American Journal of Legal History, 2021, 61, 349–384
https://doi.org/10.1093/ajlh/njab020
Advance Access Publication Date: 7 January 2022
Article

OXFORD

What Oath (If Any) Did Jacob Henry Take in 1809?: Deconstructing the Historical Myths

Seth Barrett Tillman*

I. INTRODUCTION

The story of Jacob Henry is one which has been told and retold. It has been long celebrated, as a triumph of light over darkness, and of the progress of then-emerging American religious diversity over older traditions of parochialism and intolerance.[1] Our story starts with Article 32 of the 1776 North Carolina Constitution. That provision imposed a religious test:

> That no person, who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this State.[2]

Article 32's religious test extended to four categories of persons. It extended to atheists—those 'who . . . deny the being of God'. It extended to non-Protestants—those 'who . . . deny . . . the truth of the Protestant religion'. It extended to non-Christians—those 'who . . . deny . . . the divine authority either of the Old or New

* Seth Barrett Tillman, Associate Professor, Maynooth University Department of Law, Ireland. Roinn Dlí Ollscoil Mhá Nuad. I thank Trey Allen, Mark K Bauman, Gerard V Bradley, Richard D Brown, Philip Hamburger, Eli Lederhendler, John V Orth, Leonard Rogoff, and Jonathan D Sarna for their comments and the editors and referees at the *American Journal of Legal History*.

1 See eg Joseph L Blau (ed), *Cornerstones of Religious Freedom in America* (Boston, MA, Beacon Press 1950) 89 ('[Henry's] statement was clear-cut and incisive—it is a pleasure to report that it was decisive'); 'Speech of H.M. Brackenridge, Delivered in the House of Delegates of Maryland, 1818, on the Jew Bill' in *Speeches on the Jew Bill in the House of Delegates of Maryland* (Philadelphia, PA, Dobson 1829) 59, 91 ('Mr. Henry prevailed, and it is a part of our education, as Americans, to love and cherish the sentiments uttered by him on that occasion'), <https://tinyurl.com/wj2tfrq>; Clement Eaton, *Freedom of Thought in the Old South* (Durham, NC, Duke UP 1940) 27 (suggesting that Henry's prevailing was a product of North Carolina's 'tolerant atmosphere'); Philip S Foner, *The Jews in American History 1654–1865* (New York, International Publishers Company 1945) 34 (asserting that Henry's speech 'made a profound impression on progressive Americans by a brilliant reply to narrow-minded bigots'); Charles C Haynes, 'Teaching Our Common Compact: A New Curriculum on Religious Liberty' (1992) 6 OAH Magazine of History 47, 49–50 ('Junior high students learn about the challenge to Jacob Henry's election to the North Carolina legislature in 1809 because he was Jewish'); Helen Alpert-Levin, 'A Jewish Defender of Religious Liberty: Jacob Henry's Stinging Speech had wide Repercussions' *Baltimore Sun* (Baltimore, MD, January 12, 1930) 6 ('[Henry's] victory . . . marked a victory for religious tolerance').

2 'Constitution of North Carolina—1776' in Francis Newton Thorpe (ed), *The Federal and State Constitutions*, vol 5 (Washington, DC, Government Printing Office 1909) 2787, 2793.

Testaments'. Lastly, it extended to an amorphous category of persons—those 'who . . . hold religious principles incompatible with the freedom and safety of the State'.[3] A person falling into any of these four categories was not 'capable of holding any office or place of trust or profit in the civil department within this State'. The meaning and scope of Article 32's language has been a matter of continuing debate.[4]

In 1809, Jacob Henry[5] was elected to a second, consecutive annual term[6] in the House of Commons, ie North Carolina's lower legislative house, as one of two

3 The specific purpose of this 'freedom and safety of the State' language is not entirely clear. It is believed that its purpose was to exclude 'religious bodies as Quakers, Moravians, and others who refused to bear arms in time of war'. William S Powell, *North Carolina Through Four Centuries* (Chapel Hill, NC, University of North Carolina Press 1989) 273.

4 Of course, neither the North Carolina Constitution of 1776, nor the specific language of Article 32 is now in force. In consequence of 1835 constitutional amendments, the scope of the religious exclusion was narrowed—instead of excluding non-Protestants, only non-Christians were excluded. See Ronnie W Faulkner, 'Constitution of 1835' (*North Carolina History Project*) <https://tinyurl.com/42buxz3m> accessed September 9, 2021. In late 1861, the North Carolina state convention, which had already voted for secession, liberalized Article 32. See *Ordinances and Resolutions Passed by the State Convention of North Carolina: First Session in May and June, 1861* (Raleigh, NC, John W Syme 1862) 56 (reporting ratification on December 6, 1861). The legal effect (if any) of the actions taken by such a body is well beyond the scope of this article. See Eric Eisner, '"Hebrews in Favor of the South": Jews, Race, and the North Carolina State Convention of 1861–1862' (2021) 24 Southern Jewish History 1. In 1868, the scope of the religious exclusion was narrowed yet again. See North Carolina Const. of 1868 art 6, § 5 (disqualifying 'All persons who shall deny the being of Almighty God'). The state constitution now in force largely retains the language used in the 1868 provision. See North Carolina Const. of 1971 art 6, § 8 (disqualifying 'any person who shall deny the being of Almighty God'). Formally, this religious test still extends to some persons—eg atheists, agnostics, and perhaps to others. But this provision is likely inoperative in consequence of long-settled United States Supreme Court case law, which incorporates the First Amendment of the United States Constitution against the states. See *Torcaso v Watkins* 367 US 488 (1961) (Black J).

5 For general biographical information on Jacob Henry, see 'Henry, Jacob' in William S Powell (ed), *Dictionary of North Carolina Biography*, vol 3 (Chapel Hill, NC, University of North Carolina Press 1988) 113–14; Leonard Rogoff, *Down Home: Jewish Life in North Carolina* (Chapel Hill, NC, University of North Carolina Press 2010) 43; Leon Huhner, 'The Jews of South Carolina from the Earliest Settlement to the End of the American Revolution' (1904) 12 Publications of the American Jewish Historical Society 39, 55–56; Leon Huhner, 'The Struggle for Religious Liberty in North Carolina, with Special Reference to the Jews' (1907) 16 Publications of the American Jewish Historical Society 37, 46–54, 68–71; Ira Rosenswaike, 'Further Light on Jacob Henry' (1970) 22 American Jewish Archives 116, 120; Seth Barrett Tillman, 'A Religious Test in America?: The 1809 Motion to Vacate Jacob Henry's North Carolina State Legislative Seat—A Re-Evaluation of the Primary Sources' (2021) 98 North Carolina Historical Review 1. Tracking down early and modern sources relating to Jacob Henry and to the events of 1809 poses several challenges. One difficulty is that many early sources misreport Henry's name as 'Henry Jacobs'. 'Miscellany from the Philadelphia Register' *Northern Whig* (Hudson, NY, March 8, 1810) 1. Other sources report the year of the underlying events as 1808; still others report it as 1810. Sources using the 1808 date include: *Proceedings and Debates of the Convention of North-Carolina, Called to Amend the Constitution of the State, which Assembled at Raleigh, June 4, 1835* (Raleigh, NC, Joseph Gales and Son 1836) 281 (quoting speech of Justice William Gaston); *Speech of the Honorable Judge Gaston* (Baltimore, MD, Fielding Lucas, Jr 1835) 23; Milton Ready, *The Tar Heel State: A History of North Carolina* (Columbia, SC, University of South Carolina Press 2005) 173. Sources using the 1810 date include: EH Lindo, *A Jewish Calendar for Sixty-Four Years* (London, L Thompson 1838) 132; Leon Huhner, 'The Jews of North Carolina Prior to 1800' (1925) 29 Publications of the American Jewish Historical Society 137, 140. Finally, it is likely that there was more than one person named 'Jacob Henry', among Jews and gentiles, in North Carolina and South Carolina, at around the time of the events of 1809. See Mary Hollis Barnes, 'Jacob Henry's Role in the Fight for Religious Freedom in North Carolina' (unpublished typescript manuscript, North Carolina State Archives, March 19, 1984) 5; see also Huhner, 'The Jews of South Carolina' (n 5) 55–56 (noting an American patriot named 'Jacob Henry', who was a prisoner of the British during the American War of Independence).

6 See *Journal of the House of Commons of the State of North Carolina*, vol for 1809 (Raleigh, NC, Gales & Seaton nd) 1 (entry for November 20, 1809); *The Legislative Manual and Political Register of the State of*

members for Carteret County. According to the standard narrative, Henry was Jewish.[7] Legislative elections were held during August 1809. The returning officers reported those persons who had been duly elected, that is, the members-elect. On November 20, 1809, the House of Commons convened in Raleigh, North Carolina, and the members-elect qualified by taking their oaths.[8] On December 5, 1809,[9] Hugh C Mills, one of two members for Rockingham County, put forward a motion to declare Henry's seat vacant based (at least in part) on Article 32 of the 1776 North Carolina Constitution.[10] The next day, on December 6, 1809,

North Carolina, for the Year 1874 (Raleigh, NC, Josiah Turner, Jr 1874) 185; Morton Borden, *Jews, Turks, and Infidels* (Chapel Hill, NC, University of North Carolina Press 1984) 43 (noting that Henry 'served in the 1808 session'). For a discussion of Henry's first legislative term, see generally (n 45) and (n 46), and accompanying text.

7 What Henry's Judaism and what Henry's being a Jew meant to him, to his family and household, to his neighbors and contemporaries, to his colleagues in the Commons, to his Carteret County constituents, to the press, to the wider state and national political community, and also to us—these are all questions well beyond the scope of this article. The words 'Jewish', 'Judaism', and 'Jew' nowhere appear in Henry's speech in his own defense. Compare eg Eli N Evans, *The Provincials: A Personal History of Jews in the South* (New York, Atheneum 1973) 363 (characterizing Henry's speech as 'one of the first statements on Jewish rights in America'), and Eli Faber, 'America's Earliest Jewish Settlers, 1654–1820' in Marc Lee Raphael (ed), *The Columbia History of Jews and Judaism in America* (New York, Columbia UP 2008) 21, 40 (characterizing Jacob Henry as a 'Jewish spokesman [who] took a bold stand'), with Leonard Rogoff, *Homelands: Southern Jewish Identity in Durham and Chapel Hill, North Carolina* (Tuscaloosa, AL, University of Alabama Press 2001) 10 ('Henry never mentioned Judaism by name'). It is hardly clear whether his constituents knew or cared if Henry was Jewish, much less whether such information might have influenced their voting for or against him. Henry was not reelected in the 1810 or any subsequent legislative term—nor have I found any reason to believe he stood for reelection after his 1809 term had ended. But see Mark K Bauman, *Jewish American Chronology* (Santa Barbara, CA, Greenwood Press 2011) 28 (asserting that Henry was 'defeated for reelection'); Peter B Levy, *100 Key Documents in American Democracy* (Westport, CT, Greenwood Press 1994) 86 (asserting that Henry's 'Protestant constituents reelected him in spite of the constitutional restriction against Jews'); Harry Simonhoff, *Jewish Notables in America 1776–1865: Links of an Endless Chain* (New York, Greenberg 1956) 138 (claiming that Henry 'was reelected [in 1809], indicating that anti-Jewish feeling was not present among the voters'). The issue of identifying 'Who is a Jew' has been a continuous source of friction within modern Israeli society, and also between, on the one side, the Israeli state and its religious establishment, and, on the other side, some persons living outside of Israel who lay claim to being Jewish. See Nir Kedar, 'Ben-Gurion's View of the Place of Judaism in Israel' (2013) 32 Journal of Israeli History: Politics, Society, Culture 157; Sherry F Colb, 'Who Counts as a Jew?' (*Verdict: Legal Analysis and Commentary from Justia*, March 8, 2021) <https://tinyurl.com/2utzvj7h> accessed September 10, 2021.

8 See *Journal of the House of Commons* (n 6) 1 (entry for November 20, 1809).

9 See *Journal of the House of Commons* (n 6) 26–27 (entry for December 5, 1809); see also 'House Resolution to Vacate the Seat of Jacob Henry: November–December 1809' (*North Carolina Digital Collections*) <https://digital.ncdcr.gov/digital/collection/p16062coll36/id/101617> accessed September 10, 2021. On November 20, 1809, Henry qualified and was seated with all the other members—Mills's objection came later, on December 5, 1809. But see Oscar Reiss, *The Jews in Colonial America* (Jefferson, NC, McFarland & Company, Inc 2004) 117 (asserting that Mills objected to Henry's being 'seated'), <https://tinyurl.com/y573oq7g>; David Sorkin, *Jewish Emancipation: A History across Five Centuries* (Princeton, NJ, Princeton UP 2019) 227 ('Jacob Henry similarly protested when the North Carolina legislature refused to seat him after his election in 1809'); Faber (n 7) 40 (asserting that Henry 'was challenged when he sought to take his seat'). But see generally (n 18) (collecting authorities).

10 See Thorpe (n 2) 2793 and accompanying text (quoting 1776 North Carolina Constitution); *Journal of the House of Commons* (n 6) 27 and accompanying text (quoting Mills's resolution). Historians are divided in regard to how frequently Article 32 had been used, while it was in force, to preclude office-seekers from holding government posts. Compare eg Powell (n 3) 273 (asserting that the Henry motion was the only attempt to enforce Article 32), with Ready (n 5) 170 (describing Article 32 as 'seldom enforced' prior to

Henry[11] gave an impassioned speech in his own defense before the full House.[12] Many ascribe the authorship of Henry's speech, in whole or in part, to Judge Taylor, a Republican.[13] Henry's speech made no express reference to his being Jewish, and his speech did not use the words 'Jewish', 'Judaism', or 'Jews'. Afterwards, Mills attempted to introduce evidence to support his allegations. But his efforts to do so were immediately thwarted by William Gaston, the single member for the town of New Bern.[14]

1823), with James S Kabala, *Church–State Relations in the Early American Republic, 1787–1846* (Abingdon, UK, Routledge 2016) 110 (noting that Article 32 'first became a cause of controversy in 1809'), and John H Wheeler, *Historical Sketches of North Carolina, from 1584 to 1851*, vol 2 (Philadelphia, PA, Lippincott, Grambo and Company 1851) 74 (stating that the Jacob Henry incident was 'the first time in the history of the State that this question had been made').

11 Who drafted Henry's speech remains a surprising matter of contention. Some historians claim Henry was aided by Judge John Louis Taylor, a Republican. See Wheeler (n 10) 74 (noting that 'Mr. Henry, [gave] an able speech, said to be the production of Chief Justice [John Louis] Taylor'); Justice Wm H Battle, 'Memoir of John Louis Taylor: The First Chief Justice of the Supreme Court of North Carolina' (1860) 9 North Carolina University Magazine 385, 388 (ascribing authorship of Henry's speech to Taylor). Taylor was elected a judge in 1798; he did not become North Carolina's first post-independence Chief Justice until sometime after the motion to vacate Henry's seat had failed. See 'Taylor, John Louis' in William S Powell (ed), *Dictionary of North Carolina Biography*, vol 6 (Chapel Hill, NC, University of North Carolina Press 1996) 11–12. But see Morris U Schappes (ed), *A Documentary History of the Jews in the United States 1654–1875* (New York, Schocken 1971) 122 (apparently misidentifying Judge Taylor as the Attorney General of North Carolina during the Jacob Henry proceedings). In addition to having Taylor's aid in drafting his speech, Marcus hinted that Henry had been also aided by Henry's colleague in the 1809 Commons, and fellow Federalist, William Gaston. But Marcus's claim is unsupported. See Jacob Rader Marcus, *United States Jewry 1776–1985*, vol 1 (Detroit, MI, Wayne State UP 1989) 507 ('On the following day, the 6th of December, 1809, after consulting with eminent Christian jurists, Henry wrote a letter to his colleagues in the House of Commons'); ibid 86 (same). See generally (n 29) (discussing Gaston's biography), and (n 80) (same). Gaston's sister married Judge Taylor. See Joseph Herman Schauinger, 'William Gaston: Southern Statesman' (1941) 18 North Carolina Historical Review 99, 102.

12 See 'State Legislature/Debate' *The Star* (Raleigh, NC, December 14, 1809) 236 (reporting Henry's speech in full). Marcus reports that the speech was, in fact, a letter to the other members. See Marcus (n 11) 507. It would appear that the first reprint of Henry's speech, in a book, was *The American Speaker: A Selection of Popular, Parliamentary and Forensic Evidence* (Philadelphia, PA, Abraham Small 1814) 279–82, <https://tinyurl.com/4shsw7c9>. If not actually a canonical document, Henry's speech is nearly in the canon of significant American documents, and it has been regularly reproduced in such compilations. See, for example, in chronological order: 'Speech Delivered by Jacob Henry, in the Legislature of North Carolina, on a motion to vacate his seat, he being a Jew' in Samuel Clark, *The American Orator* (Gardiner, ME, Intelligencer Office 1828) 46–49, <https://tinyurl.com/564yc67n>; Wheeler (n 10) 74–76 (an 1851 collection); 'Jacob Henry in the North Carolina Legislature' in J Agar, *The American Orator's Own Book* (New York, CM Saxton, Barker & Company 1859) 227–30; Joseph L Blau, 'Jacob Henry: On Religion and Elective Office' in Daniel J Boorstin (ed), *An American Primer* (Chicago, IL, University of Chicago Press 1966) 219–20; Levy (n 7) 86–89 (a 1994 collection).

13 See generally (n 11) and (n 12) (collecting authorities).

14 See generally (n 5), (n 11), (n 18), (n 29), and (n 80) (collecting biographical information on William Gaston). Under the North Carolina Constitution of 1776, all senators and all members of the Commons were elected annually. Each county elected, in countywide elections, one senator and two members of the lower house. See North Carolina Const. of 1776 arts 1–3, 9. Additionally, seven towns, sometimes called 'boroughs', were identified as each having a single additional member in the Commons (apart from the two House members representing the entire county). ibid art 3; Ready (n 5) 170 (describing the town or 'borough franchise' as 'an ancient English custom kept by North Carolina's revolutionary founders'); John V Orth, 'North Carolina Constitutional History' (1992) 70 North Carolina Law Review 1759, 1769 (noting 1789 and 1835 constitutional amendments to the borough franchise); 'Jacob Rees-Mogg Teaches SNP [the Scottish National Party] a History Lesson' (*YouTube*) <https://tinyurl.com/33v5exkx> accessed September 12, 2021 ('House of Commons . . . started in 1265. . . . 1265 is when the burgesses come from the towns') (at 2:50ff).

Gaston argued that introducing evidence was premature at this stage. In other words, Gaston argued that Mills's charges were insufficient as a matter of law, and so the introduction of evidence was not necessary. Gaston further argued that if the House determined that an investigation of the facts were necessary, then proceedings should be directed to a select committee or the committee of the whole.[15] Additionally, Gaston made the argument that Article 32 reached only 'offices', not members of the legislature—and so it had no application to Jacob Henry. Gaston's lengthy speech was followed by extensive debate among more than a few members of the Commons.[16] Subsequently, the matter was redirected to the House's Committee of the Whole, which heard testimony from witnesses.[17] The committee recommended that the House reject the motion, and the House voted in favor of the committee's recommendation. Henry kept his seat.[18] Some reports indicate that the Commons voted unanimously to reject Mills's motion.[19]

The Jacob Henry literature has been primarily concerned with two questions. First, why did the members of the North Carolina House of Commons on December 6, 1809 vote against Mills's motion to vacate Henry's seat? That is, what motivated the members—in the sense of politics, partisanship, and personalities—to vote as they did?[20] Likewise, what constitutional or other legal or policy rationales (if any) did the members put forward to explain their votes?[21] A surprising number of very different

15 'State Legislature/Debate' *The Star* (Raleigh, NC, December 28, 1809) 241–42 (reporting, primarily, William Gaston's extensive contribution to the debate, after a brief contribution from Hugh C Mills).

16 'State Legislature/Debate' *The Star* (Raleigh, NC, January 4, 1810) 2–3.

17 ibid.

18 See *Journal of the House of Commons* (n 6) 28 (entry for December 6, 1809). A few historians and other commentators have incorrectly suggested that Henry did not prevail. See Wheeler (n 10) 74; see also Alan Dershowitz, *Blasphemy: How the Religious Right Is Hijacking Our Declaration of Independence* (Hoboken, NJ, Wiley 2007) 78 (asserting that Jacob Henry 'was blocked from taking his seat'); Justice Barbara A Jackson, 'Called to Duty: Justice William J Gaston' (2016) 94 North Carolina Law Review 2051, 2058.

19 See 'State Legislature/House of Commons/Wednesday, Dec. 6' *The Star* (Raleigh, NC, December 7, 1809) 230–31. But cf Cecil Roth, 'The Two Cradles of Jewish Liberty: The New World and the Mother Country' (1954) 17 Commentary 109, 116 ('[I]t was only with the greatest difficulty that Jacob Henry was able to take his seat in the legislature').

20 See eg Samuel A'Court Ashe, *History of North Carolina: from 1783 to 1925*, vol 2 (Raleigh, NC, Edwards & Broughton Printing Company 1925) 207 (asserting that '[d]uring th[e] [1808] session [Henry] contracted the ill will of another member; and [Henry's? or the other member's?] being elected again in 1809, this member objected to [Henry's] qualifying'); Borden (n 6) 43 (suggesting that politics lay behind Mills's objection and noting that 'Henry was a Federalist, Mills a Republican'); Rogoff (n 5) 39 (noting division between a pro-Henry Federalist 'coastal gentry' and anti-Henry Republican 'back country' sentiment, 'pitting an educated, propertied elite against the greater numbers of less-educated, yeoman farmers'); David Hackett Fischer, 'Patterns of Partisan Allegiance, 1800' in Lance Banning (ed), *After the Constitution: Party Conflict in the New Republic* (Belmont, CA, Wadsworth 1989) 143, 169 ('Jacob Henry . . . had been the victim of discrimination less for his religion, perhaps, than his politics').

21 See Kabala (n 10) 111 ('[T]he record is unclear as to whether the deciding factor was [Henry's] argument based on principles of religious freedom or his colleagues' argument based on legal technicalities' such as whether a legislative seat was an 'office or place of trust or profit in the civil department within this State' as used in Article 32); see also Ashe (n 20) 207 (suggesting both arguments played a role). Modern commentators, in law and history, have not been particularly sympathetic to Gaston's 'office' argument. See eg John V Orth and Paul Martin Newby, *The North Carolina State Constitution* (2nd edn, New York, OUP 2013) 8; Gary R Govert, 'Something There is that Doesn't Love a Wall: Reflections on

views have been put forward.[22] Second, what did Henry's victory against purported religious intolerance mean to his contemporaries and later generations?[23]

This article addresses a different set of (albeit related) questions. The focus of this article is not on what happened on December 5 and 6, 1809 and why the members of the North Carolina House of Commons voted as they did. Instead, the focus of this article is on what happened on November 20, 1809—in other words, what legislative oath (if any) did Jacob Henry actually take? Second, how have later historians and legal commentators described and distorted our understanding of the events of November 20, 1809? And, third, why did the December 6, 1809 debate on the motion veer so far from any substantial discussion of the actual underlying events of November 20, 1809? Admittedly, this third question cannot be answered with clarity.

II. WHERE DOES THE OATH COME IN?

As explained, on December 5, 1809, Hugh C Mills introduced his motion.[24] The House of Commons' *Journal* reports that:

> Mr. Mills moved that the house do enter into the following resolution:
>
> WHERE AS it is contrary to the freedom and independence of our happy and beloved government, that any person should be allowed to have a seat in this

the History of North Carolina's Religious Test for Public Office' (1986) 64 North Carolina Law Review 1071, 1080–81. In 2020, Newby was elected Chief Justice of North Carolina.

22 See Barnes (n 5) passim (suggesting Mills's motion was defeated by lack of evidence and witness testimony substantiating the factual claims in Mills's allegations); see also Rogoff (n 5) 40, 381 n 51 (discussing Barnes's materials); Tillman (n 5) passim (discussing Barnes's and Rogoff's views). See generally (n 20) and (n 21) (collecting authorities).

23 See eg Levy (n 7) 86 (noting that Mills's 'challenge [to Henry] disturbed many Americans'). See generally (n 1) (collecting authorities). Whether the North Carolina Constitution of 1776 and Article 32 were rooted in religious bigotry is contested. Compare Richard D Brown, *Self-Evident Truths: Contesting Equal Rights from the Revolution to the Civil War* (Yale UP 2017) 43 (suggesting that 'the fact that exclusion from public office was the only disability Catholics and Jews faced in North Carolina illustrates the breadth of the Revolutionary commitment to natural religious equality'), Powell (n 3) 275 ('[M]any able North Carolinians of the time, though *not actually guilty of religious bigotry*, had no quarrel with the provision' (emphasis added)), Simonhoff (n 7) 137 ('Article 32 in the new constitution simply preserved the [pre-Revolutionary era religious] status quo'), ibid 137–38 ('This religious disability is no indication that North Carolina was steeped in prejudice and bigotry'), and Tillman (n 5) 36–40 (suggesting that Articles 31 and 32 may have been rooted in an evolving disestablishment culture), with Henry G Connor and Joseph B Cheshire, Jr, *The Constitution of the State of North Carolina Annotated* (Raleigh, NC, Edwards & Broughton Printing Company 1911) xxvii (asserting that Article 32 was an 'attempt to discriminate against Christians, other than Protestants'), and Ready (n 5) 173 ('At the heart of the issue lay the ancient animosity between Protestants and Catholics'). See also Michael D Breidenbach, 'Religious Tests, Loyalty Oaths, and the Ecclesiastical Context of the First Amendment' in Michael D Breidenbach and Owen Anderson (eds), *The Cambridge Companion to the First Amendment and Religious Liberty* (Cambridge, UK, CUP 2020) 166, 170 ('Part of this anti-Catholic rhetoric [in the North Carolina 1788 ratification convention on the federal constitution] was the reliable pabulum of Protestant prejudices. Yet these speeches, representative of a broader Protestant political culture, [also] did express a particular concern about the direct political implications of Catholicism, such as papal inquisitions and claims to temporal power in other countries').

24 See *Journal of the House of Commons* (n 6) 26–27 (entry for December 5, 1809). 1809 was Mills's first and only reported term in the legislature. Perhaps Mills's intervention against Jacob Henry was not welcomed by his constituents? See *Legislative Manual 1874* (n 6) 327; Barnes (n 5) 4 (noting that after 1809, Mills 'disappears from the records').

> Assembly, or to watch over the rights of a free people, who is not constitutionally qualified for that purpose; it is therefore made known, that a certain Jacob Henry, a member of this house, denies the divine authority of the New Testament, and *refused to take the oath prescribed by law for his qualification*, in violation of the Constitution of this State. *Resolved*. That the said Jacob Henry is not entitled to a seat in this house, and that the same be vacated. The resolution being read, the house resolved that the consideration thereof be postponed until to-morrow.[25]

Mills made two primary allegations. First, Mills asserted that Henry 'denies the divine authority of the New Testament'. This language closely tracks the text of Article 32's religious test. One notices that here Mills used the present tense.

Second, Mills asserted that Henry 'refused to take the oath prescribed by law for his qualification'. Here Mills used the past tense—a matter to which this article will later turn to.[26] Mills's allegation in regard to Henry's oath is opaque. The text does not make clear if Mills was asserting:

i. that Henry had refused to take an oath which had been imposed by the 1776 state constitution;
ii. that Henry had refused to take an oath which had been established by statute;
iii. that Henry had refused to take an oath prescribed by the Commons' written rules; or,
iv. that Henry had refused to take an oath which had been established by custom or practice.

More importantly, it is not clear what Mills intended by this second allegation. Mills could have meant one of two things. Mills may have intended his allegation involving Henry's oath to be understood by his Commons colleagues as a free-standing reason to vacate Henry's seat. In other words, quite apart from Article 32's religious test, Mills's position may have been that Henry's alleged failure to take the prescribed oath was an independent basis to vacate Henry's seat. Alternatively, Mills may have intended his allegation to be understood as factual support or evidence substantiating his primary charge that Article 32's religious test made Henry ineligible to hold a Commons seat. It is also possible that Mills intended his oath-related allegation to be understood in both ways.

Article 32 is a constitutionally imposed religious test. In other words, it excludes some persons from holding certain government positions based on their denying or holding certain religious views. Nevertheless, on its face, Article 32 does not impose any oath on anyone, including those persons seeking or holding government positions. It follows that Article 32 is not a test oath.[27] What is a test oath? A test oath

25 *Journal of the House of Commons* (n 6) 27 (entry for December 5, 1809) (emphasis added).

26 See Part VIII.

27 See 'Religious Tests and Oaths in State Constitutions, 1776–1784' (*Center for the Study of the American Constitution*) <https://tinyurl.com/22tea5xd> accessed September 13, 2021; see also 'Oaths of loyalty to the Crown and Church of England' ([United Kingdom] *National Archives*) <https://tinyurl.com/

compels a person (sometimes as a condition towards holding a public position) to swear, subscribe, agree with, or object to some particular principle or principles. If the text of the oath embraces religious principles, one can characterize the test oath, as a religious test oath. But Article 32 does not do that—at least not expressly.

Indeed, the primary provision of the North Carolina Constitution of 1776 which addresses oaths is not Article 32, but Article 12. That latter provision states:

> That every person, who shall be chosen a member of the Senate or House of Commons, or appointed to any office or place of trust, before taking his seat, or entering upon the execution of his office, shall take an oath to the State; and all officers shall also take an oath of office.[28]

Article 12's language is somewhat complex—it is, arguably, arcane. Article 12 mandates oaths for two classes of 'person[s]': 'member[s]' of the legislature, and those holding an 'office or place of trust'. Members are elected or 'chosen'; by contrast, those holding an 'office or place of trust' are 'appointed'. Members take their oath 'before taking [their] seat'; by contrast, those holding an 'office or place of trust' take their oath 'before . . . entering upon the execution of [their] office'. Both 'member[s]' and those holding an 'office or place of trust' take 'an oath to the State'. Furthermore, 'officers' take an additional 'oath of office'. It is not clear from Article 12's text if there would be a singular 'oath of office' or if different offices would have different oaths. Likewise, the text is unclear whether a person holding a 'place of trust'[29] is an 'officer' who 'take[s] an oath of office'.

The phraseology of Article 12 is much like parallel language subsequently employed in the Oath or Affirmation Clause in Article VI of the United States Constitution of 1788. That clause provided:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the

2fsu3z65> accessed September 13, 2021; cf Breidenbach (n 23) 174 ('The [US] Constitution did not ban *all* test oaths for public office, only religious tests').

28 North Carolina Const. of 1776 art 12. A discussion of pre-independence North Carolina legislative oaths is beyond the scope of this article. One suspects that such oaths would have closely conformed to their English and British parliamentary counterparts. Cf eg SM Pargellis, 'The Procedure of the Virginia House of Burgesses' (1927) 7 William and Mary Quarterly (2nd service) 143, 156 ('[The House of Burgesses] remarkabl[y] adhere[d] to English forms and practices').

29 How, if at all, an 'office . . . of trust' differs from a 'place of trust' was a matter of some debate in the 1809 Jacob Henry proceedings. For example, in 1809, William Gaston was the single member for the town of New Bern. See *Journal of the House of Commons* (n 6) 1 (entry for November 20, 1809). (In 1833, Gaston was elected by the legislature to the state supreme court. See 'Gaston, William' in William S Powell (ed), *Dictionary of North Carolina Biography*, vol 2 (Chapel Hill, NC, University of North Carolina Press 1986) 284.) In the 1809 Commons proceedings, Gaston argued that 'the word *place* impl[ies] in common language a station of a subordinate kind, something of less dignity than an office' and so this language would not extend to seats in the legislature. 'State Legislature/Debate' *The Star* (Raleigh, NC, December 28, 1809) 241–42. Gaston's view was not universally shared. For example, after the American Civil War, the supreme court of North Carolina opined on this issue. The state supreme court's view and Gaston's view were not *ad idem* on this issue. See *Worthy v Barrett* 63 North Carolina Reports 199 (Supreme Court of NC 1869) 201–02 (Reade J).

United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.[30]

Like the federal constitution's Oath or Affirmation Clause, Article 12 of the North Carolina Constitution of 1776 only identifies the public positions for which an oath is mandatory. But Article 12 does not specify the form or text of that oath (or, perhaps, in some cases, the text of the two state oaths an officeholder must take). Similarly, although Article 12 mandates that oaths shall be imposed on holders of certain positions, it does not expressly clarify what institution is charged with drafting the text of the oaths. A few modern academics have understood Article 12 as charging the legislature with this duty.[31] As will be seen, this was an entirely sensible position.

Again, Article 12 of the North Carolina Constitution of 1776 is much like Article VI of the United States Constitution of 1788. Indeed, the first statute enacted by the first Congress of the United States was An Act to Regulate the Time and Manner of Administering Certain Oaths.[32] In that statute, Congress drafted the text of the oath for those holding nearly all[33] the positions in the federal government. Under both the United States Constitution and the North Carolina Constitution of 1776, the obligation to take the oath was imposed directly by the constitution, but the specific form or text of the oath, as well as, the procedures for taking and documenting that one had taken the prescribed oath, were left to the legislature.

III. HOW DID HENRY'S CONTEMPORARIES AND LATER HISTORIANS CHARACTERIZE THE OATH MANDATED BY ARTICLE 12?

The events of November 20, 1809 were, in themselves, unremarkable. There are no detailed contemporaneous reports of what happened in the Commons that day and what oath (if any) Henry took and how he took it. Rather, the modern understanding of what happened on November 20 flows from two sources. First, the December 6, 1809 Commons debate on Mills's motion characterized the prior November 20 events. There are only a few extant reports of the December 6, 1809 Commons debate. Indeed, the earliest detailed newspaper reports of these events are from December 28, 1809 and January 4, 1810.[34] Second, there are also post-1809 historians and other commentators discussing the events of November 20, 1809.

30 See US Const. art VI, cl 3.

31 See eg Eli Lederhendler, *American Jewry: A New History* (Cambridge, UK, CUP 2017) 17 ('The House nevertheless voted to seat [Henry], regardless of the statute'); Trey Allen, 'One Oath or Two? What is THE Oath of Office' (*North Carolina Government Law*) <https://tinyurl.com/y7dxvd4k> accessed September 13, 2021 ('Unlike the 1868 and 1971 constitutions, the 1776 constitution did not dictate the wording of the oath, leaving it up to the legislature to formulate the oath as it saw fit. See NC Const. of 1776, § 12').

32 See An Act to Regulate the Time and Manner of Administering Certain Oaths 1789, c 1, §§ 1–5, vol 1 *The Public Statutes at Large of the United States of America* 23, 23–24 (Richard Peters (ed), Boston, MA, Charles C Little and James Brown 1845), <https://tinyurl.com/9eydwpd2>.

33 The United States Constitution expressly provided the text of the President's oath or affirmation. See US Const. art II, § 1, cl 8.

34 See 'State Legislature/Debate' *The Star* (Raleigh, NC, December 28, 1809) 241–42; 'State Legislature/Debate' *The Star* (Raleigh, NC, January 4, 1810) 2–3. There were two other newspaper reports, but they were short on details. See 'State Legislature/House of Commons/Wednesday, Dec. 6' *The Star* (Raleigh,

1. Newspapers reporting on the events of November 20, 1809

As explained, Mills's original motion to vacate Henry's seat made two related allegations: that Henry 'denies the divine authority of the New Testament', and that he 'refused to take the oath prescribed by law for his qualification'. Most of the newspaper reports of the debate focused: (i) on the sufficiency of the factual allegations, such that even if proved, the motion should be rejected absent hearing any evidence or witnesses; (ii) on the procedural question whether argument and evidence should be heard by the full house or some committee, including the House's Committee of the Whole; and (iii) on whether Article 32's 'office or place of trust or profit in the civil department within this State' language applied to members of the legislature, that is, to elected positions, in addition to appointed positions.[35] That said, the newspaper reports record some discussion relating to what oath Henry took and how he took it.

The January 4, 1810 issue of the *Star*,[36] a Raleigh newspaper, reported on the Commons' debate from December 6, 1809—the subject matter of the debate was the adjudication of Mills's motion concerning the events of November 20, 1809. Again, the January 4, 1810 newspaper report follows roughly seven weeks after the underlying November 20, 1809 events. The reported debate was fast-paced and, as explained, it covered a variety of factual and legal issues which were relevant to the adjudication of Mills's motion.

One speaker was William Drew, the single member in the Commons for the town of Halifax. 1809 was Drew's second term in the House, after having served in 1803. He would go on to serve three more terms in the House, during 1813, 1814, and 1816. Subsequently, in 1816, he was elected state Attorney General by the legislature. Drew remained Attorney General until circa 1825—apparently retaining the post, absent reelection, under a judge-like good behavior standard.[37] According to the *Star*, Drew stated:

> [I]t was objected that [Henry] refused to swear upon the New Testament when he qualified as a member of this House. Does the law say what a man

NC, December 7, 1809) 230–31 (reporting debate, but without much more detail than what appears in the Commons' *Journal*); 'Legislature N Carolina: House of Commons' *Strength of the People* (Charleston, SC, December 14, 1809) 3 (providing a short summary of floor debate).

35 See 'State Legislature/Debate' *The Star* (Raleigh, NC, December 28, 1809) 241–42 (reporting primarily, William Gaston's extensive contribution to the debate, and a brief contribution from Hugh C Mills); 'State Legislature/Debate' *The Star* (Raleigh, NC, December 14, 1809) 236 (reporting Henry's contribution to floor debate); see also Harold M Hyman and Morton Borden, 'Two Generations of Bayards Debate the Question: Are Congressmen Civil Officers?' (1953) 5 Delaware History 225, 229 n 18 ('Since the Blount impeachment decided that *any* elected official is not a civil officer, Bayard was wrong in defining the presidential office as a civil office' (emphasis added)); ibid 236 ('The Blount case has set the correct precedent which has endured: congressmen are not civil officers, and, therefore, not impeachable').

36 'State Legislature/Debate' *The Star* (Raleigh, NC, January 4, 1810) 2–3.

37 *Legislative Manual 1874* (n 6) 244; John L Cheney, Jr (ed), *North Carolina Government, 1585–1979: A Narrative and Statistical History* (rev edn, Raleigh, NC, North Carolina Department of the Secretary of State 1981) 182; 'Drew, William' in Powell (n 29) 104–05; Ready (n 5) 172; 'North Carolina 1816 Attorney General' (*A New Nation Votes/American Election Returns 1787–1825*) <https://tinyurl.com/pmf6xedx> accessed September 13, 2021. In addition to Drew, the other two candidates for the Attorney General post were: 'George E Spruell and Moses Mordecai'. ibid. The latter was Jewish. See 'Mordecai, Moses' in William S Powell (ed), *Dictionary of North Carolina Biography*, vol 4 (Chapel Hill, NC, University of North Carolina Press 1991) 317, 318.

> shall swear upon? It is all the same if he binds his conscience, whether he swears upon Mahomet's Koran, the Bible, or New Testament.[38]

It appears Drew understood Mills's allegation—that Henry 'refused to take the oath prescribed by law for his qualification'—as not an allegation that Henry entirely failed to recite (or failed to subscribe in some written form to) the oath's prescribed text (whatever that text was) and not that Henry departed from that text, but as an allegation that Henry swore to the oath while holding the 'wrong' religious book.

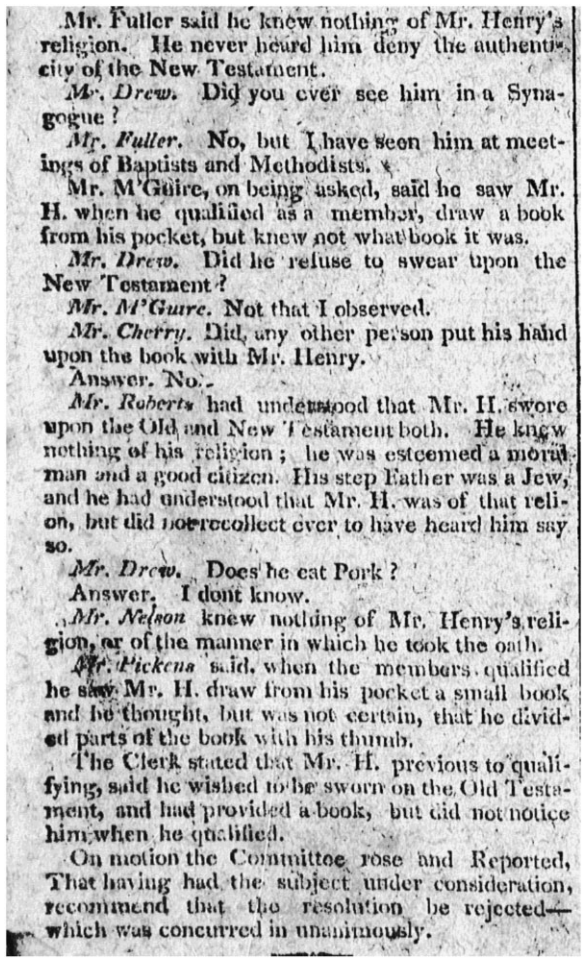
In response to that understanding of Mills's allegation, Drew does not put forward contestable *facts* about Henry's conduct on November 20, 1809. First, Drew does *not* affirm that Henry took the prescribed oath, in the sense that he made use of the prescribed text, and did so in the prescribed manner. Second, Drew does *not* make an argument based on Henry's having substantially complied with the law governing oaths for members of the legislature. In other words, Drew does *not* make the argument that Henry, having sworn to the prescribed text, should not lose his seat for failing to comply with a procedural detail regarding the manner in which he took his legislative oath. Finally, Drew does *not* state that Henry swore on a copy of the Jewish Bible, the Christian New Testament, or any other book. Indeed, Drew makes no *factual* claim at all. Instead, Drew's defense is a *legal* argument: that the law, as it then stood, did not prescribe (or proscribe) that any would-be oath-taker should hold (or refrain from holding) any particular religious book. As Drew put it: 'It is all the same if [the declarant, that is the party taking the oath] binds his conscience'.

It is not at all clear how Drew's colleagues would have understood his position. Drew did not explain exactly what the law required, at that time, to effectuate a valid oath. One might think that this information was well known, and so no explanation was necessary. But that may prove too much. Assuming Drew's legal position was the correct one, then the more widely accepted or obvious his position was, the less need there was for Drew to have made that argument in the first instance. Additionally, although Drew's position may have influenced some members, it was not decisive. Had it been decisive, Mills's motion would have been rejected at that stage, ie while proceedings were still before the Commons; instead, the proceedings were subsequently redirected to the Commons' Committee of the Whole to hear further argument and evidence. Finally, one notices that Drew—much like modern historians and commentators discussing the events of November 20, 1809—does not explain what was the text of the prescribed oath, the manner in which it should be taken, or even what legal source one would turn to in order to find this information. Absent such basic details, the modern reader may be placed today much like Drew's colleagues were in 1809: we understand what conclusion Drew reached, that is, an oath can be validly taken apart from swearing over a Christian New Testament, but we do not know how Drew came to that conclusion.

Subsequent to Drew's contribution to debate before the full House, the proceedings were transferred to the Commons' Committee of the Whole. Instead, of *debate* regarding governing law or legislative procedure, the committee heard *testimony* from several witnesses. The witnesses included Senator Bencher Fuller (Carteret County),

38 'State Legislature/Debate' *The Star* (Raleigh, NC, January 4, 1810) 2–3.

the Clerk of the House, Pleasant Henderson, and four House of Commons members. The four House members included: John Roberts (Carteret County),[39] Joseph Pickens (Buncombe County), Samuel M'Guire (Chowan County), and John S Nelson (Craven County). Additionally, two House members posed questions: William Drew (town of Halifax), who had already spoken in debate before the proceedings were transferred to the Committee of the Whole, and Joel Cherry (Martin County). The interrogation of the witnesses was also reported in the *Star*'s January 4, 1810 issue. It is reproduced below.[40]



Mr. Fuller said he knew nothing of Mr. Henry's religion. He never heard him deny the authenticity of the New Testament.

Mr. Drew. Did you ever see him in a Synagogue?

Mr. Fuller. No, but I have seen him at meetings of Baptists and Methodists.

Mr. M'Guire, on being asked, said he saw Mr. H. when he qualified as a member, draw a book from his pocket, but knew not what book it was.

Mr. Drew. Did he refuse to swear upon the New Testament?

Mr. M'Guire. Not that I observed.

Mr. Cherry. Did any other person put his hand upon the book with Mr. Henry.

Answer. No.

Mr. Roberts had understood that Mr. H. swore upon the Old and New Testament both. He knew nothing of his religion; he was esteemed a moral man and a good citizen. His step father was a Jew, and he had understood that Mr. H. was of that religion, but did not recollect ever to have heard him say so.

Mr. Drew. Does he eat Pork?

Answer. I dont know.

Mr. Nelson knew nothing of Mr. Henry's religion, or of the manner in which he took the oath.

Mr. Pickens said, when the members qualified he saw Mr. H. draw from his pocket a small book and he thought, but was not certain, that he divided parts of the book with his thumb.

The Clerk stated that Mr. H. previous to qualifying, said he wished to be sworn on the Old Testament, and had provided a book, but did not notice him when he qualified.

On motion the Committee rose and Reported, That having had the subject under consideration, recommend that the resolution be rejected—which was concurred in unanimously.

Image from Genealogy Bank

39 The Commons member identified by the *Star* as 'Roberts' is unclear. No member named 'Roberts' was listed in the House's *Journal* by the returning officers among those persons who had been duly elected to the Commons in 1809. See *Journal of the House of Commons* (n 6) 1–2 (entry for November 20, 1809). There was a 'John Robards', who, like Henry, was one of two House members for Carteret County. I suspect Roberts was Robards, but there is considerable confusion in the primary and secondary sources on this point.

40 'State Legislature/Debate' *The Star* (Raleigh, NC, January 4, 1810) 2–3.

This news report is almost comical; it reads a bit like *Hogan's Heroes*' Sergeant Schultz, immortalized by the phrase: 'I see nothing—*nothing*!' No one appears to know Jacob Henry, or, at least, no one knows anything about him which is relevant to the parliamentary investigation. And what the members do know or purport to know, they lack confidence in. No one knew Henry's religion or if he was Jewish, except one member 'understood' that Henry was Jewish, but that member could not 'recollect . . . hav[ing] heard [Henry] say so'. No one heard him 'deny the authenticity of the New Testament', and no one saw him 'refuse to swear upon the New Testament'. No one knew what text he swore on, and no one knew 'the manner in which he took the oath'. No one knew what he eats. Finally, Drew's query—'Did you ever see him in a Synagogue?'—was a neat rhetorical trick: no Jewish congregation was formed in North Carolina until after the American Civil War.[41]

Of course, the comparison to Sergeant Schultz is really quite unfair. A legislative chamber's members' taking their qualification oath is usually a short and largely unnoticed event. In most instances, members do not dwell on this process,[42] and they certainly have no good reason to closely watch their colleagues during that time. As for the members' not knowing Henry's religious views—that is not altogether surprising either. Not everyone wears their religion in an outward manner, and certainly, a failure to do so is insufficient cause to overturn an otherwise procedurally regular election. Moreover, the one witness statement made with real confidence about Henry's 'religion' was made by Senator Fuller, who had seen Henry, not at a synagogue meeting, but 'at meetings of Baptists and Methodists'. On the basis of Fuller's testimony, would it have been wrong for the members to conclude that Henry was not Jewish or that Henry had done nothing to 'deny . . . the truth . . . of the New Testament'? Or, perhaps, some Christian members, who did not attend church all that regularly, were worried about the slippery slope: 'Today it is Henry's seat, and tomorrow it may be mine'. Lastly, one should not fault or demean witnesses for telling the truth as they understood it. If the members' answers seem a bit ridiculous to us today, that is, in part, because the subject matter and questions were quite odd by modern American standards. Indeed, those questions and answers may very well have been odd by the standards of 1809 North Carolina too.[43]

That said, the testimony of the Clerk of the House and Joseph Pickens requires some further analysis. Did the clerk mean: 'Mr H[enry] previous to qualifying, said he wished to be sworn on the Old Testament, and [*Henry*] had provided [himself] with a book, but [the clerk] did not notice [Henry] when he qualified'. Or perhaps the clerk meant: 'Mr H[enry] previous to qualifying, said he wished to be sworn on the Old Testament, and [*the clerk*] had provided [Henry] with a book, but [the clerk] did not notice [Henry] when he qualified'. Either way, it would appear that Henry possessed a copy of the Jewish Bible on November 20, 1809.

41 'North Carolina' in *The Jewish Encyclopedia*, vol 9 (New York, Funk and Wagnalls 1905) 335.

42 If things are different now, the exception is largely limited to new members who want the event photographed, televised, or otherwise recorded for family, friends, donors, and constituents.

43 See eg 'A Carolinian' *The Star* (Thomas Henderson, Jr (ed), Raleigh, NC, February 1, 1810) 19 (characterizing Mills's motion as 'novel' and a 'strange proposition'); 'A Carolinian' *The Carolina Federal Republican* (Hall and Bryan (eds), Newbern, NC, February 12, 1810) 4 (reporting the same anonymous letter to the editor).

What did Joseph Pickens's testimony suggest? The implication was not that Henry had qualified on a copy of the Jewish Bible, but that Henry had used a Christian Bible, including both the Jewish Bible and the Christian New Testament. Pickens implied that Henry divided the book with his thumb while qualifying. If Pickens's claim were true, what Henry had intended by doing so (assuming this action had been taken with any deliberation at all) was then and remains now entirely a matter of conjecture.

What is reasonably clear is that Pickens's and the clerk's testimony are in considerable tension with one another. The clerk's evidence, uncertain as it is, leaned in the direction that Henry had qualified using a copy of the Jewish Bible, standing alone. Pickens's testimony suggested Henry had used a text which combined the Jewish Bible and Christian New Testament. Faced with conflicting testimony, where neither witness is quite sure what happened, it strikes me that the remaining members' best strategy may have been to discount the testimony of both of these witnesses.

All told, the witness testimony—that is, the evidence before the Committee of the Whole—was uncertain and conflicting. Thus, it offered no clear factual basis in support of Mills's position—ie that Henry's holding a seat violated Article 32 (even assuming Article 32 applied to legislative seats). Likewise, it offered no clear factual basis in support of the position that Henry had failed to take the required oath in the required manner. This would explain the entry in the *Journal* for December 6, 1809.

> The house, agreeably to the order of the day, proceeded to the consideration of the resolution presented yesterday by Mr. Mills, for the purpose of vacating the seat of Jacob Henry, one of the [two] members representing the county of Carteret in this house; and the resolution being again read, the house resolved itself into a committee of the whole, Mr. Love in the chair, and after some time spent therein, the committee rose, and Mr. Speaker resumed the chair, and Mr. Love reported, That the committee, according to order, had taken the said resolution under consideration, and that as no proof had been adduced in support of the charges, to induce the committee to believe that the seat of the said Jacob Henry ought to be vacated, they recommend that the said resolution be rejected,
>
> The house taking the foregoing report into consideration, *Resolved*, that they do concur there with.[44]

Still a reasonable member might have discounted Pickens's testimony and accepted the clerk's testimony as truthful. There is some good reason to do that. The distance between Beaufort, Carteret County, North Carolina, that is, Henry's home, and Raleigh, where the legislature met, is over 130 miles as the crow flies. Is it really likely that Henry asked the clerk for a copy of the Jewish Bible for anything other than his qualification oath?

Yet a member's relying on the clerk's testimony in order to reach a fair-minded decision on Mills's motion would have been in a quandary. Such a member still had to fit the clerk's factual testimony (even if believed) into Mills's legal charge. Those

44 *Journal of the House of Commons* (n 6) 28 (entry for December 6, 1809).

who, like Mills, were considering the possibility that Henry's seat should be vacated because he had failed to take the prescribed oath in the prescribed manner—eg for swearing over the 'wrong' religious book—failed to put forward a concrete legal argument. They never explained to the members the controlling source of law, that is, the specific statute fixing the text of the members' oath and the manner in which the oath should be taken. Furthermore, Drew, the future state Attorney General, had assured the other members that the controlling legal source said nothing about what religious book a member-elect should hold while qualifying. Indeed, all the players, including Drew, Mills, Gaston, and Henry, failed to identify the controlling statute, the relevant text of the oath, and the manner in which the oath should be taken. All told that may explain why the members voted overwhelmingly (if not unanimously) against the motion. But if so, it leaves one and all wondering exactly what Henry did on November 20, 1809.

It is also possible that a member who concluded that Henry's qualifying oath was valid under Article 12 and the relevant statute, still might wonder if Henry's taking the oath while holding the Jewish Bible somehow violated Article 32. To do so, the member would have had to conclude that an otherwise valid oath under Article 12 for the purposes of qualifying for an elected legislative seat amounted to Henry's 'deny[ing] the divine authority of the New Testament' under Article 32. That would be an odd result—one which would make the legal system appear as a series of unfair traps set to spring on the unwary. The point is not that each member worked through each of these legal permutations, and there were many such possibilities and permutations, but that Mills, and anyone else who had supported the motion to vacate Henry's seat, at some preliminary stage, had to overcome more than a few intellectual hurdles. Collectively, these hurdles would have amounted to a substantial factual and legal bar before a fair-minded member could (or, better, should) vote to overturn Henry's otherwise procedurally regular election. But all the witness evidence that had been put forward in support of Mills's motion was inconclusive (if not conflicting) factual allegations, and no one had put forward any explanation how those *facts* (even assuming they were true) met the relevant *legal* standard, which was left entirely unexplained.

In the end, it is really no wonder that the vote to reject Mills's motion was something like unanimous. Again, the January 4, 1810 newspaper report of the members' debate from December 6, 1809 puts forward inconclusive (if not conflicting) factual allegations, without any substantive explanation in regard to what the controlling law actually required for a valid oath. Like the members of the Commons, the modern reader of the newspaper reports has been presented with no clear picture in regard to: the text of the oath Henry should have taken on November 20, 1809; the text of the oath he actually took; and the manner in which he had taken it.

Furthermore, in his celebrated December 6, 1809 speech in his own defense, Henry made two related arguments. First, he argued that the general freedom of religion and conscience provision in the 1776 North Carolina Constitution's Declaration of Rights trumped the specific religious test provision in Article 32. Second, the remainder of Henry's speech related to substantive values: toleration, democracy, and equality. In all, Henry refused to clarify, in any way, what text he had recited when he took his qualifying oath, the manner in which he had taken his oath,

and what religious book (if any) he had held. Based on Mills's allegations and Henry's response, and even including the testimony of the witnesses, for all his Commons colleagues knew and for all we know today, Henry qualified using the same text of the same oath as every other member, and he took his oath in just the same way every other member took their oath, and he did so while holding a copy of the Christian New Testament. There is no concrete evidence to the contrary.

2. The modern commentary on the events of November 20, 1809

Morton Borden, author of the acclaimed *Jews, Turks, and Infidels*, suggested that Henry 'served in the 1808 session without objection, *possibly* because no one noticed that he did not take the oath'.[45] Although Borden expresses his claim with somewhat tentative language, it remains an extraordinary claim. Borden puts forward no evidentiary support for his bold position. Oscar Reiss, author of *Jews in Colonial America*, had a view similar to Borden's. Reiss affirmed that: Henry served in the Commons 'in 1808 without taking the Protestant oath',[46] and added that Mills objected to Henry's being 'seated' in 1809 because Henry 'refused to take the oath on the New Testament'.[47] Jacob Rader Marcus, in his multivolume magnum opus, *United States Jewry*, in reference to the 1809 legislative term, stated that Henry 'took his seat without having taken a Christian oath'.[48] Furthermore, according to Marcus, Henry 'had refused to take the prescribed oath affirming a belief in the divine authority of the New Testament'.[49] Marcus's 'divine authority ... of the ... New Testament' language is drawn from Article 32—which, as explained, does not actually impose any oath. Moreover, many historians and other commentators have announced the same or similar views, with some commentators referring to the oath (as does Marcus) as a 'Christian oath', and others characterizing it in slightly different terms, as, for example, a 'Protestant oath', 'religious oath', or 'test oath'.[50]

45 Borden (n 6) 43 (emphasis added). Henry was active during the 1808 session. See eg 'State Legislature/House of Commons/Thurs, Dec. 8.' *The Star* (Raleigh, NC, December 15, 1808) 28 (reporting two bills Henry introduced).

46 Reiss (n 9) 117.

47 ibid 117. Henry had already been seated; Mills sought to have Henry's seat vacated. See generally (n 9), (n 18), (n 31), and (n 50).

48 Marcus (n 11) 506; see also ibid 87 (using 'Christian oath' characterization).

49 ibid 507.

50 See eg Blau (n 1) 89 ('It was, of course, impossible for Mr. Henry to affirm the divine authority of the New Testament'); Brown (n 23) 46 (suggesting that, in 1809, 'Gaston, Henry, and others proposed to eliminate the Protestant test oath from the Constitution' and 'failed' in their efforts); Frederic Cople Jaher, *A Scapegoat in the New Wilderness: The Origins and Rise of Anti-Semitism in America* (Cambridge, MA, Harvard UP 1994) 138 (noting that Henry was not 'forced to take the prescribed test oath'); Seymour Martin Lipset and Earl Raab, *Jews and the New American Scene* (Cambridge, MA, Harvard UP 1995) 39 (asserting that the 'North Carolina Constitution require[ed] that all officeholders swear a Protestant oath'); Brendan McConville, *The Brethren: A Story of Faith and Conspiracy in Revolutionary America* (Cambridge, MA, Harvard UP 2021) 213 ("[Article 32] assured that office-holders would swear to ...."), <https://tinyurl.com/4xhs383u>; Mark Douglas McGarvie, *Law and Religion in American History: Public Values and Private Conscience* (New York, CUP 2016) 10 (characterizing the debate on Mills's motion to vacate Henry's seat as involving a 'Protestant test oath'); Roy G Saltman, *The History and Politics of Voting Technology* (New York, Palgrave Macmillan 2006) 60 (asserting that Henry refused to take 'the sectarian oath of office'); Jonathan D Sarna, *Coming to Terms with America: Essays on Jewish History, Religion, and Culture* (Lincoln, NE, University of Nebraska Press 2021) 265 (describing efforts in 1809 'to deny [Henry] his seat in the state

All these factual claims in the secondary literature are troubling.

First, where these commentators' discussions reference a constitutional provision, their discussions refer to Article 32, and not to Article 12 or to any statutory oath. Second, although Article 32 is a religious *test* (albeit, a test of disputed and uncertain meaning, scope, and application), it does not actually impose any *oath*—it, therefore, is not, indeed, it cannot be, a test oath. Third, some of these discussions make very specific factual claims: that Henry took no oath, or that Henry refused to swear on the Christian New Testament. But the authors making these specific factual claims put forward no actual sources supporting these claims. Surely, they were not relying on Mills. The entirety of Mills's allegation was that Henry 'refused to take the oath prescribed by law for his qualification'. What precisely Mills meant by that allegation was opaque in 1809, and it remains so today. Fourth, in all these commentators' discussions of the 1809 Jacob Henry proceedings, one finds not even a single report, reproduction, or citation to the text of the oath these commentators believed was then in force—that is, the oath Mills had alleged that Henry had, in some fashion, failed to take. Having not identified the relevant oath, these historians and other commentators characterize the 'oath' as a Christian, Protestant, or religious oath. But their basis for these characterizations remains obscure. In short, these claims by historians and others, across several academic disciplines and specialties, are a puzzle; perhaps they are a puzzle nearly as interesting as what Henry did or did not do on the floor of the Commons on November 20, 1809.

How is it that the secondary literature is chock-full of these unsubstantiated factual claims? One might imagine a continuum of state authorized religious

legislature for refusing to subscribe to a Christian test oath'); John E Semonche, *Religions & Constitutional Government in the United States: A Historical Overview with Sources* (Carrboro, NC, Signal Books 1985) 23 (characterizing Article 32 as a 'test oath'); Denise A Spellberg, *Thomas Jefferson's Qur'an: Islam and the Founders* (New York, Knopf 2013) (characterizing Article 32 as 'an oath to affirm "the truth of the Protestant religion"'); 'Errata' (2011) 14 Southern Jewish History 237 (clarifying Vann Newkirk's 2010 publication, and stating that Article 32 involved a 'religious test oath'); Faber (n 7) 40–41 (asserting that Henry was 'challenged . . . on the grounds that the state's constitution required that he take an oath affirming the New Testament's divinity'); Oscar Handlin and Mary F Handlin, 'The Acquisition of Political and Social Rights by the Jews in the United States' (1955) 56 American Jewish Year Book 43, 59 (explaining that Henry's seat was 'challenged because he . . . would not take an oath affirming the divine character of the New Testament'), <https://tinyurl.com/wt78devf>; Samuel Rabinove, 'How—And Why—American Jews Have Contended for Religious Freedom: The Requirements and Limits of Civility' (1990) 8 Journal of Law and Religion 131, 137 (Henry's 'seat was challenged on the ground that "he denie[d] the divine authority of the New Testament" and failed to take the required oath concerning "the truth of the Protestant religion", as required by the state constitution'); Jay Michael Eidelman, '"In the Wilds of America": The Early American Origins of American Judaism, 1790–1830' (PhD thesis, Yale University Department of Judaic Studies 1997) 107 ('[Henry] was initially not allowed to take his seat due to the requirement of a Christian oath'); see also Dershowitz (n 18) 78 (asserting that Henry 'was blocked from taking his seat by a law requiring him to accept the divinity of the New Testament'); Melvin J Konner, 'Jewish Diaspora in Europe and the Americas' in Melvin Ember, Carol R Ember, and Ian A Skoggard (eds), *Encyclopedia of Diasporas*, vol 1 (New York, Springer Science+Business Media 2005) 164, 170 (explaining that 'a colleague proposed that [Henry] be barred for not swearing allegiance to the New as well as the Old Testament'); A James Rudin, 'Mr. President, Leave Your Bibles at Home' (*The Washington Post*, January 17, 2013) <https://tinyurl.com/rkjk2zd5> accessed October 22, 2021 (Henry's 'opponents tried to prevent him from serving a second term because a law demanded that legislators affirm the divinity of the New Testament'); cf Hasia R Diner, *The Jews of the United States 1654–2000* (Berkeley, CA, University of California Press 2004) 50 (asserting that Henry 'could not, in good conscience, take the oath'); Jon Meacham, 'A New American Holy War' (*Newsweek*, December 8, 2007) <https://tinyurl.com/3yahyseb> accessed October 22, 2021.

establishments.[51] One end of the continuum might be characterized as *no establishment, no recognition, no preferences, and no funding*. That is the state is entirely neutral with respect to religion or particular denominations. Such descriptions of particular organizations, groups, or persons are not occasions to assign benefits or burdens through the legal system—including expressive benefits or burdens, such as official government praise or condemnation channeled through the legal system or government officials.[52]

At the other extreme, one might imagine a caricature of premodern English practice during and after Henry VIII's major institutional reforms. State and church are one. The head of state is head of the church, not just head of a church, but head of the true church as determined by the state. The church is funded by the state, and funded to the exclusion of other denominations and religions, which may not be legal to practice, in public or private. And even where such non-conforming religions are legal to practice as a private matter, such practice will exclude one from holding government positions and from participating in wide aspects of civic society, including admission to universities, the professions, and appearing as a litigator, party, or witness in civil actions. At its worst, this type of system will use the criminal law and instruments of torture to ferret out non-belief, to exile religious non-conformists through the threat of investigation and punishment, and, ultimately, to coerce and punish non-conformists. In this sort of quasi-totalitarian system, where state and church are one, where the state religious establishment will permeate many (if not all) aspects of public, legal, and wider civic life, it is reasonable to expect that state oaths of office (as well as judicially approved oaths for use in litigation and other purposes) will reflect the state's religious establishment.[53]

51 See Philip Hamburger, *Separation of Church and State* (Cambridge, MA, Harvard UP 2002) 487 ('[U]nion and separation [of church and state] are overgeneralizations between which lies much middle ground. These principles are, in fact, extremes along a continuum').

52 Compare eg *Roman Catholic Diocese of Brooklyn v Cuomo* 141 Supreme Court Reports 63 (2020) 67–68 (per curiam) ('If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred'), with *The Parliamentary Debates/First Session of the Fourth Parliament of Northern Ireland/24 & 25 George V/House of Commons Session 1933–34*, vol XVI (Belfast, Northern Ireland, His Majesty's Stationery Office 1935) 1095 (Sir James Craig, Northern Ireland Prime Minister and Member for North Down, on April 24, 1934, denying that judges in Northern Ireland were chosen based on religious or denominational affiliation, and adding, 'All I boast of is that we are a Protestant Parliament and a Protestant State'), and *The Parliamentary Debates/Second Session of the Fourth Parliament of Northern Ireland/25 & 26 George V/House of Commons Session 1934–35*, vol XVII (Belfast, Northern Ireland, His Majesty's Stationery Office 1935) 73 (Craig, on November 21, 1934: 'That is my whole object in carrying on a Protestant Government for a Protestant people').

53 'Oath' in *The Jewish Encyclopedia* (n 41) 365, 368 ('The identification of Church and State seemed to render it necessary to have a different formula [for oath-taking] for those outside the state church'). The issue of the form of oath-taking was raised with George Washington during the Philadelphia Convention. See Letter from Jonas Phillips to George Washington, September 7, 1787 (*Founders Online*) <https://tinyurl.com/ymw2jrm8> accessed September 13, 2021 ('[I]f the honourable Convention shall in their Wisdom think fit and alter the said oath and leave out the words to viz.—"and I do acknowledge the scriptures of the new testement to be given by devine inspiration", then the Israelites will think themself happy to live under a government where all Religious societys are on an Eaquel footing' (inner quotation marks added) (using spelling reported in the original)); ibid editor's note 1 ('Phillips also petitioned the Pennsylvania state constitutional convention in 1789 to remove the religious oath [from the state's constitution]').

The North Carolina Constitution of 1776 is somewhere between these two polar extremes. Undoubtedly, Article 32 is exclusionary: it favors adherents of one religion over adherents of other religions, and it favors adherents of one religion over those having no religion at all. Considering Article 32 standing alone, one might conclude that the North Carolina Constitution of 1776 leans more in the general direction of the Henry VIII model, than in the direction of the no-establishment model. But one thing's leaning in the general direction of another does not make those two things the same. Again, the reasonable assumption applicable to the Henry VIII model is that the state religious establishment will permeate many (if not all) aspects of public, legal, and wider civic life. But the further a society diverges from that model, the weaker the applicability of that assumption becomes.

So, one possibility is that each and every one of these historians and other commentators simply misread Article 32: they genuinely believed it imposed a religious test oath even though its language expresses no such requirement. But another possibility is that these historians and other commentators believed that the religious worldview behind Article 32 required those downstream legal actors charged with drafting North Carolina's state oaths to incorporate Article 32-like religious tests and language into the state's oaths. Some of them might have believed that Article 32's language expressly required this result, and others might have believed that Article 32's text merely functioned more as guidance which strongly favored, but did not expressly mandate, that result. Still, others might have believed that the worldview of 1776 North Carolina which supported Article 32 would have also expressed itself in whatever oaths took shape in the legislature under the aegis of Article 12, even if Article 32 did not expressly require or favor that particular result. But whatever their thinking was, these historians and other commentators did not put forward the text of the legislative oath that Henry and his colleagues swore to uphold on November 20, 1809. And in that, they were much like William Drew and all the others who participated in the debate on the motion to vacate Henry's seat. They were all willing to have a debate *about* the oath, but they were not willing to clarify what the *text* of that oath was, how it should be taken, and if any particular religious book needed to be in-hand while taking the oath.

Other possibilities are also worth considering. The history of England, Great Britain, the United Kingdom, its dependencies, colonies, and former colonies is tied to oaths involving the established church and succession of the crown. That history is alien to many modern American historians and commentators. Perhaps they are unwilling (or unable) to investigate strange waters? On the other hand, those historians and other commentators whose nation, legal system, and popular culture are still tied to the United Kingdom by a common head of state, legal system with its transnational Judicial Committee of the Privy Council, and educational ties to Oxbridge and London's Inns of Court are, perhaps, better placed to understand these early American historical chestnuts. Compare how American historians have treated Jacob Henry and *his* oath with how these Canadian commentators discussed the first Jewish member of a Canadian parliament and *his* oath.

> The actual oath of a member of the assembly, unlike the Oath of Abjuration,[54] did not contain the concluding words 'on the true faith of a Christian' and should not therefore have been offensive to a professing Jew.[55]

These authors were willing to discuss the text of the oath which applied to assembly members, its content, how it veered from other oaths which were not in force, and how those particular words might or might not offend the sensibilities of a person outside the established church. This sort of analysis is not what one finds in the largest part of the extant Jacob Henry literature.

IV. RECONSTRUCTING JACOB HENRY'S OATH

Although the Commons members and others (such as Pleasant Henderson, the clerk) who participated both in the events of November 20, 1809 and in the subsequent proceedings on December 6, 1809 have left no meaningful records regarding what oath Jacob Henry took and how he took it, there are other documents from which one can glean relevant information in regard to these issues. One can turn to *The State Records of North Carolina* and various collections of North Carolina's post-independence statutes. These records are in some sense second-best materials in regard to determining what happened in 1809. One reason these statutes may not be entirely reliable as guidance is that the statutes may substantially predate 1809. In such circumstances, one cannot be sure if there were other intervening statutes (or other legal guidance) that one's research has missed. Another reason is that the legislature may have departed from what the statutes mandated. For example, a legislative house might have claimed that it had power under its own internal rule-making authority to depart from otherwise applicable statutory guidance.[56]

54 See 'Oath of Abjuration' (*Oxford Reference*) <https://tinyurl.com/2tutwj63> accessed September 14, 2021 ('An oath renouncing the Stuart dynasty and the temporal power of the Pope, imposed in 1702 on all who took civil, military, or spiritual office. It was replaced in 1858 by a new form of the Oath of Allegiance'). In the United Kingdom, the Oaths of Allegiance etc and Relief of the Jews Act 1858, 21 & 22 Vict, c 49, 'removed the bar from those of the Jewish faith from tak[ing] a seat in Parliament' by permitting the declarant to take the oath absent any 'on the true faith of a Christian' language. See Michael Everett and Danielle Nash, House of Commons Briefing Paper No CBP7515, *The Parliamentary Oath* (February 26, 2016) 19, 23–24, <https://tinyurl.com/23fw9k8j>, <https://tinyurl.com/9hckyhjs>.

55 Sheldon Godfrey and Judith Godfrey, *Burn this Gossip: The True Story of George Benjamin of Belleville Canada's First Jewish Member of Parliament* (Toronto, Canada, Duke and George Press 1991) 86 n 13 (footnote added). Similarly, 'Jews in [colonial] Georgia received dispensation to omit the words 'on the faith of a Christian' from the naturalization oath required in 1740'. Michael W McConnell, 'The Origins and Historical Understanding of Free Exercise of Religion' (1990) 103 Harvard Law Review 1409, 1467. Jews in colonial New York had a similar exemption. See Laws of the Colony of New York, c 538 (July 12, 1729) in *The Colonial Laws of New York*, vol 2 (Albany, NY, James B Lyon 1894) 513, 515. Moreover, '[i]n 1740 [the British] parliament legislated for the first time concerning naturalization in the colonies'. Herbert L Osgood, *The American Colonies in the Eighteenth Century*, vol 2 (New York, Columbia UP 1924) 528–29, <https://tinyurl.com/ynn6p5wr>. The statute, 14 Geo II, c 7, imposed certain conditions, including taking the relevant oaths. Jews were exempted from the 'on the faith of a Christian' language.

56 See eg Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* (New York, reprint 1971, Da Capo Press 1943) 56 (discussing colonial North Carolina disputes relating to oaths in the lower legislative house); cf eg Aaron-Andrew P Bruhl, 'Using Statutes to set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause' (2003) 19 Journal of Law and Politics 345, 349 ('Congress itself appears to hold the view that each house always possesses a constitutionally

What follows is a brief recapitulation of the history of post-independence North Carolina oaths.

The North Carolina General Assembly met in 1777. In the legislature's first 1777 session,[57] it enacted a new general form of oath for use in judicial and other legal proceedings. The statute provided:

> Chapter IV.
>
> An Act Concerning Oaths.
>
> I. Whereas lawful Oaths, for the Discovery of Truth, and establishing Right, are necessary, and highly conducive to the important Ends of good Government; and being most solemn Appeals to Almighty God, as the omniscient Witness of the Truth, just and omnipotent Avenger of Falsehood, such Oaths ought therefore to be taken and administered with the utmost Solemnity:
>
> II. Be it therefore Enacted by the General Assembly of the State of North-Carolina, and by the Authority of the same, That Judges, Justices of the Peace, and other Persons, who are or shall be empowered to administer Oaths, shall (*except in the Cases in this Act excepted*) require the Party to be sworn to lay his Hand upon the Holy Evangelists of Almighty God, in Token of his Engagement to speak the Truth, as he hopes to be saved in the Way and Method of Salvation pointed out in the blessed Volume, and in further Token, that if he should swerve from the Truth, he may justly be deprived of all the Blessing of the Gospel, and made liable to the Vengeance which he has imprecated on his own Head; and after repeating the Words So help Me God, shall kiss the Holy Gospels, as a Seal of Confirmation to the said Engagements.[58]

More than a few of the statute's references are clearly Christological. These include: eg 'Holy Evangelists of Almighty God' and the 'Holy Gospels'. The party taking the oath was required to hold the Christian Bible or Christian New Testament.[59]

mandated power to change its own rules, regardless of what any statute says about the matter'). The larger point is that practice on the ground may have substantially veered from the strict letter of the statutory law. The suggestion is that the older the controlling statutes were relative to the events of 1809, the more likely practice was to veer in this manner. See generally John Heywood, *A Manual of the Laws of North-Carolina*, vol 1 (2nd edn, Raleigh, NC, J Gales and W Boylan 1808) 7, 8 and n a (entries under "members of Assembly"); ibid 25, 30–31 (entries under "oaths and affirmations").

57 Apparently, the first session met in New Bern from April 7, 1777 to May 9, 1777. See Walter Clark (ed), *The State Records of North Carolina*, vol 24 (Goldsboro, NC, Nash Brothers 1905) 1, <https://tinyurl.com/yphslkmo>, <https://tinyurl.com/jrt4j95t>.

58 'An Act Concerning Oaths' (1777) in Clark (n 57) 12 (emphasis added), <https://tinyurl.com/yphslkmo>. Compare NC Stat 1777, c 108, § 2, in Frederick Nash, James Iredell, and William H Battle, *The Revised Statutes of the State of North Carolina*, vol 1 (Raleigh, NC, Turner & Hughes 1837) 431 (reproducing general oath requirements, including swearing upon the 'gospels'), with ibid § 3, 431–32 (permitting an opt-out for a person who was 'conscientiously scrupulous of taking a book oath'). It is notable that the Nash compilation has different chapter numbers from what is reported in Clark's *State Records*.

59 See eg J Crawford Biggs, 'Religious Belief as Qualification of a Witness' (1929) 8 North Carolina Law Review 31; Maximilian Longley, 'Oaths' (*North Carolina History Project*) <https://tinyurl.com/17cyejjl> accessed September 13, 2021. The modern North Carolina oath statute superseded the original 'Holy

That said, the statute expressly provides for two opt-outs, including one exemption for those 'conscientiously scrupulous of taking a Book Oath in Manner aforesaid', and a second exemption for 'Quakers, Moravians, and Menonists'. The statute provided:

> III. And be it enacted by the Authority aforesaid, That in all Cases when any Judges, Justices of the Peace, or other Persons, are or shall be empowered to administer any Manner or Oath in this State, and the Person to be sworn shall be conscientiously scrupulous of taking a Book Oath in Manner aforesaid, and pray the Benefit of this Act, it shall and may be lawful for all such Judges, Justices, and other Persons, and they, and each of them, are hereby required to excuse such Person from laying Hands upon or touching the Holy Gospels; and the said Judges, Justices, and others, are hereby directed in such Case to administer the Oath required, in the following Manner, to-wit, The Party so conscientiously scrupulous, and praying the Benefit of this Act, shall stand with his right Hand lifted up towards Heaven,[60] in Token of his solemn Appeal to the Supreme God, whose Dwelling is in the highest Heavens, and also in Token, that if he should swerve from the Truth, he would draw down the Vengeance of Heaven upon his Head, and shall introduce the intended Oath with these Words, viz. I, A. B., do appeal to God, as a Witness of the Truth and Avenger of Falsehood, as I shall answer the same at the great Day of Judgment, when the Secrets of all Hearts shall be known, that, &c., as the Words of the Oath may be. And it is hereby declared, That an Oath thus administered and taken, with the right Hand lifted up, is and shall be a lawful Oath in this State; and such Oath shall be admitted and used in all Courts in this State where the same shall be requested as aforesaid, and shall be equally good and valid in Law, to all Intents and Purposes, as if the same Oath had been taken by the Party, having laid his Hand upon, and kis[s]ed the Holy Gospels.
>
> IV. And be it Enacted by the Authority aforesaid, That the solemn Affirmation of Quakers, Moravians, and Menonists, made in the Manner heretofore used and accustomed, shall be admitted as Evidence in civil Controversies in this State; and where other Persons are required to take an Oath or Oaths to the State, the said Quakers, Moravians and Menonists, shall make their solemn

Evangelist' language with the term 'Holy Scriptures'. NC Gen Stat § 11–2. In 2007 litigation, plaintiffs sought a declaration from the state trial court of record to the effect that 'the court declare that the term Holy Scriptures, as set out in N.C. Gen. Stat. § 11–2, includes not only the Christian Bible, but other religious texts, including but not limited to, the Quran, the Old Testament and the Bhagavad-Gita'. Although granting other relief, Judge Paul C Ridgeway denied granting this particular relief sought by plaintiffs. See *American Civil Liberties Union of North Carolina, Inc v North Carolina*, Civil Action Number 05-CVS-9872 (Superior Court of North Carolina May 24, 2007) slip opinion 17, <https://tinyurl.com/zng8s1hx>.

60 One notes that in designing an alternative book-less oath, the drafters of this statute made use of Scottish practice. 'Oath' in *Encyclopaedia Britannica*, vol 16 (Chicago, IL, Encyclopaedia Britannica 1976) 663, 664 (characterizing Scottish practice as using an 'uplifted hand' with 'no book of any kind being used'). Diversity comes in many forms, as does continuity with America's wider British and transatlantic heritage. See eg Forrest McDonald, *Recovering the Past: A Historian's Memoir* (Lawrence, KS, University of Kansas Press 2004) 50.

> Affirmations in the Words of the said Oath or Oaths, beginning after the Word swear, or shall make such Affirmation as shall be hereafter provided for them by Law.[61]

Section 3 does not require the party swearing an oath to make use of the Christian Bible or Christian New Testament. Nor does it expressly forbid the use of any other religious book. The words of Section 3 do have some concrete theological content: the party swearing an oath makes a 'solemn Appeal to the Supreme God' and expresses belief in 'Heaven' and a 'Day of Judgment'. Many people, including many non-Protestants and many non-Christians, could make use of this opt-out oath in good conscience.[62] Although this statute does not make provision for all persons to make a valid oath in good conscience, it did not limit its sphere exclusively to Protestants or Christians. Its drafters were clearly thinking about extending legal protections to 'others', even if not to all 'others'.

This general oath was designed largely for judicial proceedings. It was not specifically designed to fulfil Article 12's mandate—which called for an oath for members of the legislature and an oath for those holding an 'office or place of trust'. Given that members were required to take the oath before taking their seat, one can only wonder what was the text of the oath the members took prior to the legislature's passing this statute or any other statute fulfilling Article 12's mandate.[63] It is both a legal and historical conundrum. And it is similar to the difficulties faced by the first United States Congress which met in 1789. As explained, the United States Congress' first act was a statute providing for oaths for members of Congress and for all (or nearly all) federal officers. Before Congress passed that act, no statutory oath existed, and so members passed the first federal statute prior to taking any statutory oath, which did not then yet exist. In regard to both situations, the one faced by North Carolina legislators in 1777 and the one faced by the members of the first federal Congress in 1789, there is no reason to be surprised. Transitions from one constitution to another, particularly in the midst of a violent revolution, will pose some difficulties, including: difficulties for those who draft those constitutions; difficulties for those required to obey them; and difficulties for those who interpret and enforce them.

61 'An Act Concerning Oaths' (1777) in Clark (n 57) 12–13 (footnote added). 'As early as the seventeenth century the proprietors of the Carolina colony permitted Quakers to enter pledges in a book in lieu of swearing an oath'. McConnell (n 55) 1467. '[A]lmost every state afforded dissenters an oath exemption by the time the U.S. Constitution was ratified'. William W Bassett and others, 'Early American Oaths' in *Religious Organizations and the Law*, vol 1 (2nd edn, Eagan, MN, Thomson Reuters 2017) § 6.11.

62 Whether a Jew, of any particular religiosity or affiliation, could take this oath in good conscience is a matter beyond the scope of this article. See also eg Rabbi Shmuel Boteach, 'Maimonides: The 13 Principles and the Resurrection of the Dead' (*Internet History Sourcebooks Project*) <https://sourcebooks.fordham.edu/source/rambam13.asp> accessed September 13, 2021.

63 My guess, based on the historical practice taken by other legislatures facing similar situations, is that prior to the members' passing this statute and prior to their passing the specific oath for members of the legislature, which did not happen until the second 1777 session, the members of each house took an oath supported by the authority of a single-house order or resolution. Then, after the statutory oath was enacted, they took the new oath as required by constitutional guidance. See North Carolina Const. of 1776 art 12; cf (n 66) (linking to digitized photographs of the document which was the signed oath members took circa April 1777).

In the legislature's second 1777 session,[64] it enacted its first post-independence oath for members of the legislature.

CHAPTER X.

An Act for ascertaining the Oath of Allegiance and Abjuration.

I. Whereas it is necessary, to prevent Persons disaffected to the present Government from enjoying Seats in the Legislature, or holding Offices under the State, that the Oath of Allegiance and Abjuration should be ascertained by a permanent Law;

II. Be it therefore Enacted, by the General Assembly of the State of North Carolina, and it is hereby Enacted by the Authority of the same, That every Person who shall hereafter be elected as a Member of the General Assembly, or who shall be appointed to hold any Office of Trust or Profit in this State, shall, before taking his Seat in the General Assembly, or executing the Office to which he shall be appointed as aforesaid, repeat and subscribe the following Oath, that is to say,

I, A. B., do solemnly and sincerely promise and swear, that I will be faithful and bear true Allegiance to the State of North Carolina, and to the Powers and Authorities which are or may be established for the Government thereof, not inconsistent with the Constitution. And I do solemnly and sincerely declare, that I do believe in my Conscience that neither the King of Great Britain, nor the Parliament thereof, jointly with the said King or separately, or any foreign Prince, Person, State, or Potentate, have, or ought to have any Right or Title to the Dominion or Sovereignty of this State, or to any part of the Government thereof. And I do renounce, refuse, and abjure any Allegiance or Obedience to them, or any of them, or to any Person or Persons put in Authority by or under them, or any of them. And I will do my utmost Endeavours to disclose and make known to the legislative or executive Powers of the said State, all Treasons and traiterous [sic] Conspiracies and Attempts whatsoever, which I shall know to be made or intended against the said State. And I do faithfully promise, that I will endeavour to support, maintain and defend, the Independence of the said State, against him the said King, and all other Persons whatsoever. And all these Things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain and common Sense and Understanding of the same Words, without any Equivocation, mental Evasion, or secret Reservation whatsoever. And I do make this Acknowledgment, Abjuration, and Promise, heartily, willingly, and truly. SO HELP ME GOD.[65]

64 Apparently, the second session met in New Bern from November 15, 1777 to December 24, 1777. See Clark (n 57) 43, <https://tinyurl.com/blxlrdok>, <https://tinyurl.com/jrt4j95t>.

65 'An Act for ascertaining the Oath of Allegiance and Abjuration' (1777) in Clark (n 57) 103, <https://tinyurl.com/blxlrdok>; NC Stat 1791, Sess 1, c 342, §§ 1–2, amending NC Stat 1777, Sess 2, c 10, § 2 in Nash and others (n 58) 430, 432, <https://tinyurl.com/ycya7xsu>.

Because of its last four words, this oath is theistic and, probably, best characterized as monotheistic. But there is nothing in it strictly Christian or specifically Protestant.

This oath is a test oath. The oath-taker agrees to and promises to adhere to particular fixed political principles—here, relating to political loyalty and the revolution. If this is a religious test oath, then it is a very vanilla (or pareve) one.

A few details and possibilities are worth considering. First, the oath-taker 'repeat[s] and subscribe[s]' to the oath. This indicates that he must speak the words of the oath, and he must sign them in some written form. Each member would sign a separate document. Or, a common document could be circulated on the Commons' floor, and each member would sign that common document. Indeed, in the *first* legislative session of 1777, all the members signed a common document circa April 1777.[66] It is noteworthy that the members' April 1777 oath, which was taken before the statutory oath for legislators had been enacted, ie Act for ascertaining the Oath of Allegiance and Abjuration (1777), ends with 'upon the true faith of a Christian'. This latter language was standard English practice for parliamentary oaths.[67] And the shift from the language used in the oath taken in the first session, ie 'upon the true faith of a Christian', to the language required in the second session's 1777 statute, ie 'SO HELP ME GOD', might be fairly characterized as an attempt to make the law more religiously neutral and inclusive, or to break with prior English parliamentary practice, or both. One might also wonder if the use of capital letters was some indication that although the statute's drafters were shifting away from overtly Christological oaths, they were not departing from what they perceived as an essential religious element.

Second, the Act Concerning Oaths (1777), the general oath for judicial proceedings, may have supplied a gloss in regard to the procedures for taking the oath for legislators. In other words, members were permitted to swear on the Christian Bible or to opt out of doing so. But even if that is not the case, there is nothing in the Act for ascertaining the Oath of Allegiance and Abjuration (1777) expressly requiring or foreclosing a member's using any particular religious book while taking his oath. That being the situation, it is somewhat difficult to understand the force of the argument that using the 'wrong' religious book might invalidate an otherwise procedurally regular oath.

In 1789, North Carolina ratified the United States Constitution. Article VI of the United States Constitution required all state legislators and state executive and judicial officers to take an oath or affirmation to support the United States Constitution. In compliance with Article VI and the United States Congress' statutory guidance,

66 See 'Session of April–May, 1777: Election Certificates and Oaths' (*North Carolina Digital Collections*) <https://tinyurl.com/728e2zm5> accessed September 13, 2021. This document is the signed oath members took circa April 1777—ie the oath they took prior to the legislature's enacting a statutory oath under the aegis of Article 12. These digitized photographs of the faint writing in this document, now more than two centuries old, are largely unreadable.

67 This 'on the true faith of a Christian' language had been introduced in the English Parliament's oath for members during the reign of James I. See Everett and Nash (n 54) 23 n 66; see also 'Oath' (n 60) 663 (explaining the history of statutory reforms to the English parliamentary oath, its successors, and specifically, noting that 'Jews were enabled to sit in parliament by being allowed to omit the words "on the true faith of a Christian"'). See generally (n 54) (discussing 1858 statutory reforms), and (n 55) (discussing naturalization oaths in the British New World colonies).

An Act to Regulate the Time and Manner of Administering Certain Oaths (1789),[68] the North Carolina legislature amended its oath for legislators. In 1791, the legislature enacted: An Act for Altering the Oath of Allegiance to the State of North-Carolina. The 1791 state statute directed members of the North Carolina legislature to take three oaths: a federal oath (in Section 3), a general state oath (reproduced in Section 1, and mandated in Section 2), and a supplementary anti-bribery and anti-conflicts oath (in Section 2).

First, Section 3 of the 1791 Act simply required the members of the state legislature and certain state officers to 'take' the following oath: 'I, A. B. do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States'.[69] This new text brought North Carolina's oaths into conformity with federal constitutional and statutory law.

Second, the 1791 Act followed roughly eight years after peace had been made with Great Britain, its king, and parliament, and roughly fifteen years after 1776. Peace and normality (such as it was) had returned. There was no longer good reason for the state's oaths to function as loyalty tests vis-à-vis the former colonial master. The 1791 Act simplified the law. Section 1 of the 1791 Act provided that certain state officers 'take and subscribe the following oath or affirmation':

> I, A. B. do solemnly and sincerely swear or affirm, that I will be faithful and bear true allegiance to the State of North-Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavour to support, maintain and defend the constitution of the said state, not inconsistent with the constitution of the United States, to the best of my knowledge and ability. SO HELP ME GOD.[70]

68 See generally (n 32), and accompanying text (discussing 1789 federal statute).

69 'Chap. XI. An Act for Altering the Oath of Allegiance to the State of North-Carolina' (1791) in *The Acts of the General Assembly of the State of North-Carolina, Passed during the Sessions held in the Years 1791, 1792, 1793 and 1794* (Newbern, NC, François X Martin 1795) 7 (reporting statutory revisions at chapter 11, not chapter 342 as used in subsequent statutory compilations), <https://tinyurl.com/yaodn3j8>; 'An Act for Altering the Oath of Allegiance to the State of North-Carolina' (1791) in James Iredell and Francois-Xavier Martin, *The Public Acts of the General Assembly of North-Carolina*, vol 2 (Newbern, NC, Martin & Ogden 1804) 11–12 (same), <https://tinyurl.com/4nsdazfm>; see also 'Chap. 342. An Act for Altering the Oath of Allegiance to the State of North-Carolina' (1791) in Henry Potter, JL Taylor, and Bartlett Yancey, *Laws of the State of North-Carolina*, vol 1 (Raleigh, NC, J Gales 1821) 660, 661 § 2 (reporting statutory revisions at chapter 342), <https://tinyurl.com/y9jlsymw>; NC Stat 1791, Sess 1, c 342, §§ 1–2, amending NC Stat 1777, Sess 2, c 10, § 2, in Nash and others (n 58) 431 (an 1837 compilation), <https://tinyurl.com/ycya7xsu>. Unfortunately, Clark's *State Records* does not have a reproduction of this statute; indeed, this source has little post-1790 material.

70 'Chap. XI. An Act for Altering the Oath of Allegiance to the State of North-Carolina' (1791) (n 69) 7. Some of the changes reported in the 1791 statute had been first made in 1784, after the Treaty of Paris (1783) had been concluded. See 'Chapter XXI. An Act for Altering the Oath of Allegiance, and the Oath and Affirmation of Fidelity' (1784) in Clark (n 57) 684–85 § 1 ('Whereas the oath of allegiance and abjuration required to be taken by persons holding places of trust and profit, and the oath and affirmation of fidelity were framed in the infancy of the present government, when the dominion and sovereignty of this State were claimed by the king and parliament of Great Britain: And whereas by the late treaty of peace the said king hath expressly acknowledged this State, and the other United States, to be free sovereign and independent: It is therefore become nec[e]ssary that the oaths and affirmation should be altered'), <https://tinyurl.com/3uuabcdn>. This oath was not overtly Christological, and it ended with 'SO HELP ME GOD' language. ibid § 2. Apparently in 1784, ie prior to the enactment of the 1791 Act, a Jew

Section 1 also provided an opt-out for Quakers. Section 2 of the 1791 Act directed members of the legislature to 'take and subscribe' to the oath for officers provided in Section 1.

Third, Section 2 also directed members to take a supplementary anti-bribery and anti-conflicts oath. This supplementary oath provided:

> I, A. B. do solemnly and sincerely swear or affirm that I have not by myself, or any other person or persons, either directly or indirectly, given or caused to be given, any gift, gratuity, reward or present to any person or persons, for his or their votes to obtain a seat in the present General Assembly; and that I will not during my continuing a member thereof, take or receive the profits, or any part of the profits of any office within this state, or under the United States, either for my own use or uses of any person or persons whatsoever, otherwise than what is agreeable to the constitution of this state, or shall be allowed by law. SO HELP ME GOD.[71]

Finally, Section 4 of the 1791 Act provided: 'that all laws coming within the purview and meaning of this act are hereby repealed'.[72] It is not entirely clear what this repealing clause was intended to do or how it was understood. One possibility is that it was intended to reduce the force of the argument that the Act Concerning Oaths (1777), ie the general oath for judicial proceedings, may have supplied a gloss in regard to the procedures for taking the oath for members of the legislature.

It would appear that An Act for Altering the Oath of Allegiance to the State of North-Carolina (1791), and its three oaths for members of the General Assembly, were in force in 1809 when Henry and his colleagues qualified.

The oaths for members provided by the 1791 Act are not overtly Christian or Protestant. They are theistic, or, perhaps, monotheistic. One might also suspect that the 'So help me God' language was optional for those who chose to affirm, rather than to swear. In a reciprocal fashion, one might suspect that a member's swearing—as opposed to affirming—to the federal oath might be permitted to add 'So help me God'.[73] The 1791 statutory oaths are test oaths. These oaths test the oath-taker's political loyalties, but not his religious principles—except to the limited extent that the 'So help me God' language was understood as a religious principle, and even that

was sworn in as a witness before the assembly. See Walter Clark (ed), *The State Records of North Carolina*, vol 19 (Goldsboro, NC, Nash Brothers 1901) 784–85, <https://tinyurl.com/55pnww5u>. What oath (if any) the witness and the assembly used on this occasion is unclear. But see Anson Phelps Stokes, *Church and State in the United States*, vol 1 (New York, Harper 1950) 865 (asserting that '[o]ne of the causes of difficulty . . . was the old English common-law doctrine, that practically made no one but a Christian a competent witness').

71 'Chap. XI. An Act for Altering the Oath of Allegiance to the State of North-Carolina' (1791) (n 69) 7.

72 ibid c 11, § 2.

73 See eg Akhil Reed Amar, *America's Unwritten Constitution* (New York, Basic Books 2012) 76 ('[N]either did Article II bar the use of the word "God" or the phrase "so help me God" . . . at a presidential oath ceremony if the oath-taker opted to add an allusion to the Almighty'); see also Breidenbach (n 23) 172 (explaining that 'in the eighteenth century, to require an oath was a de facto acknowledgment of a Supreme Being'); ibid 174. But see Peter R Henriques, '"So Help Me God": A George Washington Myth that Should Be Discarded' (*History News Network*, January 11, 2009) <https://tinyurl.com/rk9u8hv7> accessed September 14, 2021.

assumes that that language was mandatory. To put it another way, the primary purpose of this 'So help me God' language was not to test the oath-taker's adherence to religious principles favored by the state; rather, this, arguably bland, religious language was employed to signify the oath-taker's sincerity.

Under the 1791 Act, the principles to which the oath-taker promises to adhere are political principles—all relating to loyalty to the state and to aspirational political norms. Notwithstanding how we, today, might think of the statute's 'So help me God' language, in 1791, these oaths were not in any meaningful sense traditional religious test oaths, Christian oaths, or Protestant oaths. There is no mention of the 95 Theses or the 39 Articles. There is no duty to abjure the Pope—as a Christian, Catholic, religious, or political authority. We are in North Carolina in 1809, not Henry VIII's Hampton Court in 1529. It is not in any way obvious that the texts of the three oaths imposed by the 1791 Act on members of the state legislature were inconsistent with Judaism, in any variant that may have existed in 1809, or inconsistent with any of Jacob Henry's personal religious beliefs or commitments, whatever they may have been.

The text is one thing, but what book one swore on may have been another. As explained in regard to the Act for ascertaining the Oath of Allegiance and Abjuration (1777), there is likewise nothing in the 1791 statutory oaths expressly requiring or precluding a member's using any particular religious book while taking his oath. Still, it is possible that the Act Concerning Oaths (1777), the general oath for judicial proceedings, may have supplied implicit guidance or a gloss in regard to the procedures for taking the oaths imposed by the 1791 Act. If so, it would appear that members were permitted to swear on the Christian Bible or to opt out of doing so. In this light, those who had opposed Henry, such as Mills, may be understood as having made the argument that Henry was put to the hard choice of using the Christian Bible or no book at all. There are several substantial problems with this position. First, there is no record of anyone's having expressly made this particular legal argument. Second, it seems to hang on a very technical reading of election law. It is tantamount to admitting that Henry substantially complied with the relevant statute, in reciting and subscribing to the mandatory text and having done so in conformity with the customary procedures. The argument for lack of compliance is not that Henry did something expressly forbidden, but that he did something extra, which is neither expressly allowed nor forbidden. Indeed, William Drew might be understood as having responded to this argument. But if Drew's speech was intended to respond to this particular argument, it is strange how he failed to develop his position when he had an opportunity to do so. It is also strange that he failed to explain that the 1791 Act supported his general position. Moreover, if Section 4 repealed the force of the 1777 Act vis-à-vis the 1791 Act, and if Henry's using a copy of the Jewish Bible invalidated his qualifying oath, then the same logic would have invalidated any other member's qualifying if that member had qualified while holding a copy of Christian New Testament or any other book. That is a bridge too far. Lawyers and members of legislatures sometimes make arguments which are odd if not obtuse. The fact that an argument was odd or obtuse does not prove it was not made. We cannot rule out this possibility. That said, we should also consider possible alternatives. One reason

prior actors' positions and arguments seem odd or obtuse to us is that we have misconceived their position.

The better understanding of the oaths mandated by the then in force 1791 Act was that they were, if not neutral with respect to religion, they were, like their recent statutory predecessors, not overtly Christological. If Henry could have taken these oaths in good conscience, then why did he not read the required texts, sign the required documents, and do all this in the standard way? And if that is, in fact, what he did do, then why was not his defense based on the merits—developing the actual facts of what had happened on November 20, 1809, an exposition of the governing statutory provisions, and an application of law to those facts? Indeed, one wonders why was any substantive legal defense necessary beyond a simple merits-based defense. Even if Henry and others still wanted to reach for the stars by discussing Jeffersonian principles relating to religious toleration, would not one expect someone, perhaps William Drew, the future state Attorney General, to have made these more mundane merits-based arguments in the alternative?

Our knowledge of North Carolina state law with respect to oaths in 1777, 1791, and 1809 has not provided any meaningful solution to the question of what Jacob Henry did on November 20, 1809. Rather, it has only deepened the mystery.

V. SO WHAT DID NOT HAPPEN ON NOVEMBER 20, 1809?

There are no contemporaneous sources documenting what Henry did on November 20, 1809—what oath he spoke, how he took it, and what religious book (if any) he held. One approach might be to stop there, and to admit defeat. There are limits to human knowledge, and that includes knowledge of our past. And if we admit we do not know what happened, we remain somewhat advantaged over prior researchers: who wrongly believed that they understood what had happened that day[74] and who incorrectly characterized what the legal system had mandated by way of Article 32's religious test.

Still, some reasonable inferences may be possible based on our records of the statutes then in force and on the January 4, 1810 newspaper accounts of the December 6, 1809 debate on Mills's motion. Even if those sources cannot determine what precisely happened, they may be sufficient to rule out some possibilities. In doing so, we leave the relatively safe ground of documented history, for hypothesis, inference, and conjecture.

One possibility is this article has failed to properly identify the controlling legal requirements. Perhaps post-1791, the law of oaths in North Carolina took a distinctly Christological turn. Another possibility is that notwithstanding the plain text of the 1791 Act, the prevailing understanding was that oath-takers were required to

74 Confucius, *The Analects* § 2.17 ('The Master: To know when you know something, and to know when you don't know, that's knowledge'), <https://tinyurl.com/cm5dvep7>; Plato, *Apology* § 29d (Socrates: 'Well, although I do not suppose that either of us knows anything really beautiful and good, I am better off than he is—for he knows nothing, and thinks that he knows. I neither know nor think that I know. In this latter particular, then, I seem to have slightly the advantage of him'), <http://classics.mit.edu/Plato/apology.html>; see also Michael Shermer, 'Rumsfeld's Wisdom' (*Scientific American*, September 1, 2005) <https://tinyurl.com/24cc2n32> accessed September 14, 2021 ('[T]here are also unknown unknowns, the ones we don't know we don't know').

hold a copy of the Christian Bible or Christian New Testament. These possibilities seem less than likely. The general direction of debate and reform from 1776 to 1835, and then again into 1868 was to liberalize Article 32's religious test—first in regard to non-Protestant Christians, and then in regard to Jews and other monotheists. As for an implicit requirement that oath-takers swear while holding the Christian Bible, that would be directly contrary to William Drew's statement in debate, and there is no record of anyone's having objected to his statement.

Another possibility is akin to the standard narrative. Henry took the standard oath, in the standard way, while holding the Jewish Bible or, perhaps, he was holding no book at all. As far as holding no book at all, that seems very unlikely. Joseph Pickens testified that when the members qualified, he saw Henry draw 'a small book' 'from his pocket'. Pickens did not identify the book, its title, or contents. Samuel M'Guire's testimony was much the same as Pickens's. So, we can conclude with some confidence that there was a book. We have a few other facts, and we might draw reasonable inferences from them. As the clerk indicated, Henry had a copy of the Jewish Bible on hand at some time during the day's proceedings. Henry was Jewish—at least according to the standard narrative. Based on all this, one might reasonably conclude that Henry attempted to comply with the 1791 Act while holding a copy of the Jewish Bible. This proposed narrative is a distinct possibility, but it has some rather obvious problems.

As explained, if this is what Henry did, then there is a good argument that he actually complied with the 1791 Act. Yet, as far as our records show, he and his closest supporter on the Commons floor, William Gaston, did not make any such defense—not even as an alternative argument in addition to the ones they actually made. William Drew began a defense along these lines, but his defense was not aggressive or fully developed. A second possibility is that the 1791 Act was to be construed strictly to the extent that a person's holding *any* religious book at all would in consequence invalidate the oath. But that is not plausible. It would mean that any member's holding a Christian Bible would find himself in difficulty. The third possibility is that members were put to a strict choice: hold a Christian Bible or hold no religious text at all. But this view also presents abundant difficulties. In 1777, the statutory framework had already shifted away from express Christological references towards the more vanilla 'So help me God' language. This practice was adhered to in the 1791 Act. Furthermore, section 4 of the 1791 Act seemingly took using prior statutes, such as the 1777 Act, as a gloss off the (interpretive) table for understanding the 1791 Act. Finally, no one actually made this argument, that is, that the 1791 Act should be construed in light of the 1777 Act, in the recorded debate.

There is another problem with this narrative—that Henry swore while holding the Jewish Bible and that his doing so somehow took him out of compliance with the 1791 Act. The proposed remedy—vacating Henry's seat—is all wrong.[75] Neither Article 12, nor the 1791 Act has one word prescribing the loss of one's seat for failing to take the oath or for taking the wrong oath. If Henry took the wrong oath, but was

75 See eg Iredell and Martin, vol 1 (n 69) 387 (expressly providing, in a 1784 statute, for vacating a member's seat when the member accepts lucrative office); ibid, vol 2 (n 69) 177 (expressly providing, in an 1801 statute, for expulsion of members involved in bribery).

acting in good faith, that is, he mistakenly thought his oath complied with the law, then the proper remedy is not to vacate the seat. Generally, the consequence of a member-elect's failing to take the qualifying oath or of his taking the wrong oath (in good faith) is that he cannot participate in legislative proceedings (with the possible exception of a parliamentary inquiry involving his own contested membership) until such time as he complies by taking a valid oath.[76] The remedy for taking the wrong oath is simply to retake the oath in the proper fashion.

VI. JACOB HENRY AT THE END OF HIS POLITICAL CAREER

It is not just that Jacob Henry failed to put forward the most obvious defense: that is, he had actually complied with the 1791 Act. There is a further problem: the defense which he did put forward is difficult to square with his party affiliation. Henry was a Federalist.[77] Admittedly, his speech was not built around 1789, Dr Price, rabid anti-clericalism, and glorification of the French revolution's guillotine, but it was a defense built around Jeffersonian egalitarian ideals—even to the extent of attacking the handiwork of the framers of the state's 1776 constitution.[78] Why do this, particularly when other defenses were easily at hand?

A Federalist defense would have emphasized not the future, or, at least, not just the future, but the past. Such a defense would have expressed continuity and agreement with what had come before. And even if it would not hallow tradition in the Burkean sense, Henry's speech might have read more like this:

> *I am Jacob Henry. I was elected by the good people of Beaufort and Carteret County. I stand with them and with 1776, with those who fought and died so that we*[79] *could be free, and with those who left us a good state constitution and good state laws. I obeyed that Constitution, and I obeyed those laws. My election was fairly held. My title to my seat is as good as the title any one of you have to your seat. I ask for no special consideration, but only the regular application of the law as it has applied to a good many others who have been and continue to appear in this chamber, whatever their religious views, Protestant or otherwise. And just as I have not in the past complained of Article 32 and its religious test, I do not now use my own personal difficulties as a point of entry to launch broadsides against our way of life, our state's Constitution, and our state's laws which have served our commonwealth well to date. One day we should have that debate on Article 32's religious test, but this is not that day.*

76 See generally (n 28), and accompanying text (reporting text of North Carolina Const. of 1776 art 12, using 'before taking his seat' language).

77 Borden (n 6) 43. See also Rogoff (n 7) 10; Fischer (n 20) 169.

78 See 'Jacob Henry in the North Carolina Legislature' in Agar (n 12) 227, 228 ('It is difficult to conceive how such a provision [as Article 32] crept into the [North Carolina] [C]onstitution, unless it was from the difficulty the human mind feels in suddenly emancipating itself from fetters by which it has long been enchained').

79 'We' here had definite limits. In 1810, just a short time after Jacob Henry gave his celebrated speech on equality and tolerance, Henry owned 12 slaves. See Rogoff (n 5) 43. Henry was counted in South Carolina's 1820 census. He was listed as a 'head of household'. At that time, it appears he owned 15 slaves. See Ira Rosenswaike, 'The Jewish Population of the United States as Estimated from the Census of 1820' (1963) 53 American Jewish Historical Quarterly 131, 143, 168.

Furthermore, the problem with the standard narrative is not just that Henry gave the wrong speech, he also had the wrong help. Why was Judge Taylor, a Republican, the primary (and, perhaps, the only) person who came to his aid? Was there no Federalist who could aid him in drafting his speech?[80]

One possibility is that a smart political operative will take good help where he can find it. As for his Jeffersonian speech, that might mean that Henry had the minority Federalist caucus locked up, and he was only working towards getting members of the majority Republican faction on board.[81] But the alternative is that Henry was already a dead man walking or so he thought: that he had already alienated members of his own caucus, who he did not believe he could entirely rely upon for help, and, in the end, he was reaching out to members of the other political faction for any support he might find.

Many historians have suggested that Henry was popular with his constituents and other members of the Commons.[82] And other records suggest that Mills's motion was defeated unanimously.[83] But Henry never again held elected public office; indeed, there is no record of his even having attempted to run again for public office. An odd result. And if Henry was a dead man walking, so was Mills. Mills's fellow Republicans must have been livid to be cast in the role of religious inquisitors with regard to enforcing Article 32's religious test, much less being asked to interpret Article 12 along denominational lines, when no such interpretation was strictly necessary. As it was for Henry, 1809 was the finale, if not the dénouement, of Mills's political career. Mills never again held elected public office, and there is no record of his even having attempted to run again for public office.

VII. SO WHAT DID HAPPEN?

At this point, I feel some obligation to tell the reader to put this article down. What comes next will, for some, be unexpected and difficult. For a few others, it may follow almost logically from what has come before. From here, you go forward at your own risk and do so on your own recognizance.

80 See Marcus (n 11) 507 (suggesting, absent documentary support, that Gaston, a Federalist, aided Henry in drafting his speech). For further information on Gaston, see Nicholas P Miller, 'North Carolina: Early Toleration and Disestablishment' in Carl H Esbeck and Jonathan J Den Hartog (eds), *Disestablishment and Religious Dissent: Church–State Relations in the New American States, 1776–1833* (Columbia, MO, University of Missouri Press 2019) 97, 110–11 (discussing Gaston).

81 Gaston, a Federalist, had been speaker of the Commons during the tail end of the 1808 annual session. He was a nominee for speaker at the start of the 1809 session. But the chamber, instead, elected, by a vote of 95 to 29, Thomas Davis, a Republican. See Cheney (n 37) 255, 348 n 297; 'North Carolina 1809 Speaker of the House' (*A New Nation Votes/American Election Returns 1787–1825*) <https://elections.lib.tufts.edu/catalog/dr26xz66h> accessed September 14, 2021.

82 Marcus (n 11) 507–08 ('Jacob Henry retained his seat in 1809, but not because his colleagues were impressed with his spiritual vision or the compulsion of his arguments; he retained his seat despite his arguments. They liked the man; that was sufficient for them'); Jonathan D Sarna and Benjamin Shapell, *Lincoln and the Jews: A History* (New York, Thomas Dunne Books 2015) 8 (noting that Henry's 'colleagues . . . liked him'); Huhner, 'The Struggle for Religious Liberty' (n 5) 48 ('Henry seems to have been popular with his constituents and also to have had many strong friends among the leaders in the House').

83 See 'State Legislature/House of Commons/Wednesday, Dec. 6' *The Star* (Raleigh, NC, December 7, 1809) 230–31.

If Henry took the oaths prescribed by the 1791 Act, in the prescribed manner, while holding a book, and that book was not the Jewish Bible, then what book was he holding? To put it another way, when all alternatives are explored, and only one alternative remains, then we should consider that alternative.

Henry was holding the Christian Bible when he took the oath.

The problem was not that Henry failed to recite and sign the required text, nor that he failed to follow the required procedures, nor that he swore while holding a proscribed religious book. It was *not* a proscribed book. The problem was that *his* using that particular book, rightly or wrongly, could be perceived as a kind of lie.[84] If this is what had happened, then no discussion about good faith error may have been possible. And a second oath, even if it were in the prescribed manner, with or without a religious book in hand, could not correct what already had been done. Ironically, if he had just used a Jewish Bible, everything might have continued forward like clockwork.

Henry's using a Christian Bible would also explain why he never made any defense on the merits—that is, why he never argued that he had actually complied with the 1791 Act. A fact-based defense would have placed his conduct front and center. A defense explaining the relevant legal provisions, such as the 1791 Act, might have led frustrated members of the chamber to ask Henry to testify under oath, and then they would have asked: 'What oath did you recite and sign, how did you take it, and what book, if any, were you holding?' In these circumstances, is it really any surprise that Henry turned to Jeffersonian platitudes about equality and toleration?[85] Henry's best defense was a slew of witnesses who could not quite remember or see precisely

84 Admittedly, this claim is essentially an intuition about how Henry's colleagues and the wider public would have understood his conduct. The argument that Henry's swearing on the Christian New Testament may have been construed as a kind of lie is based on Drew's conception of an oath. The purpose of the form of an oath is to bind the declarant's conscience. If the book the oath-taker swears over is not one which has meaning to him, then, arguably, that form of oath does not achieve its intended purpose. To many, such an oath would appear as a sham. See generally (n 38), and accompanying text (quoting William Drew's speech), and (n 53) to (n 59), and accompanying text (discussing oaths); 'Proceedings Relating to the Expulsion of Ezekiel Hart from the House of Assembly of Lower-Canada' (1808) in Arthur G Doughty and Duncan A McArthur (eds), *Public Archives/Documents Relating to the Constitutional History of Canada 1791–1818* (Ottawa, Canada, Parmelee 1914) 351, 356 (excluding Hart, a Jewish member, notwithstanding that he took the required oath while holding a Christian Bible, apparently because such an oath 'could not bind him'); Steven Lapidus, 'The Golden Century?: Jews in Nineteenth-Century British North America' in Ira Robinson (ed), *Canada's Jews: In Time, Space and Spirit* (Brighton, MA, Academic Studies Press 2013) 29, 31 (in 1809, the Lower Canada Legislative 'Assembly again rejected [Hart's] oath, claiming that a Jew cannot swear "on the true faith of a Christian", as that would be fraudulent'). On the other hand, one notes that Henry, perhaps under the influence of Judge Taylor, ended his speech in his own defense with a quotation from *Matthew*. I do not suggest that Henry's quoting the Christian New Testament would have been understood as a kind of lie. That said, quoting a book and swearing upon it are not the same thing. Henry's quoting *Matthew* might also have been, in part, understood as an after-the-fact effort to make the point that religious minorities often find themselves speaking in the voice of the dominant culture and its religious tradition. Not all such efforts are lies—on occasion, they are a compliment.

85 See generally (n 78) and (n 79), and accompanying text (discussing Henry's speech).

what Henry had done on November 20, 1809. As for William Drew, he quite conveniently made an argument which was entirely fact-free. Like the witnesses before the Committee of the Whole, I suspect Drew wanted to draw the members' attention away from what Henry actually had done, all while leaving the impression, without ever clearly stating, that Henry had sworn on the Jewish Bible.

It was all very subtle. Perhaps it was not accidental that Drew became Attorney General and held that high office for some ten years.

VIII. JACOB HENRY: AN AMERICAN GLYNDWR MICHAEL

If the thesis of this article is correct, then the standard narrative about Jacob Henry is not quite right. It never has been. If so, Jacob Henry is a historical personality something like the late, lamented Glyndwr Michael.[86]

Henry was not a hero, nor was he an anti-hero. He was a man who, at best, inadvertently or, at worst, mistakenly made a singularly poor choice in a moment of carelessness, doubt, or weakness. After that, his opponent pounced and sought to entrap him in something like a perjury trap. Some evidence supporting this position can be found in Mills's charge. Mills asserted that Henry 'denies the divine authority of the New Testament'. Here Mills used the present tense. Additionally, Mills alleged that Henry 'refused to take the oath prescribed by law for his qualification'. Here Mills used the past tense. The second charge went to past observable conduct. The present tense allegation may have anticipated what Henry would have said had he been interrogated like the witnesses who had testified before the Commons' Committee of the Whole.

To put it another way, if Henry had testified as a witness, he might have been asked anything, including: Do you believe in the 'truth of the Protestant religion, and the divine authority of the New Testament?' None of Henry's colleagues had an interest in casting Henry out of the Commons on that basis. The Jeffersonian Republicans surely would have been against that. And although many Federalists might have been willing to defend Article 32's religious test, it is somewhat difficult to imagine that any significant number of members wanted Article 12 and the 1791 Act's state oaths of allegiance, which tested *political* loyalty, to be used as tools to ferret out *religious* non-conformity and non-conformists. But the fact that few would have wanted to expel Henry on that basis is only one part of our story.

It is equally true that few would have wanted Henry to run for or serve another legislative term. If Henry had refrained from holding the Jewish Bible, and, instead,

86 See 'Y Dyn Na Fu Erioed' (*Aberbargoed, Borough of Caerphilly, Wales, United Kingdom War Memorial*) <https://tinyurl.com/43z4ym3a> accessed September 14, 2021. See also Ewen Montagu, CBE, KC, *The Man Who Never Was* (Philadelphia, PA, Lippincott 1954) (publicizing the details of Operation Mincemeat: including the story of Glyndwr Michael, who posthumously served as Major William Martin, RM); Ronald Neame (director), *The Man Who Never Was* (Sumar Productions 1956). Montagu was elected president of the Anglo-Jewish Association in 1949, and he became president of the United Synagogue in 1954. See *Year Book of the Anglo-Jewish Association 1951, 5711/5712* (London, Office of the Anglo-Jewish Association nd) 93–94.

chose to hold a Christian Bible, then his colleagues would have gotten the message. What was that message? The message, as *they* would have understood it, was that Henry did not trust them. Henry's constituents might have felt much the same as Henry's Commons colleagues. Perhaps inquisitors do not mind being thought of in this manner; they might even prefer it. But in 1809, many others were likely to have taken exception. North Carolina's citizens, including those who supported Article 32, Article 12, and the 1791 Act (which lacked any express Christological references), might have believed they lived in a reasonably just polity among a reasonably just people.[87] Henry's speech suggested that the polity and its 1776 state constitution were unjust—just as his conduct suggested that his fellow citizens and their way of life had more in common with the Spanish Inquisition's auto-da-fé than with the Palace of Westminster's courts of justice.[88]

So why did he do it? We can only guess. Henry wanted to smooth things over; he wanted to fit in; he probably thought no one would notice. What followed were consequences he did not plan, and what he came to stand for in the popular mind may have been principles to which he did not subscribe. The service he did his country through the popular reimagination of November 20, 1809 was not of his own making.

By the 1820 census, Henry had migrated to Charleston, South Carolina,[89] and established connections with its relatively large and affluent, by New World standards, Jewish community.[90] One guesses that among them, Henry would find some comfort—among his coreligionists and the descendants of Marranos,[91] and other

87 See eg EW Caruthers, *A Sketch of the Life and Character of the Rev. David Caldwell, D.D.* (Greensborough, NC, Swaim and Sherwood 1842) 190 ('[M]any still doubt the propriety of altering . . . [A]rticle [32], as was done in 1835'), <https://tinyurl.com/y6sksmgg>; Stephen B Weeks, 'The History of Negro Suffrage in the South' (1894) 9 Political Science Quarterly 671, 674–75 (explaining that 'free negroes' enjoyed the right to vote under the 1776 North Carolina Constitution—a right which lasted until the 1835 amendments to the state constitution), <https://digital.lib.ecu.edu/text/10354>.

88 How substantial the differences were between these institutions is a matter which could be debated. Compare eg Robert Bolt, *A Man for All Seasons: A Play in Two Acts* (New York, Random House 1962) 44 ('Norfolk: "Cromwell, are you threatening me?" Cromwell: "My dear Norfolk, this isn't Spain. This is England"'), with Hilary Mantel, *Wolf Hall: A Novel* (New York, Henry Holt 2009) 325 ('[Thomas Cromwell:] "Are you threatening me? I'm just interested". "Yes", More says sadly. "Yes, that is precisely what I am doing"').

89 See Barnes (n 5) 5 and n 22 (explaining that Henry 'drops off the Carteret County tax list in 1818'). See generally (n 5) and (n 79) (collecting biographical information on Henry). After migrating to South Carolina, it appears Henry became active in that state's militia. See 'Federalist Artillery' *Southern Patriot, and Commercial Advertiser* (Charleston, SC, January 3, 1822) 2 (reporting that 'Jacob Henry, sec'ry' called a 'Meeting of your Company').

90 See Barnett A Elzas, *The Jews of South Carolina* (Philadelphia, PA, Lippincott 1905) 135 (noting that a 'Henry, Jacob' was listed in 1823 records of Beth Elo[k]im, a Charleston, South Carolina congregation); 'Henry, Jacob' in Powell (n 5) 113–14 ('Henry also died in Charleston and probably was buried alongside his wife and mother in the local Hebrew cemetery'). But cf Funeral Notice, *The Charleston Daily Courier* (Charleston, SC, October 14, 1847) 3 (publishing Jacob Henry's funeral notice, and 'particularly request[ing]' friends from the 'Masonic Fraternity' to attend, absent any specific indication of Jewish affiliation).

91 See Pocket Guide to Kahal Kadosh Beth Elo[k]im and Charleston Jewish History (2014) 8, <https://tinyurl.com/a646s8kw> accessed September 13, 2021 (noting congregation's Marrano connections).

crypto-Jews. He could enjoy basking in their and others' pleasant admiration,[92] and they would not ask too many uncomfortable questions.

As few have since.

Dublin, on the Liffey, 16 Adar 5781

92 See Brent Gilchrist, *Cultus Americanus: Varieties of the Liberal Tradition in American Political Culture, 1600–1865* (Lanham, MD, Lexington Books 2006) 175 ('Henry was successful, well respected, and popular amongst his electorate; he bore the signs of American saintliness'); Rosenswaike (n 5) 120 (asking: 'Why should Jacob Henry have fallen into such obscurity during his lifetime that his death—unlike that of his wife, or of his mother—produced no obituary?'). See generally (n 7) and (n 90) (discussing records of Henry's affiliation with the Jewish community).