conn. at vii (1849) (funeral address for David Daggett); D. Loomis & J. Calhoun, supra note 30, at 265 ("For many years, no man in the State had so much political influence, an influence amounting so nearly to a political control of the State, as he.").

41. The case was an action qui tam brought by an informer under a statute that authorized a splitting of the fine between the state and the informer. See Conn. Gen. Stat. tit. 106, § 2 (1821). See also 1 Z. Swift, A Digest of the Laws of the State of Connecticut 585-86 (1822).

Scott was a Universalist; Universalism takes as its fundamental doctrine the idea that all men will be saved. The church, founded in the 18th century, merged with the Unitarian movement in 1961. On Universalism in Connecticut, see D. Robinson, The Unitarians and the Universalists (1985); D. Watt, From Heresy Toward Truth: The Story of Universalism in Greater Hartford and Connecticut 1821-1971 (1971).
that Scott did not believe in a Supreme Being or in future rewards and punishment. Viewed broadly, the case involved two questions. The first was whether the witness could be disqualified altogether because he did not believe in future punishment but instead believed that all men would be made happy immediately after death. The second was whether, assuming that Scott was qualified as a witness, his religious belief could go to his "credit," that is, his credibility.

Judge Daggett believed that Curtiss v. Strong, unchallenged for almost twenty years, had to be the guide for the Atwood court. He concluded that the reasons would have to be weighty to compel a departure from Curtiss's witness-exclusion rule. Disestablishment, it was obvious, had no such compelling weight. Daggett did not find it necessary to reach the issue of credibility because he saw the case as involving total disqualification of the witness. Daggett quoted Justice Joseph Story, who in 1827 had said that "[p]ersons who do not believe in the existence of God, or a future state or who have no religious belief, are [not] to be sworn as witnesses." The administration of an oath, Story said, presupposes that the oath-taker feels a moral and religious accountability to a Supreme Being. Daggett also quoted with approval a New York court: While "[r]eligion is a subject on which every man has a right to think according to the dictates of his understanding . . . , in the development of facts, and the ascertainment of truth, human tribunals have a right to interfere." The New York court had held that no testimony is entitled to credit, unless delivered under the solemnity of an oath, which comes home to the conscience of the witness, and will create a tie arising from his belief that false swearing would expose him to punishment in the life to come. On this great principle rest all our institutions, and especially the distribution of justice between man and man.

The Atwood opinion included some general supporting comments on the role of Christianity in Connecticut law. In Connecticut, according to Judge Daggett, "[o]ur constitution declares it to be the duty of all men to worship the Supreme Being according to the dictates of their

42. Atwood, 7 Conn. at 66-67.
43. Id. at 79-86 (Peters, J., dissenting).
44. Id. at 74 (quoting from Justice Story in Wakefield v. Ross, 28 F. Cas. 1346, 1347 (D.R.I. 1827) (No. 17,050) (Reporter's Note)).
45. Atwood, 7 Conn. at 75 (quoting Tuttle v. Gridley, 18 Johns. Ch. 98 (N.Y. Ch. 1820)).
46. Atwood, 7 Conn. at 66-67.
consciences.” He cited the statutes prohibiting blasphemy, profane swearing, and violation of the Sabbath, the surviving sections of the former statute on offenses against religion. These provisions “do not look like annulling Christianity,” he wrote.

Judge Daggett dismissed the argument that the decision to exclude the witness violated the new constitution. He assumed that the argument rested on the constitutional provisions of free exercise and the rejection of religious preference among Christian sects, but found these sections irrelevant to the present case. The plain meaning of these provisions, Daggett said, was to secure an entire freedom in religious profession and worship, and an entire exclusion by law of a preference to any sect or mode of worship. But these goals had nothing to do with the present issue. Daggett observed: “[C]annot a person be free in his profession and worship who is excluded from giving testimony on the ground of his denial of all liability to future punishment? How does his exclusion affect his belief, profession or mode of worship? It has no possible bearing on either.”

It is not clear who made the constitutional argument in Atwood. Daggett was careful to note that the point “was not suggested by the able and ingenious counsel, who argued the cause. . . .” The argument could have been made by someone outside the courtroom entirely. Daggett was in general aware of a larger political arena. He referred to a view “said to be sanctioned by gubernatorial authority” that “Connecticut is an asylum for all sorts of consciences.” Daggett responded: “[I]f thereby it is meant, that all sorts of consciences are here tolerated, it is doubtless true; but if it be further intended, that witnesses with all sorts of consciences are equally entitled to credit, it is denied.”

David Daggett’s understanding of the matter, and particularly his view of the irrelevance of the new constitution, ought not, however, be taken conclusively as the intention of the framers. Judge Peters, who served as trial judge below and dissented in Atwood v. Welton in the supreme court, approached the problem of witness qualification quite differently. Peters supported the authority of Curtiss v. Strong as a case in which “it was correctly decided that a person who did not be-

47. Id. at 76-77.
48. Id. at 77.
49. Id. at 78.
50. Id.
51. Id. at 79. Daggett ordered a new trial.
lieve in the obligation of an oath, was not a competent witness." 52 He viewed as proper the rejection of the testimony of an atheist. But he also noted that the statute that made certain religious ideas criminal—ideas similar to those held by Scott—had been repealed by the legislature as repugnant to the constitution. 53 He concluded from this that "[i]f the legislature cannot disfranchise a citizen, on account of his religious sentiments, a fortiori, a court of justice cannot, for the same cause, deprive him of the power of vindicating his rights, by his own testimony. . . ." 54 Judge Peters clearly was aware of the political and religious diversity in Connecticut and of the risk that sectarian prejudices—Christian against Mohammedan, Protestant against Catholic, Free Mason against anti-Mason 55—could affect the jury's judgment of credibility after a witness has been admitted. He concluded that the "moral character of the witness is the only safe criterion." 56

As significant as Judge Peters's dissent were the events immediately following the new trial in Atwood v. Welton. At that trial, David Daggett presided. The same witness was offered and the same objection made to his testimony. The case report includes an annotation to the effect that "[m]any witnesses were examined relative to the opinion of the witness as to a future state of rewards and punishments." 57 Judge Daggett was satisfied, in view of the testimony, that Scott believed in future rewards (though not endless punishment), and he finally admitted the witness. 58 This, however, was not the end of the matter.

Daggett's position, historian Jarvis Morse tells us, was "unacceptable to the liberal element in the state." 59 Newspaper publicity brought the matter before the legislature. Morse relates: "Gideon Welles, representative from Glastonbury, proposed that religious belief, or unbelief,
should not debar a person from the privilege of acting as witness." Yet this proposal was too radical for the majority, who felt that it threatened the religious foundations of the state. Connecticut, Morse recalls, "had been established in the seventeenth century as a religious commonwealth, and the vicissitudes of later years had not obliterated the religious convictions held by Thomas Hooker and his associates."

In the 1829 session, one house adopted a proposal that would require of witnesses a belief in a Supreme Being and superintending providence, but no further action was taken.

Morse records that in the next session Democratic influences resulted in the appointment of a committee on religious freedom to reconsider the problem. This committee recommended that the legislature abolish all religious tests for witnesses on the theory that secular sanctions were adequate to address the problem. Morse reconstructs the scene:

The bill is sacrilegious said the many; it is only rational and just said the few. Thaddeus Betts moved an amendment stating that any one who believed in a Supreme Being should not, on account of religious opinion, be held an incompetent witness. . . . When the bill was referred to the upper house, Democratic senators endeavored to restore its original form. Some of them held that the courts should not be permitted to investigate religious beliefs. What a heresy to be voiced in the land of Hooker and Davenport! But the spirit of the founders [of the colony] was still strong enough to repulse this attack upon organized religion, for the senate eventually approved the bill as amended by Representative Betts.

Morse concludes that the new witness law did evidence religious toleration to a degree. But "[w]hile Universalists could now testify in court, atheists, and perhaps agnostics, were still denied the privilege."

The legislative debate over the witness bill reveals the complexities

60. Id.
61. Id.
62. This version was discussed in the QUARTERLY CHRISTIAN SPECTATOR, Sept. 1829, quoted in Swancara, Non-Religious Witnesses, 8 Wis. L. REV. 49, 54-55 (1932).
64. See J. MORSE, supra note 38, at 105.
of the state of mind of Connecticut's legislators on general issues of religious liberty ten years after disestablishment. Further, it indicates a considerable range of opinion about the meaning of the specific language of the constitutional change of 1818. Although it is not apparent from Morse's account, the issue of the significance of the new constitution was very much in the minds of the legislators.

As noted above, newspaper coverage after *Atwood v. Welton* apparently played a large role in generating and focusing debate over the witness issue. The debate was heated. The *Hartford Times* first published a series of four articles that criticized the *Atwood* decision as "rashly unconstitutional."\(^{65}\) The *Connecticut Courant* responded with a defense of the majority opinion in *Atwood*,\(^{66}\) and an attack on the dissent, which the *Times* called "indecent."\(^{67}\)

In 1829, Mr. Judson introduced a proposal that he viewed as "declaratory of the spirit of the Constitution."\(^{68}\) This version provided that "no person's religious belief shall affect his admissibility to an oath, or his credibility as a witness."\(^{69}\) Others were not persuaded by the constitutional point. One conservative response to the argument was that the 1818 constitution prohibited preferences between Christian sects; here, where only individual disabilities were involved, there was no sect issue.\(^{70}\)

Renewing the debate the following year, the *Hartford Times* reprinted the decision in *Atwood v. Welton*, and noted that it was "in direct opposition to what many of our citizens conceive to be the plain letter of our Constitution."\(^{71}\) When the religious freedom bill finally passed (though substantially amended), the *Times* commented that the statute was not the one for which "sincere friends of religious liberty could wish, for a power is still left in courts to enquire into the religious

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68. Hartford Times, June 8, 1829, at 2, col. 1.
69. *Id.* This proposal, relating only to the qualification of witnesses, may have been in response to the judiciary committee's criticism of the original formulation eliminating religious tests for both witnesses and electors. Conn. Courant, May 26, 1829, at 2, col. 4; Report of the Judiciary Committee, State Papers (1829) (R.G. II. Archives, History and Genealogy Unit, Connecticut State Library). The Judiciary Committee, in asking to be discharged, noted that it would not be able to agree on a substitute proposal.
70. Hartford Times, June 8, 1829, at 2, col. 1.
opinions of witnesses.'" Indeed, the paper said, some of the friends of the proposal voted against it for this reason.

The witness statute remained in its 1830 form until 1886, when it was revised to provide that no witness should be disqualified on account of religious belief,73 the position taken by the liberals decades earlier.

Frank Swancara, in an article published in 1932, reviewed *Atwood v. Welton* and the subsequent controversy.74 Noting the hostility of the religious elements of the state to the new law, he quoted from an 1829 newspaper article that emphasized the need for future accountability as an explicit part of the standard for qualifying witnesses. The 1829 piece expresses the fear that "the property and character and life of every man among us, may depend on the testimony of those who believe, that not only perjury, but every other crime, will be instantly rewarded with eternal happiness when we enter the future world!" To show that little was gained by a requirement in the belief in God, the newspaper writer explained: "This God may be anything to which the witness chooses to give the name, matter or spirit; present to our actions and preparing to reward the evil and the good, or retired in the depths of immensity and totally regardless of human conduct." Only the orthodox requirement of rewards and punishments would provide adequate safeguards.

Having reviewed this much of the historical material, can we say anything about the intent of the framers of the Connecticut Constitution of 1818 on the question of the appropriate qualification of witnesses? The debate at the 1818 Constitutional Convention over the various pieces of relevant language contained no discussion of the witness question, though there was repeated emphasis on striking down distinctions between Christian sects. The issue was later decided by a highly conservative judge who was perhaps moved by the spirit of the eight-

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72. Hartford Times, June 14, 1830, at 2, col. 5. See generally supra note 63 and accompanying text.
73. Act of Mar. 25, 1886, ch. 72, 1886 Conn. Pub. Acts 588 (codified at CONN. GEN. STAT. ch. 76, § 1098 (1887)).
74. See Swancara, Non-Religious Witnesses, supra note 62, at 52-55. See also F. Swancara, Obstruction of Justice by Religion (1936).
76. Id. Swancara commented that "[i]f such was the argument against a law which required a belief 'in the being of a God' to render a witness competent, there obviously would have been an even more bitter objection, if possible, to any proposed statute that would permit an atheist to testify. The [1829] article assumed[d] that only one who fears a personal, judging and punishing Deity has any sense of obligation." Swancara, Non-Religious Witnesses, supra note 62, at 54.
teenth century, but not that part of the eighteenth century that we associate with the enlightenment, a judge who, though possibly loyal to the intention of the "founders," might have looked to the founders of the original Puritan undertaking rather than of the state under a new constitution. We see a decision that, in the face of a constitution providing that there should be no preference among Christian groups, disadvantaged adherents of a Christian sect. Perceiving this issue, some legislators wanted to remove the strict requirement of belief but retain some religious standard. Others wanted to do more than simply reverse the decision of the court. They wanted instead to adopt the position that all religious tests for witnesses should be abolished, and they thought that position mandated by the spirit of the 1818 Constitution. Thus, the debate over witness qualification some ten years after disestablishment suggests that the framing generation was (still) deeply divided over the larger meanings of disestablishment and religious liberty in Connecticut.

Still, attempts are often made to reach conclusions on the intent of the framers. Such attempts can involve weighting the opinion of some individuals—experts, who may or may not be of the framing generation—more than others. They can involve an emphasis on the resolution of a debate ten years later, rather than the debate itself. They may achieve provisional certainty by limiting the examination of relevant history to events immediately surrounding the adoption of the constitutional text, and even then events taking place only in certain places. Another technique is to raise the level of generalization, so that instead of involving ourselves in the details of historical research (antiquarian-

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77. See D. Daggett, Count the Cost (1804). Considering a problem of separation of powers in 1897, the Connecticut Supreme Court noted that

[i]n some respects the views of those engaged in framing a Constitution, as to its meaning, are entitled to peculiar regard; but not in all respects; and especially not as to the extent of the radical change involved in the adoption of a written Constitution. Such a change brought into existence an absolutely new branch of jurisprudence which judges, trained under a different and antagonistic system, were not peculiarly fitted to comprehend.

Norwalk Street Ry. Co.'s Appeal, 69 Conn. 576, 586 (1897). The particular judge under discussion was David Daggett: "The views of Judge Daggett . . . on the effect of a constitution, are those of an able and thoughtful jurist; but we find it more easy to reconcile them with the traditions in which he had been educated, and the conditions existing during the greater part of his long and extensive practice at the bar, than with the plain provisions of the Constitution itself." Id. at 590.

78. See A Review of the Prosecution Against Abner Kneeland, in Blasphemy in Massachusetts 349 (L. Levy ed. 1973) (recognition of injury to Universalists in the matter of the oath for witnesses).
We focus on some idea of general rather than specific intention and look for an abstract concept. This last solution has its own problems, however, at least in the field of church and state, because the general ideas held in the framing generation of disestablishment might exist within a still larger idea of the relationship between Christianity and the civil order.

III. A Christian Commonwealth

Historian Morton Borden has recently noted that many early federalists "envisioned the American future as a federation of Christian States in which the majority churches would be supported by local compulsory taxation, and the state governments—where real power would reside—would be controlled by Protestants only." Connecticut was among the last of the states to give up its religious establishment. Therefore, this federalist vision may have been strong in Connecticut long after it had weakened elsewhere. In Connecticut, as in much of early America, differences between Christian denominations were of considerable importance. Moreover, it is quite possible that differences between Christians and non-Christians, or believers and nonbelievers, were even more significant. Discriminations based on religious belief were not necessarily inconsistent with the understanding of many of those who witnessed the framing of the Connecticut Constitution of 1818. At the same time, the intention of the framers was not necessarily limited to merely the destruction of the old standing order.

Formal disestablishment in Connecticut was, it seems, uncertain in scope and in ultimate direction. When the witness controversy took place, ten years after formal disestablishment, the consequences of dis-

79. See Brest, supra note 4, at 222 ("The interpreter's understanding of the original understanding may be so indeterminate as to undermine the rationale for originalism.").
80. M. Borden, supra note 27, at 17.
81. Catholic/Protestant differences were no less significant, and these differences existed in an alignment that today is unfamiliar. Perhaps this matter can be illustrated most simply by noting the images of the fictional Methodist minister Theron Ware: He thought of Catholics as largely Irish, and associated them with "ignorance, squalor, brutality and vice," the Molly Maguires, and opposition to [Protestant] bible reading in the public schools. H. Frederic, The Damnation of Theron Ware 50 (1896). See also Donahue v. Richards, 38 Me. 376 (1854). On the Catholic experience in Connecticut, see J. Noonan, Nativism in Connecticut (1938).

Mark Tushnet, reviewing R. Cord's Separation of Church and State (1982), notes: "Looking back from today, Cord seems to think that all Christian sects are pretty much alike. The framers lived in a world in which differences among Baptists, Methodists and Anglicans—not to mention Catholics—were very serious indeed. Achieving a rule of nonpreferential treatment would have been a major advance for the cause of religious toleration." Tushnet, Book Review, 45 LA. L. REV. 175 (1984).
establishment were still being discussed and debated. Connecticut might have stopped at the point of a Christian-dominated system of voluntary churches. Of course, the 1818 disestablishment did not mean—indeed, could not mean—total separation of church and state (let alone total separation of religion and law) for those committed to some idea of a Christian state. At the same time, it is not clear precisely what it did mean.

In attempting to solve this problem, it might be possible to remove oneself from the details of early nineteenth century Connecticut history and politics and ignore the framers’ limited or specific intention about issues such as witness qualification in favor of focusing on what was arguably their broader or general intention, namely, to further separation of church and state. However, it is apparent that to the extent that an understanding of constitutional separation of church and state rested on a vision of a “Christian” commonwealth, this general idea must itself be interpreted according to an even larger conception of the proper relations between religion and the state.

If, for example, we use David Daggett as an expert to interpret the meaning of the Connecticut Constitution of 1818, we are using someone hostile to disestablishment. In 1804, he defended Connecticut’s religious establishment by saying that Connecticut laws only enforce the great principle . . . that the members of the community should contribute towards the support of these institutions as a means to promote the prosperity of the people in the same manner as they provide for the public accommodation, peace and happiness by the maintenance of roads and bridges, organization of the militia and the support of schools of instruction.82

Once disestablishment came, one would expect that Daggett’s views on any issue of the meaning of the constitutional change would be restrictive. A similar point might be made about some nineteenth century figures who are considered experts in relation to the religion clauses of the federal constitution. One such expert is Supreme Court Justice Joseph Story (1779-1845), whose well known discussion of the first amendment religion clauses indicates clearly his essential commitment to state support of Christianity. By the time we reach the treatise writer Thomas Cooley (1824-1898), who is also regularly cited as an

82. D. Daggett, COUNT THE COST, supra note 9.
expert on the meaning of the first amendment to the federal Constitution, the original option of a formal establishment was gone. But we can still see in the background of Cooley’s works an assumption of a dominantly Christian culture—a country whose institutions have been and must continue to be heavily influenced by Christianity.

Justice Joseph Story declared that the nation was Christian in the sense that the truth of Christianity was admitted.83 When he construed the federal Constitution, Story based his view on the assumption that the essential state policy was support for general Christianity. He read this orientation back into the minds of the framers. Thus Story noted: "Probably at the time of the adoption of the Constitution, and of the amendment to it now under discussion, the general if not the universal sentiment was that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship."84 Further, he thought that "[a]n attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation."85 In Story’s view, "[t]he real object of the [first] amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government."86

85. Id.
86. Id. at § 1871. See generally R. Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic 13, 29, 39, 183-84 (1985); J. Nowak, R. Rotunda & J. Young, Constitutional Law 1030 (2d ed. 1983) (citing J. Story, Commentaries on the Constitution of the United States 627-34 (5th ed. 1891)) (Story "was certain that the federal government was barred only from punishing or benefiting specific religions. He thought the amendment allowed for aid to all religions on an equal basis."). Cf. H. Fielding, Tom Jones 92 (1909) (quoting Parson Twackum: "When I mention religion I mean the Christian religion; and not only the Christian religion but the Protestant religion; and not only the Protestant religion but the Church of England."). Story, while opposed to theocratic ideas of church-state relations as represented by the Puritan colonies, was committed, at least in 1820, to the power of the legislature to compel the support of public worship. See J. McClellan, Joseph Story and the American Constitution 127 (1971). On Story and the problems of Unitarian and Trinitarian Congregationalists, see J. Marcus, Church and State in Massachusetts 101 (1930); R. Newmyer, supra, at 183. Compare Story’s 1833 description of the federal establishment clause, supra text accompanying note 84, with his view of the principle of the Massachusetts Constitution before the 1833 disestablishment: "The principle of the constitution is, that the rights of conscience shall be indulged, as far as is consistent with the right of government to require the support of public
Thomas Cooley believed that nondiscriminatory aid was constitutional and linked this view to a larger idea about the relationship between Christianity and the state. In 1880, in his *Principles of Constitutional Law*, Cooley rejected a strict separation of church and state, noting that "[t]he Christian religion was always recognized in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that religion must be recognized in the same way and to the same extent as formerly. . . ."87 Referring to the blasphemy law, Cooley said that courts sometimes find it necessary to note that the "prevailing religion of the Country is Christian."88 He argued more generally that "[q]uestions of public policy as they arise in the Common Law, must always be largely dependent upon the prevailing system of public morals, and the public morals upon the prevailing religion's belief."89 His treatment of related issues in *Constitutional Limitations*90 suggests the same view, a loose affinity with the idea of America as a Christian nation,91 and an invocation of familiar ideas about the necessary rela-
tionship between religion and morals.

But these "expert" views of the matter were not the only ones expressed. While Americans might be a religious people, America might not be a Christian nation. The background idea of the Christian nation was not so universally held that it must be our only interpretive guide to the first amendment or to any other constitutional text dealing with religion. In connection with the thoughts of the framing generation, it is often noted that the 1796 Treaty of Tripoli, for instance, contained a provision denying that the United States was founded on Christianity. For later ideas, we may note that Congress repeatedly failed to adopt the Christian Nation Amendment. The increasing immigration of groups whose traditions lay outside of Christianity and indeed outside the western world is also relevant to the narrative as a whole, as is Jefferson's insistence (contra Story) that Christianity was not a part of the common law. Moreover, one may note the existence of defenders of the convicted blasphemer Abner Kneeland, and recall that the freethinker Ingersoll made the speech at the Republican Convention of 1876 nominating James Blaine for the presidency. Story was a Supreme Court Justice, to be sure, but before writing off the views of Jefferson and his followers we should recall that Jefferson was President.


The invocation of the standard of Christianity in some of the Mormon cases is well known.


93. This 1796 treaty was said to have been drafted by Connecticut's representative of the Enlightenment, Joel Barlow. M. BORDEN, supra note 27, at 78. A later (1805) version of the treaty dropped the language. See 2 W. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1776-1909, at 1785-93 (1910).

In WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA (1985), J. Turner argues that the deism of the early republic had largely disappeared by the time of Kent and Story. In short, secularization does not proceed in a straight line. Id. at 101.

94. See generally M. BORDEN, supra note 27.

95. As Morton Borden has shown, the nation may have been all too clearly Christian from the point of view of Jewish immigrants. See generally M. BORDEN, supra note 27. But, at the same time, it may not have been Christian enough to be called Christian from another point of view. See M. NOLL, G. MARSDEN, & N. HATCH, THE SEARCH FOR CHRISTIAN AMERICA (1983).

96. See 1 JEFFERSON'S REPORTS 137 (1929), quoted in M. HOWE, READINGS IN AMERICAN LEGAL HISTORY 24-30 (1971).

CONCLUSION

The material offered here attempts to show how difficult it is to characterize in simple terms the prevailing attitudes toward religion and the state after the Connecticut Constitution of 1818, and suggests that this is true in American history generally. The discussion reinforces the view that the answers to historical questions, whatever they seem to be, cannot bind the present. Moreover, it is not simply a question of whether the framers could or could not foresee certain problems. It is clear that many of those in the generation of the framers of the constitutional text operated in a religiously based intellectual framework. A legitimate historical interpretation—one, to be sure, among others—will argue not merely the existence but also the dominance of that framework, a world view whose relation to current thinking is at best uncertain. One could, I suppose, discuss contemporary issues as though they were historical, and debate endlessly such "originalist" problems as "What was the mind of Connecticut-in-transition?" On the whole, however, this method seems inadequate as the sole basis for current decision making.

REV. 1 (1951). But there is something new in the analysis. It is unlikely that anyone would now refer to the "modest feat of scholarship" required to deal with the "historical data that determine the meaning of the First Amendment as first formulated and ratified." Murray, supra, at 28. On the contrary, the inquiry as to the intention of the framers has become more and more complex.

Issues of human fallibility remain the same, however. Wilbur Katz said in 1953 that "One conviction emerges from a study of the various attempts at 'proof.' This is the melancholy conviction that the heat generated by questions concerning religion has made fairness in the handling of historical evidence almost impossible." Katz, Religion and State Neutrality, 20 U. CHI. L. REV. 434 (1953).