A Religious Test in America? The 1809 Motion to Vacate Jacob Henry's North Carolina State Legislative Seat—A Reevaluation of the Primary Sources

Seth Barrett Tillman

During 1776, but prior to announcing the Declaration of Independence, the Continental Congress instructed the state legislatures to call conventions to draft constitutions to regularize their local state governments so that each could be administered in the name of the people and absent royal governors and royal officers.[1] North Carolina heeded the revolutionary call—in 1776, it implemented a new constitution with a bill of rights.[2] One interesting feature of the 1776 North Carolina Constitution was that Article 32 imposed a religious test. Article 32 stated:

> 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.[3]

Article 32's religious test extended to four categories of persons, including: atheists, that is, those "who . . . deny the being of God"; non-Protestants, that is, those "who . . . deny . . . the truth of the Protestant religion"; non-Christians, that is, those

1. Erwin C. Surrency, "The Transition from Colonialism to Independence," *American Journal of Legal History* 46 (January 2004): 55, 57–58. See, for example, *Journals of the Continental Congress 1774–1789: 1776 January 1–June 4*, multiple vols. (Washington, D.C.: Government Printing Office, 1906), 4:357–358 (May 15, 1776) and 4:341–342 (May 10, 1776).
2. "Th[e] [1776 state] constitution was framed by a 'Congress,' 'elected and chosen for that particular purpose,' which assembled at Halifax[,] November 12, 1776, and completed its labors December 18, 1776. It was not submitted to the people for ratification." Francis Newton Thorpe, ed., *The Federal and State Constitutions*, 7 vols. (Washington, D.C.: Government Printing Office, 1909), 5:2787.
3. Ibid., 5:2793.

"who . . . deny . . . the divine authority either of the Old or New Testaments"; and an amorphous category of persons "who . . . hold religious principles incompatible with the freedom and safety of the State." A person falling in 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." What the scope of this language is has been a matter of debate.

This particular provision would remain on the books, largely unenforced,[4] until North Carolina revisited the issue during the 1835 North Carolina Constitutional Convention, which drafted proposed amendments, subsequently ratified by the people, to the 1776 North Carolina Constitution.[5] Still, in 1809, there was one (apparent) attempt to enforce the religious test provision.[6] In 1809, Jacob Henry[7] was

4. Even if not enforced, Article 32 likely deterred some persons from seeking state positions. And given the provision's lack of clarity as to which persons and what positions were covered, candidates might have refrained from seeking posts for which they were, arguably, legally eligible. Second, it is not entirely clear what efforts—other than the Henry motion—were taken to enforce Article 32. Milton Ready has described it as "[s]eldom enforced." Ready, *The Tar Heel State: A History of North Carolina* (Columbia: University of South Carolina Press, 2005), 170. But see William S. Powell, *North Carolina through Four Centuries* (Chapel Hill: University of North Carolina Press, 1989), 273 (asserting that the Henry motion was the only attempt to enforce Article 32).

5. In consequence of amendments to the 1776 North Carolina Constitution proposed by the 1835 North Carolina Constitutional Convention, the religious test was amended: it permitted Protestant as well as non-Protestant Christians—that is, all Christians—to hold office. Jews, adherents of other non-Christian religions, as well as atheists and agnostics were still left in a political wilderness of sorts. Ronnie W. Faulkner, "Constitution of 1835," North Carolina History Project, https://northcarolinahistory.org/encyclopedia/constitution-of-1835/. But see David Sorkin, "Is American Jewry Exceptional? Comparing Jewish Emancipation in Europe and America," *American Jewish History* 96 (September 2010): 175, 191 ("The North Carolina constitution permitted only Protestants to hold office until 1868."). The proscription against Jews and at least some adherents of other non-Christian religions was abandoned by the 1868 state constitution. North Carolina Const. of 1868, art. 6, section 5 (mandating disqualification for office as extending to "All persons who shall deny the being of Almighty God."). This religious test remains in the North Carolina Constitution of 1971, now in force. See art. 6, section 8. On its face, this proscription still extends to atheists, agnostics, and, perhaps, others. Nevertheless, the provision is likely inoperative in consequence of the incorporation of the First Amendment against the States and settled U.S. Supreme Court case law. *Torcaso v. Watkins*, *United States Reports*, 367 (Supreme Court of the United States 1961) 488 (Black, J [Justice]). But see Eric Eisner, "'Suffer Not the Evil One': Unitarianism and the 1826 Maryland Jew Bill," *Journal of Religious History* 44 (September 2020): 338, 354 n. 77 (asserting the "formal abolition" of North Carolina's religious test).

6. John H. Wheeler, *Historical Sketches of North Carolina, from 1584 to 1851*, 2 vols. (Philadelphia: Lippincott, Grambo and Co., 1851), 2:74 (stating that the Jacob Henry incident was "the first time in the history of the State that this question had been made"); see also James S. Kabala, *Church-State Relations in the Early American Republic, 1787–1846* (Abingdon, Engl.: Routledge, 2016), 110. See note 4, above.

7. Jacob Henry was one of two House members for Carteret County. *Journal of the House of Commons of the State of North Carolina*, multiple vols. (Raleigh, N.C.: Gales and Seaton, n.d.), 1 (November 20, 1809). Henry's home was in Beaufort, the county seat. "Marriage and Death Notices from the City Gazette of Charleston, S.C.," *South Carolina Historical Magazine* 53 (July 1952): 172, 174. On thin evidence, Leon Hühner suggested that Jacob Henry was an American Patriot and prisoner of the British during the War of Independence. Leon Hühner, "The Jews of South Carolina from the Earliest Settlement to the End of the American Revolution," *Publications of the American Jewish Historical Society* 12 (1904): 39, 55–56. However, it seems uncontroversial that Henry was born between 1774 and 1775. *Dictionary of North Carolina Biography*, s.v. "Henry, Jacob"; Ira Rosenwaike, "Further Light on Jacob Henry," *American Jewish Archives* 22 (November 1970): 116, 120. Thus, Hühner's claim as to Henry's purported War of Independence service seems very

elected and qualified for a second annual term[8] in North Carolina's lower legislative house, the House of Commons, as one of two members for Carteret County. Henry was Jewish.[9] The House convened on November 20, 1809, and on December 5, 1809, another member, Hugh C. Mills, put forward a motion to declare Henry's seat vacant based on the 1776 North Carolina Constitution's religious test. The next day, the Commons adjudicated the motion, and the motion failed. Henry kept his seat.[10]

The modern postbellum tertiary literature relating to the 1809 motion to vacate Henry's seat is based largely on an antebellum literature, i.e., secondary sources from the

mistaken. There is, however, good reason to believe that Henry was a captain in the state militia during the War of 1812. Leonard Rogoff, *Down Home: Jewish Life in North Carolina* (Chapel Hill: University of North Carolina Press, 2010), 43. Still, it is possible, and indeed likely, that there was more than one "Jacob Henry" in North Carolina in the early 1800s.

8. Jacob Henry had also been elected to the 1808 annual legislative term. Morton Borden, *Jews, Turks, and Infidels* (Chapel Hill: University of North Carolina Press, 1984), 43 ("[Henry] served in the 1808 session without objection, possibly because no one noticed that he did not take the oath, or because no one recalled the constitutional prohibition."). Borden puts forward no reason to suspect that Henry failed to take the oath at the start of the 1808 legislative term. See also Frederic Cople Jaher, *The Jews and the Nation: Revolution, Emancipation, State Formation, and the Liberal Paradigm in America and France* (Princeton, N.J.: Princeton University Press, 2002), 143; Jacob Rader Marcus, *United States Jewry, 1776–1985*, multiple vols. (Detroit: Wayne State University Press, 1989), 1:506, 507; Oscar Reiss, *The Jews in Colonial America* (Jefferson, N.C.: McFarland and Co., 2004), 117.

9. That is, according to the standard narrative, Henry was Jewish. The scope, extent, or definition of 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 wider state and national political community, and to modern readers are all questions well beyond the scope of this article. As explained below, several of Henry's colleagues in the Commons had no clear idea whether Henry was Jewish. See notes 133 to 135, and accompanying text, below. Likewise, the legal system (in the form of the North Carolina House of Commons and its committee of the whole) never held any substantial debate on such abstractions. More to the point, the words "Jewish," "Judaism," and "Jew" nowhere appear in Henry's speech in his own defense. Compare Leonard Rogoff, *Homelands: Southern Jewish Identity in Durham and Chapel Hill, North Carolina* (Tuscaloosa: University of Alabama Press, 2001), 10 ("Henry never mentioned Judaism by name. . . ."), with 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 University Press, 2008), 21, 40. Likewise, the words "Jewish," "Judaism," and "Jew" do not appear in Mills's motion to declare Henry's seat vacant.

10. *Journal of the House of Commons*, 26–27 (December 5, 1809); ibid., 28 (December 6, 1809). One modern commentator has suggested that Henry did not prevail. See Justice Barbara A. Jackson, "Called to Duty: Justice William J. Gaston," *North Carolina Law Review* 94 (September 2016): 2051, 2058. Wheeler and more recent commentators have made the very same mistake. Wheeler, *Historical Sketches of North Carolina*, 2:74; see also Alan Dershowitz, *Blasphemy: How the Religious Right is Hijacking our Declaration of Independence* (Hoboken, N.J.: John Wiley and Sons, 2007), 78. Another commentator wrote that Henry was elected in 1810, not 1809. Leon Hühner, "The Jews of North Carolina Prior to 1800," *Publications of the American Jewish Historical Society* 29 (1925): 137, 140; see also E. H. Lindo, *A Jewish Calendar for Sixty-Four Years* (London: L. Thompson, 1838), 132. More than one commentator has suggested the events at issue happened in 1808. See Ready, *The Tar Heel State*, 173; and Allen J. Going, review of *Jews in the South*, by Leonard Dinnerstein and Mary Dale Palsson, eds., *Historian* 36 (May 1974): 563. The source of this error may have been Justice Gaston's speech from the 1835 state constitutional convention. See note 48, and accompanying text, below.

Jacob Henry's house, built around 1794, is located on Front Street in Beaufort, North Carolina in Carteret County. It was listed on the National Register of Historic Places in 1973. Photograph, dated March 1972, from the State Archives of North Carolina, Raleigh.

mid-1810s into the 1850s, and primary documents from that period.[11] Some of those early sources were part of the public debate surrounding reform of the 1776 North Carolina Constitution's religious test, including debates on proposed amendments to reform or abolish Article 32, heard in the 1835 North Carolina Constitutional Convention. Some of those sources carry good indicia of authenticity and reliability, as some of the 1835 participants had been part of the earlier 1809 drama. On the other hand, there is some reason to doubt the reliability of these sources as guides for understanding either the events of 1809 or the North Carolina Constitution of 1776, as these later sources were created during ongoing debates over political reform. Furthermore, these were not contemporaneous records; by 1835, when the state constitutional convention met, memories of 1809 and 1776 might well have grown dim.[12]

11. Perhaps the best example of this modern postbellum tertiary literature is Leon Hühner, "The Struggle for Religious Liberty in North Carolina, with Special Reference to the Jews," *Publications of the American Jewish Historical Society* 16 (1907): 37, 46–54, 68–71.
12. Certainly, Justice Gaston, speaking in 1835, at the state constitutional convention, erred when reporting that that the Henry proceedings happened in 1808, rather than in 1809. See note 48, and accompanying text, below.

This article will summarize the standard narrative handed down from the 1830s, to illustrate how that narrative has been misunderstood (at least in part) by historians and other academics in more modern times, along with problems in that narrative. It will also examine primary sources from December 1809 and early 1810. These records are not discussed in the largest part of the extant Jacob Henry literature, and they offer a significantly different account of what happened on the floor of the Commons on December 5 and 6, 1809. The article will then offer some personal reflections on the difficulties surrounding legal history, particularly where (as here) the underlying historical issues touch on deeply held moral and political intuitions about the good society and our common historical past.

On November 20, 1809, the North Carolina House of Commons convened. The returning officers reported which persons had been elected, and the members-elect, without reported objections, took their oaths.[13] On December 5, 1809, a new train of events was put in motion by Hugh C. Mills—one of two members of the House of Commons for Rockingham County.[14] On that date, the House of Commons' *Journal* reported:

> 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 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.[15]

Mills's "denies the divine authority of the New Testament"-language closely tracks the text of Article 32's religious test. Mills's assertion that Henry "refused to take the oath prescribed by law for his qualification" is considerably more opaque.

13. *Journal of the House of Commons*, 1–2 (November 20, 1809).
14. Hugh C. Mills was one of two House members for Rockingham County. *Journal of the House of Commons*, 1 (November 20, 1809). This was Mills's first and only term. Perhaps Mills's intervention against Jacob Henry was not welcomed by his constituents. *The Legislative Manual and Political Register of the State of North Carolina, for the Year 1874* (Raleigh, N.C.: Josiah Turner Jr., 1874), 327; "Mills, Hugh," A New Nation Votes: American Election Returns, 1787–1825, https://elections.lib.tufts.edu/catalog/MH0078. In 1824, a newspaper reported the "murder, most foul" of a "Hugh C. Mills" in St. Francisville, Louisiana. *New Orleans Le Courrier de la Louisiane*, February 6, 1824. Is this the same Hugh C. Mills?
15. *Journal of the House of Commons*, 27 (December 5, 1809).

It is not clear if Mills was asserting that Henry had refused to take an oath which had been imposed by the 1776 state constitution,[16] or that Henry had refused to take an oath which had been established by statute or by the House's rules, or that Henry had refused to take an oath which, although not established by positive law, had been established by custom. Moreover, it is not clear if Mills intended this second allegation as an independent basis to vacate Henry's seat, or if this allegation was presented as evidence that the application of Article 32's religious test made Henry ineligible to hold his seat. To put it another way, was Mills's allegation that Henry refused to take the oath an independent basis to declare his seat vacant, or was this allegation evidence that Henry "denie[d] the divine authority of the New Testament." Or, possibly, was it both?

On December 6, 1809, the Commons' *Journal* reported:

> 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 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.[17]

In the early national period, American state legislatures and Congress did not produce contemporaneous reports of their debates in their journals or other official records.[18] In the antebellum period, state legislative journals functioned much like (contemporaneous and modern) court dockets—journals reported a very limited range of information and events. The primary items included were: the date (and, sometimes, the time of day) when the legislature was in session and when it was adjourned (or went into recess or terminated *sine die*); a list of its members; reports of the election of its presiding officer and the appointment of its staff; messages from

16. North Carolina Const. of 1776, art. 12 ("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."). It is curious that none of the primary or secondary sources on Jacob Henry quote the text of the oath at issue in 1809. Like Article 6 of the United States Constitution, Article 12 of the North Carolina Constitution of 1776 does not provide the form or text of the constitutional oath for members of the legislature. It seems likely that the text of the oath mandated by Article 12 was set by statute. Eli Lederhendler, *American Jewry: A New History* (Cambridge, Engl.: Cambridge University Press, 2017), 17 ("The House nevertheless voted to seat [Henry], regardless of the statute.").

17. *Journal of the House of Commons*, 28 (December 6, 1809).

18. Federal practice before the early U.S. House of Representatives and Senate was not much different. "*The Annals of Congress*, formally known as *The Debates and Proceedings in the Congress of the United States*, cover

the executive and messages from the other house (if the legislature were bicameral); titles of petitions from the public; reports of votes on orders and resolutions (which are themselves the parliamentary building blocks of bills); and, finally, notations regarding significant legislative motion practice. It is this last type of information that the *Journal* reported about the Henry motion. Thus, it is not surprising that one gleans very little substantive history from these two *Journal* entries. The *Journal* simply does not meaningfully report the debate, arguments, or evidence put forward by the members for and against the motion. Based on the *Journal*, it is not clear precisely what the House—acting as a committee of the whole—did or what specific arguments or proofs (if any) it sought or heard. We know only that the committee of the whole recommended rejecting the resolution, and the full house concurred in the recommendation. So, the primary historical puzzle is: What actually swayed the members to vote as they did? There is also a secondary puzzle: Why did Mills object to Henry's qualifications on December 5, 1809? Why did he not do so when the legislature convened its annual session and the members qualified on November 20, 1809?[19]

According to the standard narrative, two primary arguments were put forward for rejecting Mills's motion to declare Henry's seat vacant. The first related to broad principles concerning freedom of religion and conscience, toleration, democracy, and equality. That argument was made by Henry in a speech in his own defense. The second argument was more technical. Article 32 textually extended only to those holding an "office or place of trust or profit in the civil department within this State"; some members may have taken the position that members of the legislature do not hold "office" and so fell outside the scope of this provision.[20]

---

the 1st Congress through the first session of the 18th Congress, from 1789 to 1824. The *Annals* were not published contemporaneously, but were compiled between 1834 and 1856, using the best records available, primarily newspaper accounts. Speeches are paraphrased rather than presented verbatim, but the record of debate is nonetheless fuller than that available from the House and Senate Journals." "Annals of Congress," A Century of Lawmaking for a New Nation/U.S. Congressional Documents and Debates 1774–1875, https://memory.loc.gov/ammem/amlaw/lwac.html. See John V. Orth, " 'Fundamental Principles' in North Carolina Constitutional History," *North Carolina Law Review* 69 (September 1991): 1357, 1359 ("The house, which under the [state] constitution was the judge of its members' qualifications, refused to exclude [Henry], *without reported explanation*." [emphasis added]). Even if a parliamentary house did not record its debates, if its sessions were open to visitors, reporters could take notes of the debates.

19. Mills failed to lodge a contemporaneous objection at the time the members took their qualification oaths. But see Eli Faber, "America's Earliest Jewish Settlers, 1654–1820," 40 (asserting that Henry "was challenged when he sought to take his seat"). By waiting until after the session began and until after the members-elect, including Henry, qualified, Mills risked that his motion would have been considered waived. See note 35, below. Albeit this argument is not discussed in the extant sources.

20. As explained below, William Gaston and other members of the Commons, in fact, raised or supported this argument. See notes 97 to 114, 119, and accompanying text, below; see also note 112, and accompanying text (discussing Article 32's "place of trust or profit in the civil department within this State"-language), below.

On December 6, 1809, according to the standard narrative, Henry gave a lengthy speech on his own behalf, albeit, some have suggested that the actual author of the speech was Judge John Louis Taylor.[21] In his speech, Henry made two related arguments. The first was on the legal side of the ledger. He argued that the general freedom of religion and conscience provision in the 1776 North Carolina Constitution's Declaration of Rights should trump[22] the specific religious test provision in Article 32. After that, the bulk of Henry's speech related to substantive values: toleration, democracy, and equality.

That speech was recorded in full in an 1859 collection on American oratory,[23] and also in John H. Wheeler's 1851 history of North Carolina.[24] Leon Hühner, the author of a twentieth-century publication with extensive material on Jacob Henry,[25] quotes from *Speeches on the Jew Bill*,[26] a collection of essays published in Pennsylvania in 1829, dealing with efforts toward religious toleration of Jews in Maryland. That publication reported two speeches—one from 1818[27] and one from 1824[28]—both of which mentioned Henry's speech. Finally, Hühner notes that Henry's speech was discussed in the debates of the 1835 North Carolina Constitutional Convention.[29] Henry's speech was not actually reproduced in these early sources from 1835,

21. Wheeler, *Historical Sketches of North Carolina*, 2:74 (noting that "Mr. Henry, [gave] an able speech, said to be the production of Chief Justice [John Louis] Taylor"); see also notes 34 (discussing Schauinger's view of the purported role of then-Judge Taylor, later Chief Justice Taylor) and 89 (discussing Marcus's view), and accompanying text, below. Taylor was elected to the Superior Court in 1798. *Legislative Manual 1874*, 98. Subsequently, he became the first post-independence chief justice of the Supreme Court of North Carolina—albeit, Judge Taylor did not become chief justice until after the motion to vacate Henry's seat had failed. *Dictionary of North Carolina Biography*, s.v. "Taylor, John Louis."

22. Borden, *Jews, Turks, and Infidels*, 43 (explaining that Henry argued that the North Carolina Declaration of Rights "took precedence over any other provisions of the state constitution"). Compare North Carolina Const. of 1776, Declaration of Rights, art. 19 ("That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences."), with North Carolina Const. of 1776, art. 44 ("That the Declaration of Rights is hereby declared to be part of the Constitution of this State, and ought never to be violated, on any pretence whatsoever."). Henry's argument here is novel, and perhaps insightful, but there is little or no evidence that this specific argument persuaded anyone in 1809. Clement Eaton believed otherwise. See note 35, and accompanying text, below; see also Hasia R. Diner, *The Jews of the United States 1654–2000* (Berkeley: University of California Press, 2004), 50; Mary C. Segers, "A Historic First: The Lieberman Nomination," in Mary C. Segers, ed., *Piety, Politics, and Pluralism: Religion, the Courts, and the 2000 Election* (Lanham, Md.: Rowman and Littlefield Publishers, 2002), 127, 130; John E. Semonche, *Religion and Constitutional Government in the United States: A Historical Overview with Sources* (Carrboro, N.C.: Signal Books, 1985), 109.

23. "Jacob Henry in the North Carolina Legislature," in J. Agar, *The American Orator's Own Book* (New York: C. M. Saxton, Barker and Co., 1859), 227–230.

24. Wheeler, *Historical Sketches of North Carolina*, 2:74–76.

25. Hühner, *The Struggle for Religious Liberty*, 46–54, 68–71.

26. *Speeches on the Jew Bill in the House of Delegates of Maryland* (Philadelphia: J. Dobson, 1829).

27. "Speech of H. M. Brackenridge, Delivered in the House of Delegates of Maryland, 1818, on the Jew Bill," in *Speeches on the Jew Bill*, 59, 90–91.

28. "Speech of Col. J. W. D. Worthington, Delivered in the House of Delegates of Maryland, 1824, on the Jew Bill," in *Speeches on the Jew Bill*, 101, 107 (reporting, and arguably in error, that "it was determined that the state test was repugnant to the [C]onstitution of the United States, *and he retained his seat!*—he was a Jew!").

29. Hühner, *The Struggle for Religious Liberty*, passim.

1829, 1824, and 1818, but the 1818 speech states that Henry's speech had already been published in a book titled *American Orator*.[30] Thus, several reasonably reliable reports across the decades of the antebellum period, including some reports from beyond North Carolina where the underlying events took place, seem to indicate that Henry's speech was well received and strengthened his case to defeat Mills's motion.[31] Modern reports of Henry's speech take a similar view. For example, Samuel A'Court Ashe's *History of North Carolina* (1925) explained that Henry's "speech was so superior that for several generations parts of it were embodied in books of elocution used in the academies of the country."[32] That said, there is a puzzle here: precisely where did the 1851 and 1859 collections find copies of Henry's speech? As explained, it was not recorded in the Commons' *Journal*.

Indeed, modern postbellum tertiary reports of Henry's speech are effusive with praise, and furthermore, some of those reports credit Henry's speech, in whole or in part, with defeating the motion.[33] For example, in an article in this journal, Joseph Schauinger wrote:

> One of the events of this session was the attempt to unseat Jacob Henry, a Federalist, on the plea that as he was a Jew his presence in the assembly was against that article of the state constitution which forbade anyone not believing in the truths of the Protestant religion to hold a state office. Henry's main supporter was Gaston, who argued for religious liberty and tolerance. It has been said that Henry's able defense, one of the best ever heard in a state legislature to this time, was written by the very able and learned Judge Taylor, who was a Republican. At any rate, the attempt [to unseat Henry] was a failure.[34]

30. "Speech of H. M. Brackenridge," in *Speeches on the Jew Bill*, 90–91. Brackenridge's speech was from 1818. It does not appear that any 1818 or pre-1818 source with the title *American Orator* reproduces Henry's speech. See note 85, below. For example, no such source appears within the collections on Internet Archive or on the Hathi Trust Digital Library. Even if Brackenridge erred in regard to the name of his source, it is likely he had *some* source. Andrew J. B. Fagal has suggested that the source may have been *The American Speaker: A Selection of Popular, Parliamentary and Forensic Evidence* (Philadelphia: Abraham Small, 1814), 279–282. See also Rosenwaike, "Further Light on Jacob Henry," 116, 116 n. 1 (suggesting that the 1814 Philadelphia publication was the speech's first reprint).

31. Joseph L. Blau, ed., *Cornerstones of Religious Freedom in America* (Boston: Beacon Press, 1950), 89 ("[Henry's] statement was clear-cut and incisive—it is a pleasure to report that it was decisive."). In another publication, Blau noted that Henry's speech "was soon recognized as a masterpiece of American oratory." Joseph L. Blau, "Jacob Henry: On Religion and Elective Office," in Daniel J. Boorstin, ed., *An American Primer* (Chicago: University of Chicago Press, 1966), 219, 220.

32. Samuel A'Court Ashe, *History of North Carolina: from 1783 to 1925*, 2 vols. (Raleigh, N.C.: Edwards and Broughton Printing Co., 1925), 2:207. See also J. Cutler Andrews, review of *Ante-Bellum North Carolina: A Social History*, by Guion Griffis Johnson, *North Carolina Historical Review* 15 (April 1938): 170, 171.

33. There are a fair number of other such sources: Blau, *Cornerstones of Religious Freedom*, 89 ("[Henry's] statement . . . was decisive."); see also Rosenwaike, "Further Light on Jacob Henry," 116.

34. Joseph Herman Schauinger, "William Gaston: Southern Statesman," *North Carolina Historical Review* 18 (April 1941): 99, 106. See also note 21 (discussing Wheeler's view of the purported role of Judge Taylor), above, and note 89 (discussing Marcus's view), and accompanying text, below. Schauinger's language is not quite right. First, Schauinger referred to the "truths of the Protestant religion," but Article 32 referred to the "truth of the Protestant religion." North Carolina Const. of 1776, art. 32. Second, and contrary to Schauinger, neither Article 32 nor Mills's resolution made use of "state office"-language. Third, Mills's

Similarly, in a well-regarded study of freedom of expression in the antebellum South, Clement Eaton concluded:

> The tolerant atmosphere of North Carolina at the beginning of the nineteenth century was indicated by the case of Jacob Henry. Despite the fact that he was a Jew, he was elected to the legislature from Carteret County for a second term in 1809. When his right to resume his seat in the legislature was challenged, he made an eloquent speech in defense of religious liberty. Deriving his arguments from Thomas Jefferson, he maintained that government should concern itself with the actions of men and not with their speculative opinions. The Bill of Rights in the state constitution, he declared, annulled any provisions in that document inconsistent with the freedom of religion and of speech. The legislature accepted his argument, and he was allowed to serve as legislator.[35]

These analyses, as well as others like them, pose some difficulty. One challenge is how to assess Schauinger's claim that Henry's speech was "one of the best ever heard in a state legislature to this time." Admittedly, such a claim is a matter of opinion, but what is the author's basis for making it? Eaton makes a more specific, fact-based claim: "The legislature accepted [Henry's] argument." Here, there are no citations to contemporaneous records, and the reader can only wonder how the author knew the reasoning behind the members' individual votes. Eaton reports none, and the Commons' *Journal* did not report any substantive debate.

Hühner did not take the position that Henry's speech persuaded the members. Hühner posited an alternate theory:

> The House of Commons in permitting Henry to retain his seat, resorted to a far-fetched construction of the 32d Article, which emphasized rather than weakened its prohibition. The decision was based on the fact that the Constitution prohibited non-Protestants from holding office *in any civil department* of the State. This was interpreted not to exclude such persons from serving in the legislature. The legislative office, it was said, was *above all civil offices*. The view was more pointedly defined by saying, that Catholics and Jews could make the laws but could neither execute nor interpret them.[36]

In other words, Article 32's proscription against non-Protestants and others outside the orbit of Article 32's religious test did not reach every position in the duly

---

resolution did not expressly state that Henry was "a Jew"; there was no such "plea." See notes 3 and 15, and accompanying text, above.

35. Clement Eaton, *Freedom of Thought in the Old South* (Durham, N.C.: Duke University Press, 1940), 27. Eaton apparently erred here. Mills's objection was not lodged when Henry "resumed" his legislative seat; rather, the challenge was lodged against Henry's continuing in a seat he had already qualified for without any contemporaneous objection. As the *Journal* indicates, Henry "appeared, qualified, and took [his] seat" on November 20, 1809, along with all the other members. *Journal of the House of Commons*, 1–2 (November 20, 1809). It was not until some days later, on December 5, 1809, that Mills sought a vote to have the seat declared vacant. See note 19 (discussing absence of any contemporaneous objection by Mills), above. Eaton's "tolerant atmosphere" characterization only makes sense if Henry's Carteret County constituents knew he was Jewish prior to electing him in 1808 or in 1809. See also notes 92 and 149, below.

36. Hühner, *The Struggle for Religious Liberty*, 52.

constituted government, that is, every position established by the state constitution or by state statutes. Rather, Article 32's proscription only encompassed "office[s] or place[s] of trust or profit in the civil department within this State," and that category, according to this view, did not include legislative seats. Hühner's only reported source for this view was William Gaston, who, along with Henry, had been a member of the Commons in 1809. Henry was one of two members for Carteret County; Gaston was the single member for the town of New Bern.[37] If Gaston had been in attendance on December 5 and 6, 1809, he would have witnessed (and, perhaps, participated in) the underlying events for himself.[38] So Gaston might have been a good source. On the other hand, Hühner's only report of Gaston's position comes from an 1835 speech that Justice Gaston (who had been on the Supreme Court of North Carolina since 1833) gave at the North Carolina Constitutional Convention.[39] Not only is this over twenty-five years after the 1809 proceedings, but the speech was made in a somewhat charged political atmosphere.

Hühner, writing nearly a century after the underlying events, characterized this purported rationale of the members' decision as "far-fetched." This is a harsh condemnation for a legal position, yet this characterization has been maintained by subsequent commentators—including legal commentators—right through to the present day—even in North Carolina. For example, in a well-regarded treatise on North Carolina constitutional law, professor John V. Orth and Paul Martin Newby,[40] associate justice of the Supreme Court of North Carolina, wrote:

37. *Journal of the House of Commons*, 1 (November 20, 1809). Under the 1776 state constitution, 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. North Carolina Const. of 1776, arts. 1–3, 9. Furthermore, six 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): Edenton, New Bern, Wilmington, Salisbury, Hillsborough, and Halifax, in Chowan, Craven, New Hanover, Rowan, Orange, and Halifax Counties, respectively. North Carolina Const. of 1776, art. 3. In 1789, the town of Fayetteville, in Cumberland County, was granted an additional House member (i.e., borough status) by the only constitutional amendment that preceded the 1835 state constitutional reforms. John V. Orth, "North Carolina Constitutional History," *North Carolina Law Review* 70 (September 1992): 1759, 1769. Separate representation for the specially designated towns was terminated by the constitutional amendments of 1835. Orth, "North Carolina Constitutional History," 1771; *Legislative Manual 1874*, 196, 205, 209, 244, 293, 302, 330.

38. As explained below, Gaston was, in fact, present, and he actively participated in the central debate on the motion. See notes 108 to 114, and accompanying text, below.

39. Hühner, *The Struggle for Religious Liberty*, 52 n. 41 ("This, according to Gaston, was the ground on which Henry retained his seat."); see also notes 48, 80 to 84, and accompanying text, below. Hühner cites *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, N.C.: Joseph Gales and Son, 1836), 281. Hühner reports the same material published as a standalone speech by Justice Gaston. *Speech of the Honorable Judge Gaston* (Baltimore: Fielding Lucas Jr., 1835), 23.

40. The N.C. Board of Elections voted to certify Newby, in a closely contested election, as chief justice of the Supreme Court of North Carolina on December 13, 2020.

In 1809 Jacob Henry, a Jew elected to the house of commons, was challenged on the basis of his religion. The house, which under the constitution was the judge of its members' qualifications, refused to exclude him, apparently on the ground that a seat in the General Assembly was not an "Office . . . of Trust or Profit" within the meaning of the North Carolina Constitution, an appealing decision that nonetheless puts one in mind of the ingratiating query of the old Tammany Hall politician: "What's the Constitution between friends?"[41]

On another occasion, Orth would characterize the member/officer distinction, i.e., one purported rationale for the Commons' rejecting the motion to declare Henry's seat vacant, as "an ingenious—one is tempted to say a talmudic—distinction."[42] Gary Govert, another recent legal commentator, simply adopts Hühner's "far-fetched"[43] characterization for the members' purported reasoning.

There are several interrelated puzzles here. First, how did the commentators writing the secondary and tertiary histories reach the conclusion that the member/officer distinction had been raised in the 1809 proceedings?[44] Second, how did some of these commentators reach the conclusion that this reasoning led to Henry's prevailing on the motion?[45] Finally, and this is perhaps the most difficult puzzle to resolve, how did these modern commentators reach the conclusion that this rationale is any more "far-fetched" than any other attempt at legal reasoning, on a matter of first impression, in regard to interpreting the scope of obscure constitutional language lacking developed on-point judicial exposition?[46] Furthermore, by December 6, 1809, when the motion to vacate Henry's seat was decided, the 1776 North Carolina

41. John V. Orth and Paul Martin Newby, *The North Carolina State Constitution*, 2nd ed. (New York: Oxford University Press, 2013), 8. See also Orth, "North Carolina Constitutional History," 1764–1765.
42. Orth, " 'Fundamental Principles' in North Carolina Constitutional History," 1359–1360.
43. Gary R. Govert, "Something There Is that Doesn't Love a Wall: Reflections on the History of North Carolina's Religious Test for Public Office," *North Carolina Law Review* 64 (June 1986): 1071, 1080–1081.
44. Ashe, *History of North Carolina*, 2:207 (asserting that the member/officer distinction was raised).
45. W. Glenn Jonas Jr., "Introduction," in W. Glenn Jonas Jr., ed., *Religious Traditions of North Carolina: Histories, Tenets and Leaders* (Jefferson, N.C.: McFarland and Co., 2018), 3 (noting that Henry "survived a challenge . . . after a determination that the constitutional test was not applicable to the legislature"); Powell, *North Carolina through Four Centuries*, 275; Reiss, *The Jews in Colonial America*, 117–118; Rogoff, *Homelands*, 10. It is unclear how Hühner and these other commentators arrived at this conclusion.
46. Richard D. Brown, *Self-Evident Truths: Contesting Equal Rights from the Revolution to the Civil War* (New Haven, Conn.: Yale University Press, 2017), 46 (characterizing the member/officer distinction as a "convenient fiction"); Jacob Rader Marcus, ed., *The Jew in the American World: A Source Book* (Detroit: Wayne State University Press, 1996), 94; Oscar Handlin and Mary F. Handlin, "The Acquisition of Political and Social Rights by the Jews in the United States," *American Jewish Yearbook* 56 (1955): 43, 57; see also note 45, above. Still, some modern historians, including this author, do not find this reasoning farfetched. Borden, *Jews, Turks, and Infidels*, 44 ("At first glance the ruling appears strained if not farfetched, but in fact the United States Senate a decade earlier, in the William Blount case, dismissed impeachment charges against [Blount] on the *same* ground: that congressmen were not 'civil officers of the United States.' " [emphasis added]); Harold M. Hyman and Morton Borden, "Two Generations of Bayards Debate the Question: Are Congressmen Civil Officers?" *Delaware History* 5, no. 4 (September 1953): 225, 236. See generally Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 171–172.

Constitution was nearly thirty-three years old. As such, few of its drafters would have been around to ask for guidance.[47]

Still, even without contemporaneous records from 1776 and from 1809, these later commentators had access to Justice Gaston's views as to the scope of Article 32's religious test. On June 30, 1835, Gaston argued:

> [Article 32] in no degree abridges the *elective* franchise. Every citizen, however heretical his religious opinions, has a right to vote in the *choice* of those who make the laws, or who administer to the service of the State. It *unquestionably* has no application to military offices. However dangerous may be supposed the religious principles of an individual, he is constitutionally qualified to command the military strength of the State. It is clear, too, and I suppose will be admitted by every legal gentleman, that the prohibitions in this Article can exclude no one from *seats in the General Assembly*. Whenever the Constitution means to exclude any man from a seat in the Legislature, it says so in express terms. Thus in the 25th section, it declares that no Receiver of Public Monies, &c. "shall have a seat in either House of the General Assembly, or be eligible to any office in this State." A seat in the Legislature is *above* offices or places of trust in the Civil Department, and is not comprehended impliedly within these terms. If there had been any good reason to doubt this construction, such a doubt would have been removed by the adjudication of the Senate of the United States upon the impeachment of William Blount, and the decision of our House of Commons, in the year 1808 [*sic*], in the case of Mr. Jacob Henry, a Jew, and a representative in that body from the county of Carteret. The persons, therefore, whom this Article proscribes are not only qualified to choose the law-makers and to hold military appointments, but *may* themselves become the law makers of the land.[48]

To be sure, Gaston, who at this time was already a justice on the North Carolina Supreme Court,[49] was explaining the meaning of Article 32 in the context of ongoing political debate to reform or abolish that very constitutional provision. Although Hühner states otherwise,[50] Gaston was *not* actually explaining what arguments had been made in 1809.[51] He was merely explaining to his contemporaries in 1835

47. For example, Samuel Johnston, a North Carolina Revolutionary leader, retired in 1803 and died in 1816. *Biographical Directory of the United States Congress*, s.v. "Johnston, Samuel."

48. *Proceedings and Debates of the Convention of North-Carolina*, 281. As noted by Hühner, Gaston's speech is reprinted in a standalone pamphlet from 1835. The pamphlet, like the *Proceedings*, also misreports the date of the Jacob Henry case as 1808. *Speech of the Honorable Judge Gaston*, 23.

49. *Biographical Directory of the United States Congress*, s.v. "Gaston, William" ("[I]n November 1833 . . . the General Assembly elected [Gaston] to the North Carolina Supreme Court."). Gaston had a rich political career, including his election as a Federalist to the Thirteenth and Fourteenth Congresses (1813–1817). In the state legislature, he sometimes represented Craven County, and other times, he represented the town of New Bern, which is in Craven County. Ibid.; see also John L. Cheney Jr., ed., *North Carolina Government, 1585–1979: A Narrative and Statistical History* (Raleigh: North Carolina Department of the Secretary of State, 1981), 255, 348 n. 297 (noting that, in 1808, Joshua Grainger Wright, a member for the town of Wilmington, in New Hanover County, was initially elected Speaker, but he resigned, and Gaston was elected in his place). Additionally, Gaston's sister married Judge Taylor. Schauinger, "William Gaston: Southern Statesman," 102; see also note 21, above. Marcus reports that Taylor was a Roman Catholic, but his sources do not support his conclusion. Marcus, *United States Jewry*, 1:507.

50. Hühner, *The Struggle for Religious Liberty*, 52 n. 41 ("This, according to Gaston, was the ground on which Henry retained his seat.").

51. Hühner's exposition on this point is somewhat uneven. Compare Hühner, *The Struggle for Religious Liberty*, 52 n. 41 ("This, according to Gaston, was the ground on which Henry retained his seat."), and ibid., 48 ("[A]

the legal consequences flowing from this constitutional provision, which was then the subject of intense debate. That said, if Gaston's understanding of the scope of Article 32's language was sensible in 1835, it is difficult to see why it would have been seen as "far-fetched" in 1809 or should be seen as "far-fetched" in 2021. Whatever later commentators may have thought of the member/officer distinction, it would certainly appear that Gaston was not embarrassed to be associated with that position. After all, Gaston made his arguments in support of that stance in a public forum, where his remarks were being recorded for posterity, and he subsequently republished his own contribution to that public debate in a standalone pamphlet.[52]

More importantly, Gaston cites as a precedent the Senate adjudication of the House impeachment of United States senator William Blount. That impeachment came about because Senator Blount, engaging in something akin to unauthorized foreign policy for reasons related to private commercial gain and adventure, "had been active in a plan to incite the Creek and Cherokee Indians to aid the British in conquering the Spanish territory of West Florida."[53] All this was done without authorization from President John Adams and his administration. After this information was transmitted by President Adams to the two houses of Congress, the House, on July 7, 1797, passed a resolution impeaching Blount.[54] The next day, on July 8, the Senate expelled Blount.[55] Notwithstanding his expulsion, impeachment trial proceedings would begin in the Senate on December 17, 1798.[56]

In the United States Senate trial proceedings, Blount was represented by counsel. His lawyers explained that Article 2, Section 4 of the United States Constitution

most curious construction of Article 32 was adopted in order to enable [Henry] to retain his seat."), with Hühner, "The Jews of North Carolina Prior to 1800," 140 ("This concession [allowing Henry to keep his seat] was *based in part* on the *fiction* that the constitutional prohibition . . . did not apply to members of the Assembly. . . ." [emphases added]). Hühner's uneven exposition is hardly unique. For example, Orth suggests that this specific passage in the 1835 convention debate from Gaston was an after-the-fact justification. Orth, " 'Fundamental Principles' in North Carolina Constitutional History," 1359–1360 ("The house, which under the [state] constitution was the judge of its members' qualifications, refused to exclude [Henry], without reported explanation. *Later* William Gaston, himself a Roman Catholic and judge of the state supreme court, justified the result. . . ." [emphasis added]); ibid., 1360 n. 21 (citing Gaston's 1835 convention speech). But, in 1992, Orth receded from his prior position. Orth, "North Carolina Constitutional History," 1764 ("The house, which under the [state] constitution was the judge of its members' qualifications, refused to exclude him, apparently on the ground that a seat in the general assembly was not an 'Office . . . of Trust or Profit' within the meaning of the constitution. . . ." [citing Hühner]).

52. *Speech of the Honorable Judge Gaston*, passim. It is likely that Justice Gaston was directly involved (if not intimately involved) in reproducing his speech from the 1835 North Carolina Constitutional Convention in this free-standing pamphlet.

53. *Biographical Directory of the United States Congress*, s.v. "Blount, William." See also Emily Field Van Tassel and Paul Finkelman, *Impeachable Offenses: A Documentary History from 1787 to the Present* (Washington, D.C.: Congressional Quarterly Press, 1999).

54. *Journal of the House of Representatives of the United States of America*, multiple vols. (Washington, D.C.: Gales and Seaton, 1826), 3:72–73.

55. *Journal of the Senate of the United States of America*, multiple vols. (Washington, D.C.: Gales and Seaton, 1820), 2:392.

56. "Blount Expulsion," United States Senate, https://tinyurl.com/y5grq8mt.

states: "The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Their argument was that this clause was jurisdictional; in other words, the House could impeach only presidents, vice presidents, and "civil officers of the United States."[57] They argued that senators were not encompassed by that language, and therefore, senators could not be impeached. On Friday, January 11, 1799, the Senate, by a vote of 14 to 11, decided: "The Court is of [the] opinion, that the matter alleged in the plea of the defendant is sufficient in law to show that this Court ought not to hold jurisdiction."[58] The Court dismissed the entire action the following Monday. Although Blount's lawyers made other arguments in support of dismissal, it appears this was the argument that carried the day. That said, whether or not this argument convinced the Senate's members to dismiss the impeachment is beyond the scope of this article.[59] Likewise, whether or not the Senate reached the "correct" result, that is, in reaching the conclusion that impeaching senators (or, at least, impeaching Senator Blount on the facts presented) is unconstitutional—a matter that is still debated among legal academics[60]—is also not at issue here.[61]

57. There is a minority view, consistent with the United States Constitution's text, that the language of the Impeachment Clause is not jurisdictional; rather, it is a mandatory removal provision. In other words, where an officer in one of the listed positions (i.e., president, vice president, or a civil officer of the United States) is impeached, tried, and convicted, then he must be removed, but the House's power to impeach extends beyond the listed positions. Joseph Isenbergh, "Impeachment and Presidential Immunity from Judicial Process," *Yale Law and Policy Review* 18 (1999): 53, 66, 66 n. 49, 98, 98 n. 207.

58. *The Debates and Proceedings in the Congress of the United States*, multiple vols. (Washington, D.C.: Gales and Seaton, 1851), 8:2319 (5th Cong., 3rd Sess., January 11, 1799). The journal entry cited here states "February 11"—this is a misprint, as is quite clear from surrounding text.

59. Joseph Story, *Commentaries on the Constitution of the United States*, 3 vols. (Boston: Hilliard, Gray, and Co., 1833), 2:259, section 791 ("The reasoning, by which [the Senate's decision in *Blount*] was sustained in the senate, does not appear, their deliberations having been private."). Modern authorities remain divided. Compare Buckner F. Melton Jr., *The First Impeachment: The Constitution's Framers and the Case of Senator William Blount* (Macon, Ga.: Mercer University Press, 1998), 232 ("[T]he [Senate's] resolution did not say whether [dismissal was appropriate] . . . because senators were not civil officers, or because of some other reason."), with Gordon S. Wood, *The Creation of the American Republic 1776–1787* (Chapel Hill: University of North Carolina Press, 1998), 523 n. 7 ("Blount was acquitted on the ground that as a senator he was not a 'civil officer' within the meaning of the impeachment provision of the [United States] Constitution.").

60. Some legal academics have disputed and continue to dispute the *Blount* decision: What was its rationale (if any)? Was it correctly decided? However, state and federal courts have uniformly embraced the view that the decision of the United States Senate in *Blount* was based on the member/officer distinction, and that the case was decided correctly. *Motions Systems Corp. v. Bush*, *Federal Reporter Third Series*, 437 (United States Court of Appeals for the Federal Circuit 2006) 1356, 1373 (Gajarsa, J, concurring) ("The Senate itself has concluded that Senators are not 'officers of the United States' for purposes of the Impeachment Clause. . . ."); ibid., 1373 n. 12 ("This principle has been accepted since 1799. . . ."); *State v. Gilmore*, *Kansas Reports*, 20 (Supreme Court of Kansas 1878) 551, 552 (Brewer, J) (noting that "this decision has been considered as applicable to members of all state legislatures"); ibid., 552 (asserting that the "question is doubtless forever at rest").

61. I have collected argument and evidence on both sides of the issue. Seth Barrett Tillman, "Interpreting Precise Constitutional Text," *Cleveland State Law Review* 61 (2013): 285, 287 n. 9, 304 n. 42.

What does matter is that many, perhaps most, of those writing in the immediate aftermath of *Blount* understood the Senate's dismissal to be based on the argument that senators (and by implication members of the House) were not "civil officers of the United States," and so not subject to impeachment. For example, in the decade between the conclusion of Blount's Senate trial in 1799 and the 1809 adjudication of the motion to vacate Henry's seat, the most significant full-length treatise on United States constitutional law was St. George Tucker's 1803 *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Law, of the Federal Government of the United States; and of the Commonwealth of Virginia*. In regard to *Blount*, Judge Tucker wrote, "It has been solemnly decided, that a senator is not a civil officer of the United States, and therefore not liable to impeachment."[62] Tucker expressed no doubt on this point. Nor was Tucker alone. In a January 1801 newspaper column on the consequences of the disputed Jefferson-Burr election, where both candidates had received the same number of electoral votes, the author, writing under the *nom de plume* Horatius, wrote:

> [U]pon the impeachment of William Blount, a distinction was taken *between an officer and a member of Congress*; and it was held that a senator was not an *officer of the United States*, and therefore was not liable to impeachment. Upon this ground, the majority of the Senate would not hold cognizance of that impeachment.[63]

Horatius's article apparently first appeared on January 2, 1801, in the *Alexandria* (Virginia) *Advertiser* and subsequently was reproduced on January 6 in the *Washington* (D.C.) *Federalist*, on January 16 in the *Philadelphia Gazette*, and on January 20 in the *Newport* (Rhode Island) *Mercury*. Horatius's article may very well have appeared elsewhere, particularly in Federalist newspapers. Albert J. Beveridge was of the opinion that John Marshall's "authorship [of Horatius] would appear to

62. St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Law, of the Federal Government of the United States; and of the Commonwealth of Virginia*, 5 vols. (Philadelphia: William Young Birch and Abraham Small, 1803), vol.1: Appendix D:335 (citing to the *Blount* trial record from January 7 and 10, 1799); ibid., vol. 1: Appendix D:335 n. *. Difficulties interpreting the United States Constitution's "office"-language are both a long-standing and a recurring problem. *Biographical Directory of the United States Congress*, s.v. "Tucker, John Randolph." John Randolph, the grandson of St. George, commented on the scope of the Fourteenth Amendment's "office"-language. John Randolph Tucker, "General Amnesty," *North American Review* 106, no. 260 (January–February 1878): 53, 55; see also Oliver P. Field, "The Vice-Presidency of the United States," *American Law Review* 56 (May–June 1922): 365, 382.

63. *Alexandria* (Va.) *Advertiser*, January 2, 3, 1801 (parts 1 and 2) (emphases added). Horatius's article was reproduced widely: *Washington* (D.C.) *Federalist*, January 6, 1801; *Philadelphia Gazette and Daily Advertiser*, January 16, 1801; *Newport* (R.I.) *Mercury*, January 20, 1801. Horatius made reference only to "officers of the United States"; the word "civil" did not expressly enter his analysis. This would seem to indicate that "civil" merely meant civilian, and that "civil office" and "civil officers" were not used (per Horatius) as terms of art. Story, *Commentaries on the Constitution of the United States*, 2:257–258, section 789 (suggesting that "civil" is used in the United States Constitution as distinguished from "military").

be reasonably certain."[64] Although his opinion is not universally shared, Beveridge is not alone in that assessment.[65]

To sum up, the secondary and tertiary sources lend some support to the view that, in 1809, one or more of Henry's supporters made the argument that a legislative seat was not an "office or place of trust or profit in the civil department within this State" as used in Article 32 of the 1776 North Carolina Constitution.[66] Prior to making that argument, the United States Senate had dismissed an impeachment against a senator, and the then-prevailing understanding for that dismissal was that a senator was not an "officer of the United States" as used in the Impeachment Clause of the United States Constitution. Admittedly, the state and federal constitutional provisions at issue here do not have precisely the same language, but it was Gaston, speaking in public in the 1835 state constitutional convention, who asserted that the two cases were analogous. Given all that, and that the dispute about the scope of the United States Constitution's "office"- and "officer"-language had been debated even during the ratification period of the federal constitution[67] and then again during the Civil War,[68] it is somewhat difficult to understand why Hühner and later commentators have asserted that the member/officer distinction, purportedly asserted in the 1809 Commons proceedings, was "far-fetched." There are also two other subsidiary puzzles here. As explained, the Commons' *Journal* does not report substantive debate. First, what source (if any) did commentators in the secondary and tertiary literature rely upon in claiming that someone in 1809 made an argument against the motion to vacate Henry's seat based on the member/officer distinction? Second, what justification was there for the related historical claim that this argument swayed the members' votes?

64. Albert J. Beveridge, *Politician, Diplomatist, Statesman, 1789–1801*, vol. 2 of *The Life of John Marshall* (Boston: Houghton Mifflin Co., 1916), 541 n. 2.

65. Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2005), 45.

66. As explained below, newspaper reports, not developed in the largest part of the extant literature, establish that William Gaston and other members of the Commons, in fact, raised or supported this argument during the 1809 debate. See notes 97 to 114, and 119, and accompanying text, below.

67. Compare James Monroe (*nom de plume* A Native of Virginia), *Observations Upon the Proposed Plan of Federal Government* (Petersburg, Va.: Hunter and Prentis, 1788), in Stanislaus Murray Hamilton, ed., *The Writings of James Monroe*, Volume 1: *1778–1794* (1898; reprint, Elibron Classic Reprint, 2005), 347, 361 ("I conceive that the Senators are not impeachable, and therefore Governor Randolph's objection falls to the ground."), and ibid., 1:359 ("The Senators are representatives of the people; and by no construction can be considered as civil officers of the State."), with Edmund Randolph at the Virginia Ratifying Convention (June 10, 1788), in Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, 5 vols. (Washington, D.C.: N.p., 1836), 4:202 ("Who are your senators? . . . They may also be impeached.").

68. John C. Rives, ed., *Appendix to the Congressional Globe* (Washington, D.C.: Congressional Globe Office, 1864), 31, 37 (38th Cong., 1st Sess., reporting January 19, 1864 statement of Sen. James A. Bayard Jr.); see also Hyman and Borden, "Two Generations of Bayards Debate the Question: Are Congressmen Civil Officers?" 231–235; Seth Barrett Tillman, "The Foreign Emoluments Clause—Where the Bodies are Buried: 'Idiosyncratic' Legal Positions," *South Texas Law Review* 59 (2017): 237, 259–262 (developing the 1864 materials).

The disparate views among commentators is rooted in linguistic confusion about the scope or meaning of "office."[69] The word "office" (in the English language) poses an interpretive challenge for modern adjudicators and historians; this is particularly true for those trying to understand how long-dead actors used the word "office" in the past. That difficulty is raised exponentially when the prior actors were themselves adjudicators who were trying to interpret how the word "office" was used in a document they did not draft and that substantially predated the adjudication. That is the difficulty to understanding the Henry motion and what followed. In 2021, historians and legal scholars are trying to understand events in 1809 (and related events in 1835), when the substantive drama in 1809 (and the related drama in 1835) focused on constitutional text drafted in 1776.

Although Conal Condren has argued that "office" embraces an entire discourse of meaning,[70] this article makes a more limited point: the word "office" has two primary discrete, but closely related, valences. Sometimes "office" means simply "position." Those holding an "office" in an organization, private or public, or an organization's "officers," may be anyone in the organization's hierarchy: both apex and subordinate positions.

But "office" and "officer" share another commonly used meaning. The terms *may* sometimes refer to those who are appointed, removed, and/or supervised by apex authority. In a monarchy (or when discussing a monarchy) or in an aristocracy (or when discussing an aristocracy), where apex authority is inherited, "officer" *may* sometimes refer to those who are appointed to positions by those holding a higher post, such as apex inherited positions. By contrast, in a democracy (or when discussing a democracy), where apex authority is elected, "officer" *may* sometimes refer to those who are appointed to positions by those holding a higher post, such as apex elected positions. In the American context, where elected positions are customarily instituted by a written constitution, the term "office" *may* sometimes refer to positions created by statute (or even by subsidiary regulations under the authority of a statute[71]), and the term "officer" *may* sometimes refer to those who

69. I have written on the scope of the United States Constitution's "office"-language and similar "office"-language in state constitutions since 2008. See, for example, Seth Barrett Tillman, "Why Professor Lessig's 'Dependence Corruption' Is Not a Founding-Era Concept," *Election Law Journal* 13 (June 2014): 336. Furthermore, regarding the scope of the Foreign Emoluments Clause and its "office"-language, see *Amicus Curiae* Scholar Seth Barrett Tillman's and Proposed *Amicus Curiae* Judicial Education Project's Response to *Amici Curiae* by Certain Legal Historians, *Citizens for Responsibility and Ethics in Washington v. Donald J. Trump*, Civil Action Number 1:17-cv-00458-GBD (United States District Court for the Southern District of New York September 19, 2017), Docket Number 85-1, https://ssrn.com/abstract=3002345.

70. Alexander B. Haskell, "Deference, Defiance, and the Language of Office in Seventeenth-Century Virginia," in Douglas Bradburn and John C. Coombs, eds., *Early Modern Virginia: Reconsidering the Old Dominion* (Charlottesville: University of Virginia Press, 2011), 161 (discussing Condren's views on how "office" was used).

71. See, for example, Geneviève Cartier, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?" *University of Toronto Law Journal* 53 (Summer 2003): 217, 223.

are appointed to positions by those holding a higher post, such as apex elected positions. Thus an *officer of or under the State* or an *officer of or under the United States*[72] or an *office in the civil department within this State* (as used in Article 32 of the 1776 North Carolina Constitution) *may* refer to those holding statutory offices[73]—offices created, regularized, or defeasible by statute—positions that in the regular order of business are subject to the *supervision* of and *subordinate* to elected or other apex authorities.[74] To be clear, these are two different linguistic conventions. Which convention a particular document uses—and it may use both in different provisions (particularly if drafted at different times or by different persons)—is a decision made by the document's drafters and, in a related sense, by its readers.

Examples of "office" having two different meanings are plentiful. In the corporate context,[75] one regularly speaks of purchasing "Directors and Officers Liability Insurance" or "D&O Insurance." If it were clear that directors were officers, one could simplify the terminology, and instead call it "Officers Liability Insurance," or one might call it, for complete accuracy's sake, "Directors and *Other* Officers Liability Insurance." But use of the latter phrase is virtually nonexistent. Whether "directors"

72. See, for example, *United States v. Mouat*, *United States Reports*, 124 (Supreme Court of the United States 1888) 303, 307 (Miller, J); *Free Enterprise Fund v. Public Company Accounting Oversight Board*, *United States Reports*, 561 (Supreme Court of the United States 2010) 477, 497–498 (Roberts, CJ [Chief Justice]); David A. McKnight, *The Electoral System of the United States: A Critical and Historical Exposition of its Fundamental Principles in the Constitution, and of the Acts and Proceedings of the Congress Enforcing It* (Philadelphia: J. B. Lippincott and Co., 1878), 346; Hyman and Borden, "Two Generations of Bayards Debate the Question: Are Congressmen Civil Officers?" 229 n. 18; Ruth C. Silva, "The Presidential Succession Act of 1947," *Michigan Law Review* 47 (February 1949): 451, 475. Of course, this view of the scope of the United States Constitution's "office"-language is disputed. Akhil Reed Amar, *The Law of the Land: A Grand Tour of Our Constitutional Republic* (New York: Basic Books, 2015), 332 n. 8 (noting, without equivocation, that "[t]he presidency is an 'Office under the United States' "). Many legal academics, including Steven G. Calabresi, Josh Chafetz, John F. Manning, and Saikrishna Bangalore Prakash, share this view. See Tillman, "Interpreting Precise Constitutional Text," 309 n. 45 (collecting authorities).

73. *Journal of the House of Commons*, 4, 7 (November 22, 1809) (reporting the governor's message, which stated: "The *express* delegation of authority to the Governor by the [state] Constitution, relative to the making of [temporary] appointments, extends only to officers, the right of whose appointment is by that instrument vested in the General Assembly; and the office of Solicitor being created by subsequent statute, it was doubted whether this special delegation of authority authorised an Executive appointment to that office"; see also North Carolina Const. of 1776, art. 20.

74. A state supreme court seat is unusually difficult to characterize. Where such a position is *appointed* by a governor or other apex authority, it might be characterized as an *office . . . of trust or profit in the civil department within this State*. On the other hand, where such a position is *elected* (by the People or by the legislature) and/or because such a position is generally not subject to supervision in the ordinary course of its duties, it might be better characterized as an apex position and, therefore, beyond the scope of Article 32's "office"-language. See note 80 (explaining that Gaston's state supreme court seat was in consequence of an election by the legislature), below. Gaston, a Roman Catholic, held a seat on the North Carolina Supreme Court at a time when the 1776 state constitution's religious test still extended to non-Protestants.

75. *Proceedings on the Impeachment of William Blount, A Senator of the United States from the State of Tennessee, for High Crimes and Misdemeanors* (Philadelphia: Joseph Gales, 1799), 54 (Alexander J. Dallas, attorney for Defendant Blount, in explicating the United States Constitution's member/officer distinction, made "analogies to a Corporation").

are properly characterized as "officers" is a matter that courts[76] and commentators[77] have divided on. Turning from private to public law, one readily discovers British dictionaries, roughly contemporaneous with the framing of the 1776 North Carolina Constitution, employing both usages. For example, Matthew Bacon, in his dictionary published in London in 1768, defined "Offices and Officers" as follows: "The King is the universal Officer and Disposer of Justice within this Realm, from whom all others are said to be derived. . . ."[78] Here, the king is a type of officer. But Comyns, in his dictionary published in London in 1766, defined "Officer" in the following manner: "The King is the Fountain of all Power and Authority, and by his Prerogative has the Nomination of all Officers originally." Under this definition, the king is distinguished from "all Officers."[79] Here, the king is not a type of officer at all. Rather, the king is above the officers, with the prior appointing the latter.

But it is not necessary to look to modern corporate usage or to usage abroad contemporaneous with 1776. Gaston[80] uses this terminology in the speech he delivered on June 30, 1835, partially quoted above.[81] He argues:

> Now, if the profession of certain irreligious notions, or certain heretical religious opinions, renders a man *necessarily* unfit for the public service, he is peculiarly and emphatically an unfit depository

76. Compare *Monroe v. Scofield*, *Federal Reporter, Second Series*, 135 (United States Court of Appeals for the 10th Circuit 1943) 725, 726 (Huxman, J) (explaining that "[a] director is an officer of a corporation"), with *Jackson v. County Trust Co. of Maryland*, *Atlantic Reporter, Second Series*, 6 (Maryland Court of Appeals 1939) 380, 382 (Sloan, J) (holding "[a] director is not an officer of a corporation").
77. Victoria A. Braucher et al., *Fletcher Cyclopedia of the Law of Private Corporations*, multiple vols. (N.p.: Callaghan and Co., 1998), rev. vol. 2:35, section 271.
78. Matthew Bacon, *A New Abridgment of the Law*, s.v. "Offices and Officers," 3rd ed. (London: J. Worrall et al., 1768), 3:718–719.
79. John Comyns, *A Digest of the Laws of England*, s.v. "Officer" (London: H. Woodfall and W. Strahan, 1766), 4:239.
80. Some have hinted that Gaston was not an entirely unbiased source. Gaston was a Roman Catholic, and so Article 32's proscription arguably applied to him, just as it arguably applied to Jews such as Henry and others. Why "arguably"? Because no court of record actually precluded Gaston or Henry from holding any position in North Carolina based on Article 32. But see Joseph L. Blau, "Jacob Henry: On Religion and Elective Office," 220 ("For Jacob Henry to hold the seat to which he had been elected violated Article 32 of the state constitution."); Marcus, *United States Jewry*, 1:87; Leonard Rogoff, "Is the Jew White? The Racial Place of the Southern Jew," *American Jewish History* 85 (September 1997): 195, 201 n. 14. Furthermore, all the positions Gaston held were apex positions: elected federal or state positions, including his service as a justice on the Supreme Court of North Carolina. Walter F. Pratt Jr., "The Struggle for Judicial Independence in Antebellum North Carolina: The Story of Two Judges," *Law and History Review* 4 (1986): 129, 147, 147 n. 103 (noting that "the General Assembly elected Gaston" in 1833); see also *Biographical Directory of the United States Congress*, s.v. "Gaston, William," and notes 49 and 74, above. The logic of the Gaston-was-a-biased-source position, that is, biased because he was Roman Catholic, is odd, and perhaps worthy of its own separate paper. *Proceedings and Debates of the Convention of North-Carolina*, 270 (where Gaston explained his indifference as an "individual" in regard to how Article 32 might be reformed, but only sought that its scope be made "perfectly explicit" in its future configuration after amendment); see also James Michael Hurley, "The Political Status of Roman Catholics in North Carolina," *Records of the American Catholic Historical Society of Philadelphia* 38 (September 1927): 237, 271 ("As a matter of fact, Gaston's argument was based on the fact that it was an ambiguous and ineffective law; and when all was said and done, Jews were still disqualified as before and remained so until 1868.").
81. *Proceedings and Debates of the Convention of North-Carolina*, 281; note 48, above.

of the political power and controller of the physical strength of the State. Yet this Article permits unbelievers and misbelievers to elect those who shall enact laws—and permits them, if the people so please, to enact laws themselves for the government of the whole State, and permits them to command the militia, by whom the laws are to be enforced. If it be safe to allow them to wield these powers, on what pretence can it be alledged, that it is utterly unsafe to permit their fellow-citizens to appoint one of them to a *subordinate civil employment*. . . .[82]

Here, Gaston attempts to explain to his audience the scope of Article 32's religious test. In other words, he considers the scope of the North Carolina Constitution's "office or place of trust or profit in the civil department within this State"-language.

Gaston starts his analysis by saying what this constitutional language does not apply to. Non-Protestants and others outside the orbit of Article 32's religious test may be voters—the elective franchise is unrestricted. Non-Protestants and others outside the orbit of Article 32's religious test may hold state military office. Finally, non-Protestants and others outside the orbit of Article 32's religious test may hold seats in the legislature. After explaining what Article 32's language does not encompass, Gaston turns to what Article 32's language does concern: "subordinate civil employment." In other words, the North Carolina Constitution's "office"-language does not apply to *apex* positions but rather to "subordinate" civil positions.[83] This is not to say that Gaston was correct in 1835 or that his speech of that year conformed to the Commons' understanding of Article 32's "office"-language in 1809 or that his 1835 elucidation of Article 32 was consistent with that provision's meaning as it was used and understood in 1776. The point here is only that Gaston's elucidation of the relevant constitutional text is consistent internally and coheres with a substantial strand of prior usage regarding the term "office." As Kenneth Bowling explains, in a somewhat related context, "In [Alexander] Hamilton's day . . . *Office under the United States* did not extend to elected officials."[84]

82. Ibid., 281 (second emphasis added). Some courts have reached a similar conclusion regarding *Blount*. See *Attorney General ex rel. Bashford v. Barstow*, *Wisconsin Reports*, 4 (Supreme Court of Wisconsin 1855) 567, 652 (Woodbury, J, concurring) (explaining that *Blount* held that the controlling "office"-language in the United States Constitution "did not embrace members of the senate, but *only the subordinate civil officers* of the government who were appointed and commissioned by the president" [emphasis added]).

83. If Gaston were correct, then apex elected positions, such as governor, as well as members of the governor's council of state, would not be controlled by Article 32. North Carolina Const. of 1776, art. 15 (characterizing the governor as "elect[ed]"); ibid., art. 16 (characterizing councillors as "elect[ed]"). Recently, Orth has asserted that the United States Constitution's Foreign Emoluments Clause applies to the U.S. president. United States Const., art. 1, section 9, cl. 8; John V. Orth, "Unconstitutional Emoluments: The Emoluments Clauses of the North Carolina Constitution," *North Carolina Law Review* 97 (September 2019): 1727, 1727–1728.

84. Declaration of Professor Kenneth R. Bowling, Ph.D. (Exhibit H), *Citizens for Responsibility and Ethics in Washington v. Donald J. Trump*, Civil Action Number 1:17-cv-00458-GBD (United States District Court for the Southern District of New York September 19, 2017), Docket Number 85-9, page 4, section 16. See also *Proceedings on the Impeachment of William Blount*, 34 (Rep. James A. Bayard Sr.: "The officers, properly speaking *under* the United States are all appointed. . . ."); ibid., 35 (Bayard: "Now it is clear that a Senator is not an officer *under* the Government. The Government consists of the President, the Senate and House of Representatives; and they who constitute the Government, cannot be said to be under it.").

Thus, it is reasonable to conclude that *Blount* and the decision on the motion to vacate Henry's seat are consistent with one another, and both are broadly consistent with Gaston's speech in 1835. Still, a puzzle remains: Were modern interpreters aware of these authorities when they characterized Gaston's line of reasoning as "far-fetched"?

Other puzzles remain. Modern commentators have examined sources from 1835, 1829, 1824, and 1818 (which refers to a prior source for Henry's speech—*American Orator*).[85] But the original source of Henry's speech is not entirely clear. Certainly, the Commons' *Journal* is not helpful. Gaston made an argument in his 1835 speech based on the member/officer distinction, but he did not positively assert that that he or anyone else had made that argument in the 1809 proceedings.[86]

The chief question is what line of legal reasoning (if any) was used by the members and what motivated them (beyond legal rationales) to reject the motion to vacate Henry's seat? One prominent historian, Morton Borden, notes that "Henry was a Federalist, Mills a Republican."[87] (And Mills might have hoped for friendly procedural rulings from the newly elected Speaker—Thomas Davis—who, like Mills, was a Republican.[88]) Still, Borden makes no effort to connect the Jacob Henry incident to any of the ideological issues that divided the two political parties. Nor does Borden show that the members' votes divided on party lines. Indeed, several historians, including Jacob Rader Marcus, Joseph H. Schauinger, and John H. Wheeler, state that Judge John Louis Taylor, later Chief Justice Taylor, a Republican, aided Henry, a Federalist, in drafting his speech.[89] Another historian, Leonard Rogoff, has argued that "[p]olitics lay behind the challenge" to Henry's seat. Rogoff argues that the divide was between a pro-Henry Federalist "coastal gentry" and anti-Henry Republican "back country" sentiment, "pitting an educated, propertied elite against

85. Henry's speech does not appear in these sources: Increase Cooke, *The American Orator* (New Haven, Conn.: Sydney's Press, 1811); Increase Cooke, *The American Orator*, 2nd ed. (Hartford, Conn.: Oliver D. Cooke, 1814); Increase Cooke, *The American Orator* (New Haven, Conn.: Sydney's Press, 1819); Joshua P. Slack, *The American Orator* (Trenton, N.J.: Daniel Fenton, 1815). Henry's speech does appear in an 1828 source with that title. "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, Maine: Intelligencer Office, 1828), 46. See note 30 (discussing *American Speaker*, an 1814 publication), above.

86. As explained below, William Gaston and other members of the Commons, in fact, raised or supported the member/officer argument during the 1809 debate. See notes 97 to 114, and 119, and accompanying text, below.

87. Borden, *Jews, Turks, and Infidels*, 43. See also David Hackett Fischer, "Patterns of Partisan Allegiance, 1800," in Lance Banning, ed., *After the Constitution: Party Conflict in the New Republic* (Belmont, Calif.: Wadsworth Publishing Co., 1989), 143, 169; Rogoff, *Homelands*, 10.

88. "North Carolina 1809 Speaker of the House," A New Nation Votes: American Election Returns, 1787–1825, https://elections.lib.tufts.edu/catalog/dr26xz66h. Thomas Davis served three terms in the Commons as the single member for the town of Fayetteville. *Legislative Manual 1874*, 209; see also note 115, below. An 1814 newspaper article described him as a general, apparently in the militia. *Raleigh Star*, December 23, 1814.

89. Marcus, *United States Jewry*, 1:507; see also notes 21 (discussing Wheeler's view of the purported role of Judge Taylor) and 34 (discussing Schauinger's view), above.

the greater numbers of less-educated, yeoman farmers."[90] Although the narrative of the Henry motion fits this broad pattern from North Carolina political history, Rogoff puts forward no specific evidence, apart from Henry's and Mills's party affiliations and the locations of the two counties they represented, illustrating that the political conflict he describes motivated the specific actors involved in the Henry motion. Finally, Samuel A'Court Ashe, another historian, suggests that a personality conflict lay behind Mills's motion. Ashe asserts that "[d]uring th[e] [1808] session [Henry] contracted the ill will of another member; and being elected again in 1809, this member objected to [Henry's] qualifying under the Constitution."[91] But Ashe supplies no authority for this mysterious claim, which has not been reported in any other source. In any event, it is not clear if Ashe was speaking to Mills's having been reelected in 1809, or Henry's having been reelected, or both, and records do not show that Mills had been a member during the 1808 session. In short, none of these explanations is particularly satisfactory.

Leaving partisan loyalties and personalities aside, were the members convinced by Henry's platitudinous[92] (almost extra-legal) argument about religious toleration and freedom of conscience? Alternatively, were the members convinced by the more legalistic arguments brought by one or more of Henry's purported supporters relating to the scope of the 1776 North Carolina Constitution's "office"-language? Samuel A'Court Ashe affirmed that it was both.[93] As he pointed to no sources, his explanation appears to be no more than an unsatisfying fudge.

There is a third explanation—one not fully developed in the extant literature. A reevaluation of some newly "discovered"[94] primary sources from December 1809 and early 1810 is revealing. The December 5, 1809 motion,[95] as well as

90. Rogoff, *Down Home: Jewish Life in North Carolina*, 39.
91. Ashe, *History of North Carolina*, 2:207. It is possible that Ashe's source was Hühner. Hühner, *The Struggle for Religious Liberty*, 46 (asserting that Mills was "actuated by some [unspecified] spiteful motive"). On the other hand, other historians have suggested that Mills's motion was voted down because Henry was popular among the members. See note 149, below. The bases for these competing historical claims rooted in personal conflict and personalities are obscure.
92. In 1810, just a short time after Jacob Henry gave his celebrated speech on equality and tolerance, Henry owned twelve slaves. Rogoff, *Down Home: Jewish Life in North Carolina*, 43.
93. Ashe, *History of North Carolina*, 2:207; see also Kabala, *Church-State Relations in the Early American Republic*, 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.").
94. Since posting a draft of this article online, further inquiries have revealed that a North Carolina state archivist placed a typescript manuscript on Jacob Henry in the state archives in 1984. That unpublished manuscript was first to uncover some of the key primary sources discussed in this article. Mary Hollis Barnes, "Jacob Henry's Role in the Fight for Religious Freedom in North Carolina" (March 19, 1984), typescript manuscript, State Archives of North Carolina, Raleigh. Leonard Rogoff kindly flagged this to me and also that he had quoted from Barnes's manuscript in his 2010 book. Rogoff, *Down Home: Jewish Life in North Carolina*, 40, 381 n. 51.
95. *Raleigh Star*, December 7, 1809 (reporting December 5, 1809 motion).

the December 6 vote on that motion,[96] were reported in a Raleigh newspaper on December 7. These initial reports had little more to say than the Commons' *Journal*. A December 14, 1809, out-of-state newspaper report was more expansive—it summarized the arguments made in debate.[97] Also, on December 14, 1809, Henry's speech was reported, in full, in a North Carolina newspaper, and in 1810, it was reported, in full, in other North Carolina newspapers.[98] Afterward, in early 1810, it was reported, in full, in other newspapers around the United States.[99] Finally, one Raleigh newspaper reported the members' debate, apparently in full.[100] This information was probably lost on (nearly all) modern commentators for two reasons. First, there was no strong reason to look for the original or first contemporaneous written report of Henry's speech. Once the speech had entered the public domain, people made do with what was on hand. Second, the remaining debate was not reported contemporaneously with Henry's speech; instead, it was strung out over several subsequent newspaper reports from late December 1809 into January 1810, with related letters to the editor following in February. This is likely why these later debates were almost entirely overlooked by subsequent commentators.[101] It would appear that few thought to examine newspaper reports a month or more after the events. Indeed, many then and now relied upon Gaston's understanding of Article

96. *Raleigh Star*, December 7, 1809 (reporting December 6, 1809 vote on the motion). One academic has characterized the December 6, 1809 debate—taking shy of one legislative day—as a "prolonged contest." Delbert Harold Gilpatrick, *Jeffersonian Democracy in North Carolina, 1789–1816* (New York: Columbia University Press, 1931), 181 n. 6. See also Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of a Nation* (New York: Random House, 2007), 108 (characterizing the Jacob Henry incident as a "standoff").

97. *Charleston* (S.C) *Strength of the People*, December 14, 1809 (summarizing floor debate).

98. *Raleigh Star*, December 14, 1809 (reporting Henry's speech in full); see also ibid., February 1, 1810 (reporting a letter to the editor from "A Carolinian," and the editor's noting that Henry's speech had already been reported in "Richmond, Baltimore &c"); *Carolina Federal Republican* (New Bern), February 12, 1810. One historian took the position that Henry's "speech" in his own defense was a letter he had written to the Commons' other members. See Marcus, *United States Jewry*, 1:507 ("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."). It appears that Marcus is suggesting that Henry consulted not just with Judge Taylor, but also with William Gaston.

99. *Charleston* (S.C.) *Strength of the People*, January 4, 1810; see also *Charleston* (S.C.) *City Gazette and Daily Advertiser*, February 3, 1810; *Carolina Gazette* (Charleston, S.C.), February 6, 1810 (referring to "Henry Jacobs"); *Charles Town* (Va.) *Farmer's Repository*, February 9, 1810 (referring to "Henry Jacobs"); *Savannah* (Ga.) *Republican*, February 10, 1810; *Lexington* (Ky.) *Reporter*, February 17, 1810 (referring to "Henry Jacobs"); *New-York Journal*, February 28, 1810; *Miller's Weekly Messenger* (Pendleton, S.C.), March 3, 1810 (referring to "Henry Jacobs"); *Danbury Connecticut Intelligencer*, March 4, 1810; *Milledgeville Georgia Journal*, March 27, 1810; *Pittsburgh Gazette*, May 11, 1810. Any number of newspapers—in Connecticut, Delaware, Kentucky, Maine, Massachusetts, New York, Pennsylvania, Rhode Island, South Carolina, Vermont, and Virginia—ascribed Jacob Henry's speech to "Henry Jacobs." Ibid. See also Lindo, *A Jewish Calendar for Sixty-Four Years*, 132 (referring to "Henry Jacobs" and using 1810 as the year of his election).

100. *Raleigh Star*, December 28, 1809 (reporting Gaston's speech, where he advanced the member/officer argument); ibid., January 4, 1810 (reporting further debate in support and opposing Gaston); ibid., January 4, 1810 (reporting committee proceedings, including hearing witnesses, and reporting the House's hearing and adopting, without reported objection, the committee's recommendation).

101. See note 94 (discussing Barnes's and Rogoff's publications), above.

32 from the 1835 constitutional convention debates as representative of the prior debate from 1809. As will be seen, those commentators were not entirely wrong to do so.

So what do these sources suggest? On December 7, 1809, the *Raleigh Star* reported that Mills put forward his resolution on December 5. For December 6, the same issue of the *Star* reported: "The allegations were disproved and the resolution unanimously rejected."[102] The *Journal* does not indicate that there was a recorded vote; apparently there was only a voice vote. It seems likely that a *Star* journalist witnessed the voice vote and did not hear any "ayes" in support of the motion. On that basis, the journalist may have reasoned that the motion had been unanimously rejected.[103] If this were the basis of the newspaper's report of the vote, then the journalist's conclusion is not entirely unreasonable, but it is certainly not sound.[104] Other newspapers also reported that the vote was unanimous, but it is unclear if they arrived at this conclusion based upon independent reporting and sources of the underlying events or if these other newspaper reports were themselves relying on the *Star*'s reporting.[105] Unanimity, the lack of a recorded vote showing how the members voted, or both all point to the possibility that partisan and political loyalties played little role in the House's decision.

The December 7 article in the *Star* also stated that the allegations were "disproved." This is broadly consistent with the *Journal*, which reported that "no proof had been adduced in support of the charges." But the reader can only wonder what precisely was meant by these words. What facts were "disproved"? Regarding what specific issue or issues was there a failure of proof?

Later newspaper reports provided more clarity. On December 14, 1809, the *Star* published Henry's speech in full.[106] It reported that the speech followed Mills's

102. *Raleigh Star*, December 7, 1809. The editor of the *Star* was Thomas Henderson Jr. In late 1810, Henry corresponded with Henderson. A. R. Newsome, "A Miscellany from the Thomas Henderson Letter Book," *North Carolina Historical Review* 6 (October 1929): 398, 398–400. A "Thomas Henderson" is listed as serving in the Commons in 1809 and for six other terms for Mecklenburg County. See Cheney, *North Carolina Government*, 153, 155, 165, 167, 228, 234, 245, 247, 248, 252, 253, 257, 259, 1201–1202. Thus, Jacob Henry and Thomas Henderson both served in the Commons in 1809. It is hardly clear if the Commons member for Mecklenburg by this name was also the *Star*'s editor—if so, it would certainly go far to explain the *Star*'s detailed reporting of the events. Multiple sources, including the *Raleigh Star*, describe Thomas Henderson, Jr. as a colonel. See Marvin Downing, "John Christmas McLemore: 19th Century Tennessee Land Speculator," *Tennessee Historical Quarterly* 42 (Fall 1983): 254, 261.

103. E-mail from James White, House Principal Clerk, North Carolina House of Representatives, supports this interpretation of the Commons' *Journal*.

104. A recorded vote could be had "upon a [mere] motion made and seconded . . . upon any question. . . ." North Carolina Const. of 1776, art. 46. By contrast, under the United States Constitution, a recorded vote requires support from one-fifth of the members voting. United States Const., art. 1, section 5, cl. 3.

105. *Carolina Federal Republican* (New Bern), February 12, 1810 (reproducing a letter to the editor noting that Mills's motion to vacate Henry's seat had been "unanimously rejected"); see also *Raleigh Star*, January 18, 1810.

106. *Raleigh Star*, December 14, 1809.

Wednesday, December 6.

The greatest part of this day's sitting was consumed in discussing the resolution introduced for expelling Mr. Jacob Henry, on the ground of his being a Jew, and having refused to qualify upon the New Testament. The friends of the Resolution, supported it on the following article of the Constitution.

"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 Testament, 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."

Those opposed to the adoption of the Resolution contended that the above article was not intended to opperate against Members of the Assembly, but against persons holding offices; as the preceding articles had been particular in pointing out the qualifications of Members of Assembly. After considerable debate, the House resolved itself into a Committee of the Whole in order to hear the evidence in support of the charge, No sufficient evidence appearing, the Resolution was disagreed to, and of course, Mr. H. keeps his seat.

The bill for establishing Courts of Chancery, has passed a second reading in the senate, without a division.

On December 14, 1809, the *Charleston* (S.C.) *Strength of the People* reported details on events in the North Carolina legislature from December 5 and 6, 1809. Newspaper from Genealogy Bank.

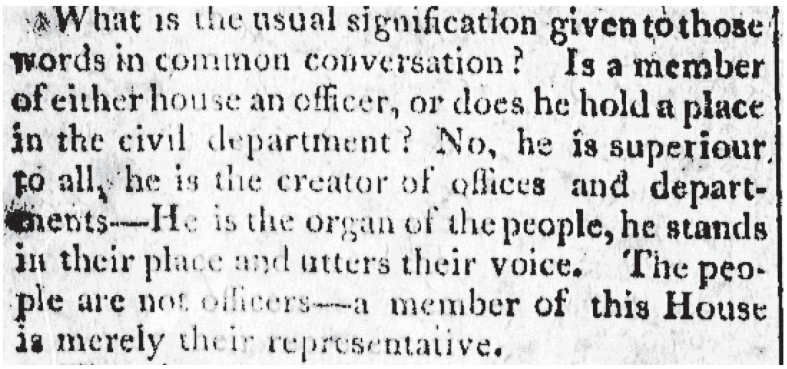
motion, but it is not clear whether Henry delivered his speech on December 5 or 6. As explained, the speech subsequently appeared in other newspapers around the country. It seems likely that the *Star* was the source for these reports. The speech closes with an editor's note: "[Debate to be continued.]" The latter would seem to indicate that Henry's speech was part of the substantive exchanges that took place on December 6. Apparently, on December 5, Mills's resolution was read, and all further consideration was adjourned until the following day. Again, this seems to indicate that Henry's speech was given on December 6.

Furthermore, on December 14, 1809, a second newspaper, the *Charleston* (S.C.) *Strength of the People* reported on events in the North Carolina legislature from December 5 and 6, 1809.[107] The report for December 5 is consistent with the *Journal* entry. But that describing the events of December 6 offers some further details.

This report, appearing in the *Strength of the People*, confirms that an argument based on the member/officer distinction was not made for the first time by Gaston in the 1835 North Carolina Constitutional Convention, but, in fact, had been made in 1809—although the member or members who had made that argument were not identified. More importantly, this newspaper article also helps solve another puzzle. The *Journal* reported for December 6 that "no proof had been adduced in support of the charges." Here, the newspaper report frames the key issues investigated by the Commons as Henry's "being a Jew, and having refused to qualify upon the New Testament." It seems that these two issues (i.e., assuming that they were understood as distinct from one another) may have been the factual matters about which no *proof* or evidence (as opposed to some failure of *legal argument*) had been heard.

Two newspaper reports from the *Raleigh Star*, from December 28, 1809, and January 4, 1810, include much new detail about the December 6, 1809 proceedings. The December 28, 1809 article, returning to the events of December 6, reported that Mills opened the day's debate by attempting "to introduce evidence to substantiate the charges contained in the Resolution." Mills was opposed by Gaston. Gaston argued that if evidence were to be taken, then the matter should go to "a select committee or a committee of the whole." But Gaston then turned from contested *facts* to contested constitutional *law*. He argued that the motion should be dismissed as a threshold matter, without going to any committee and with no need to hear any evidence, under what amounts to the modern motion to dismiss for failure to state a claim standard.[108] In other words, "it was unnecessary to proceed further with [the inquiry]. In his judgment, even were the facts charged in the resolution ascertained to be true, the member implicated was entitled to retain his seat. If so this unpleasant

107. *Charleston* (S.C.) *Strength of the People*, December 14, 1809.
108. Federal Rule of Civil Procedure 12(b)(6) ("[A] party may assert the following defense by motion . . . failure to state a claim upon which relief can be granted. . . .").


What is the usual signification given to those words in common conversation? Is a member of either house an officer, or does he hold a place in the civil department? No, he is superiour to all, he is the creator of offices and departments—He is the organ of the people, he stands in their place and utters their voice. The people are not officers—a member of this House is merely their representative.

William Gaston, along with Henry, had been a member of the Commons in 1809. Henry was one of two members for Carteret County; Gaston was the single member for the town of New Bern. On December 28, 1809, the *Raleigh Star* published portions of Gaston's argument against the resolution denying Henry a seat in the General Assembly. Newspaper from Genealogy Bank.

enquiry is at an end." Indeed, the rest of newspaper report is largely Gaston's lengthy speech laying out the member/officer argument in considerable detail.

Gaston made several important points. He noted that Henry's case was the first time an Article 32-related case was being adjudicated by the legislature. He noted further that the stakes were high—as this case touches on the "right of the people to choose their representatives." He then acknowledged that the "general words" of Article 32 are "capable of being construed so as to apply to the present case." Nevertheless, Gaston rejected that conclusion. He turned to other constitutional provisions to establish that where the North Carolina Constitution of 1776 authorizes limitations to legislative service, it does so expressly, and not by implication. In other words, general "office"-language does not apply to legislative seats. Gaston pointed to Article 25 of the state constitution, which states:

> That no persons, who heretofore have been, or hereafter may be, receivers of public the [*sic*] monies, shall have a *seat in either House of* [the] *General Assembly*, or be eligible to any office in this State, until such person shall have fully accounted for and paid into the treasury all sums for which they may he accountable and liable.[109]

Gaston reasoned that if seats in the legislature were "offices," then the italicized language was superfluous. Naturally, he took the opposite position: it is precisely because such language is not superfluous, and because seats in the legislature are not "offices," that Article 25 needed additional, express language to reach legislative

109. North Carolina Const. of 1776, art. 25, as reported in Thorpe, *The Federal and State Constitutions*, 5:2792 (emphasis added). The language reported by Thorpe for Article 25 is odd: it appears the word "the" is in the wrong place.

positions. Gaston made similarly structured arguments based on the language of Articles 12, 26, 27, 28, and 35.[110]

After discussing the text, Gaston made arguments more rooted in constitutional structure or design: Gaston's use of the term "office" here tracks the definition and usage in Comyns's dictionary. *The elected legislature is the apex; officers hold positions subordinate to apex authority*.

Gaston then turned to the *Blount* case. He asserted: "That the construction now contended for is the true one, a decision of the highest court of judicature of this country has placed beyond the possibility of doubt"[111] and concluded that the United States "Constitution made *Officers* only liable to impeachment" but not members of the legislature.

Next, Gaston turned to a potential technical problem with his reading. The controlling language in Article 32 is "any office or place of trust or profit in the civil department within this State." Here, Article 32 speaks to both "office[s]" and "place[s]." Thus, even if *Blount* were persuasive regarding understanding the state constitution's "*office* . . . of trust or profit in the civil department"-language, could a legislative seat be a "*place* of trust or profit in the civil department"? Gaston's answer was: "the word *place* impl[ies] in common language a station of a subordinate kind, something of less dignity than an office. . . ." Gaston's rationale regarding "place" would have extended to state employment or something akin to civil service positions. Under that formulation, Article 32's "office or place of trust or profit"-language could not extend to legislative seats (or, indeed, to any other elected positions).[112]

Gaston closed with the argument that Mills's motion should not be referred to a committee to take evidence because Henry should prevail as a matter of state constitutional law, even if the facts alleged by Mills were taken as true. But before he made that argument, he returned to public policy. The nagging objection to Gaston's argument is: *Why would the framers of the state constitution impose a religious test on officers, but not on seats in the legislature?* Gaston responded: "The answer is easy. It was believed to be an object of the highest importance to the preservation of liberty and the true representative principle, that the people should be left free as air to their choice."[113]

110. For example, Article 12's "office"-language is similar to Article 25's "office"-language. See notes 16 and 109, above.

111. Here, Gaston is referring to the United States Senate as a court of impeachment, and not to the United States Supreme Court. See *Proceedings on the Impeachment of William Blount*, 19.

112. After the Civil War, the Supreme Court of North Carolina would address this very issue. The court's view was not *ad idem* with Gaston's. *Doyle v. Raleigh*, *North Carolina Reports*, 89 (Supreme Court of North Carolina 1883) 133, 135–136 (Smith, CJ); *Worthy v. Barrett*, *North Carolina Reports*, 63 (Supreme Court of North Carolina 1869) 199, 201–202 (Reade, J).

113. Contesting Gaston's position, William Blackledge, one of two House members for Craven County, who spoke later in that day's debate, stated: "The Convention [that framed the state constitution] did not mean, as has been said, to leave the people as free as air to their choice—it has forbidden them to choose [p]arsons." See North Carolina Const. of 1776, art. 31; notes 118, 135 to 147, and accompanying text, below.

Of course, Gaston opened his defense for Henry on this very point.[114]

On January 4, 1810, some twenty-nine days after the underlying events, the *Star* reported the remainder of the debate from December 6, 1809. Many members participated in the fast-paced discussion on whether to commit Mills's resolution to a committee and on whether to accept the member/officer distinction. Daniel Glisson, one of two House members for Duplin County, was one of the first to speak.[115] He stated that Gaston erred in arguing the scope of Article 32 to the full house; rather, the legal question (and, by implication, any contested factual issues) should be directed to some committee.

William E. Webb, one of two House members for Halifax County, spoke next. He largely agreed with Gaston. There was no reason to investigate contested facts "when it was very probable if all the alleged facts were substantiated, the House would not be prepared to say that they amounted to a constitutional disqualification." Webb concluded by noting that *if* the House reached a determination that the allegations were sufficient for disqualification, *then* "it would be in proper course to enquire whether the allegations were true." This is akin to the standard used in the modern motion for summary judgment where a material fact is not disputed.[116] Essentially, Webb wanted Henry to have two bites at the apple: dismissal based on an insufficient legal theory, and dismissal based on insufficient evidence to prove that theory.

William Drew,[117] the single member for the town of Halifax, spoke next. Drew, much like Henry, argued in favor of freedom of conscience. He then argued that the alleged facts, even if true, did not support disqualification. He reasoned:

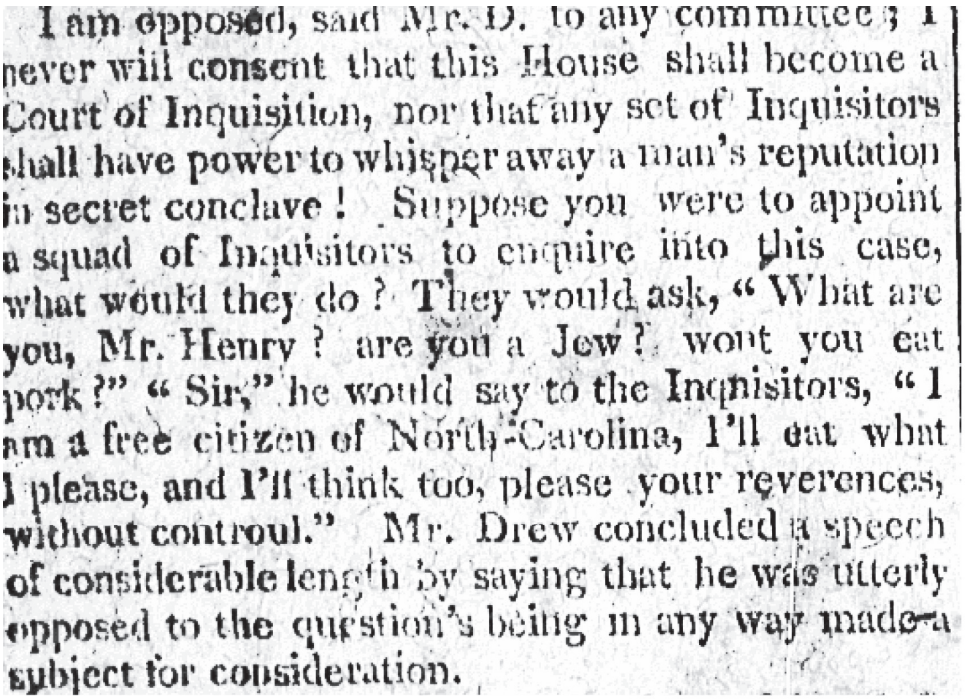
> [I]t was objected that [Henry] refused to swear upon the New Testament when he qualified as a member of this House. Does the law say what a man shall swear upon? It is all the same if he binds his conscience, whether he swears upon Mahomet's Koran, the Bible, or New Testament.

114. See generally Paul Finkelman, "James Madison and the Bill of Rights: A Reluctant Paternity," *Supreme Court Review* (1990): 330.

115. Gaston was speaker of the Commons during part of the 1808 legislative term. See note 49, above. At the start of the 1809 session, Daniel Glisson nominated Gaston for another term as speaker. But Thomas Davis, the single member for the town of Fayetteville, was elected instead. J. Herman Schauinger, *William Gaston: Carolinian* (Milwaukee, Wisc.: Bruce Publishing Co., 1949), 54; see also note 88, above. Glisson served as Duplin County sheriff from 1790 to 1793, and then again from 1812 to 1816. Faison Wells McGowen and Pearl Canady McGowen, *Flashes of Duplin's History and Government* (Kenansville, N.C.: Edwards and Broughton Co., 1971), 544. Glisson had a twenty year-long legislative career representing Duplin County: serving in the Commons for fourteen terms (including 1809) and serving in the Senate for six terms. *Legislative Manual 1874*, 220. But see *Raleigh Register, and North-Carolina Gazette*, March 18, 1828 (reporting "Major Daniel Glisson" serving "thirty six years" in the legislature).

116. Federal Rule of Civil Procedure 56 ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). William E. Webb was one of two House members for Halifax County; he served four terms in the Commons. *Legislative Manual 1874*, 245.

117. Drew had a solid political career, with five House of Commons terms as the single member for the



I am opposed, said Mr. D. to any committee; I never will consent that this House shall become a Court of Inquisition, nor that any set of Inquisitors shall have power to whisper away a man's reputation in secret conclave! Suppose you were to appoint a squad of Inquisitors to enquire into this case, what would they do? They would ask, "What are you, Mr. Henry? are you a Jew? wont you eat pork?" "Sir," he would say to the Inquisitors, "I am a free citizen of North-Carolina, I'll eat what I please, and I'll think too, please your reverences, without controul." Mr. Drew concluded a speech of considerable length by saying that he was utterly opposed to the question's being in any way made a subject for consideration.

William Drew, the single Assembly member for the town of Halifax, argued in favor of freedom of conscience. *Raleigh Star*, January 4, 1810. Newspaper from Genealogy Bank.

It is not entirely clear what Drew meant by "the Bible." Perhaps he was speaking of a traditional Christian text—Hebrew Canon and Christian Testament, as opposed to a book just including the latter. Whatever he meant, no member directly responded, in the remainder of the debate, to his legal argument.

Drew concluded by refusing to address the constitutional issue directly. Instead, Drew's contribution to the debate indicated that he did not want to be an inquisitor or to be seen as an inquisitor. The difficulty with Drew's position is that Article 32 calls for a religious test of some sort against the holders of some (yet to be determined) state positions in, at least, some set of circumstances. Considering Drew's contribution to subsequent proceedings, it appears that more was going on here than a plea for toleration. Drew was arguing self-protection. In other words, if the members were to go down this path, they and their chamber would look like fools.

The next speaker was William Blackledge—one of two House members for Craven County. Blackledge thought it would be improper for the committee of the whole to collect evidence. Instead, he urged that the issue should be determined in a select committee or the committee of elections. He spoke to Henry's supporters directly: "he tho't if the friends of Mr. Henry urged a decision without such an enquiry into facts, they would endanger his seat; for their arguments were a tacit admission that

he had no religion." Perhaps Blackledge thought that the gravamen of the Article 32 charge against Henry was that Henry "den[ied] the being of God."[118]

William W. Jones, who appears to be one of the two House members for Onslow County, spoke next.[119] He supported Gaston's position: "it was plain that [Article 32] did not go to affect the seats of Representatives in this House."

Mooring was the last member to speak in debate before the full House. He argued that the whole matter—facts and law—should go to the committee of the whole. But no Mooring is listed in the House *Journal* by the returning officers among the persons who had been duly elected to the Commons. Perhaps it was Laurence Moore—one of two House members for Anson County.[120] Alternatively, it may have been John Moring—one of two House members for Pitt County.[121] In any event, Mooring's advice was followed, and the entire matter was sent to the committee of the whole.

The chair of the committee of the whole was held by Gen. Thomas Love—one of two House members for Haywood County.[122] The newspaper report indicates that four witnesses, all of whom were members of the legislature, were identified and then "called to the Bar [of the House] to give testimony."[123] Three witnesses were members of the Commons: Roberts, Joseph Pickens (Buncombe County),[124] and

town of Halifax, and in 1816, he was elected attorney general by the legislature. *Legislative Manual 1874*, 244; Ready, *The Tar Heel State*, 172.

118. North Carolina Const. of 1776, art. 32. Blackledge served in the Commons for four terms. Additionally, Blackledge held a congressional seat from 1803 to 1809. In the election of 1810, Blackledge defeated Gaston for a seat in the 12th Congress (1811 to 1813); in the election of 1812, Gaston defeated Blackledge for a seat in the 13th. Schauinger, "William Gaston: Southern Statesman," 107–108. During his congressional service, Blackledge affiliated with the Republican Party. *Biographical Directory of the United States Congress*, s.v. "Blackledge, William ([?]–1828)". One of Blackledge's obituaries reported that "[f]or many years he was a member of the Council of State of North Carolina." *Washington* (D.C.) *Daily National Intelligencer*, November 1, 1828. In the December 6, 1809 debate, Blackledge opposed Gaston on several points. See note 113, above.

119. William Jones was one of two House members for Onslow County, and he served in the House for two terms. *Legislative Manual 1874*, 300.

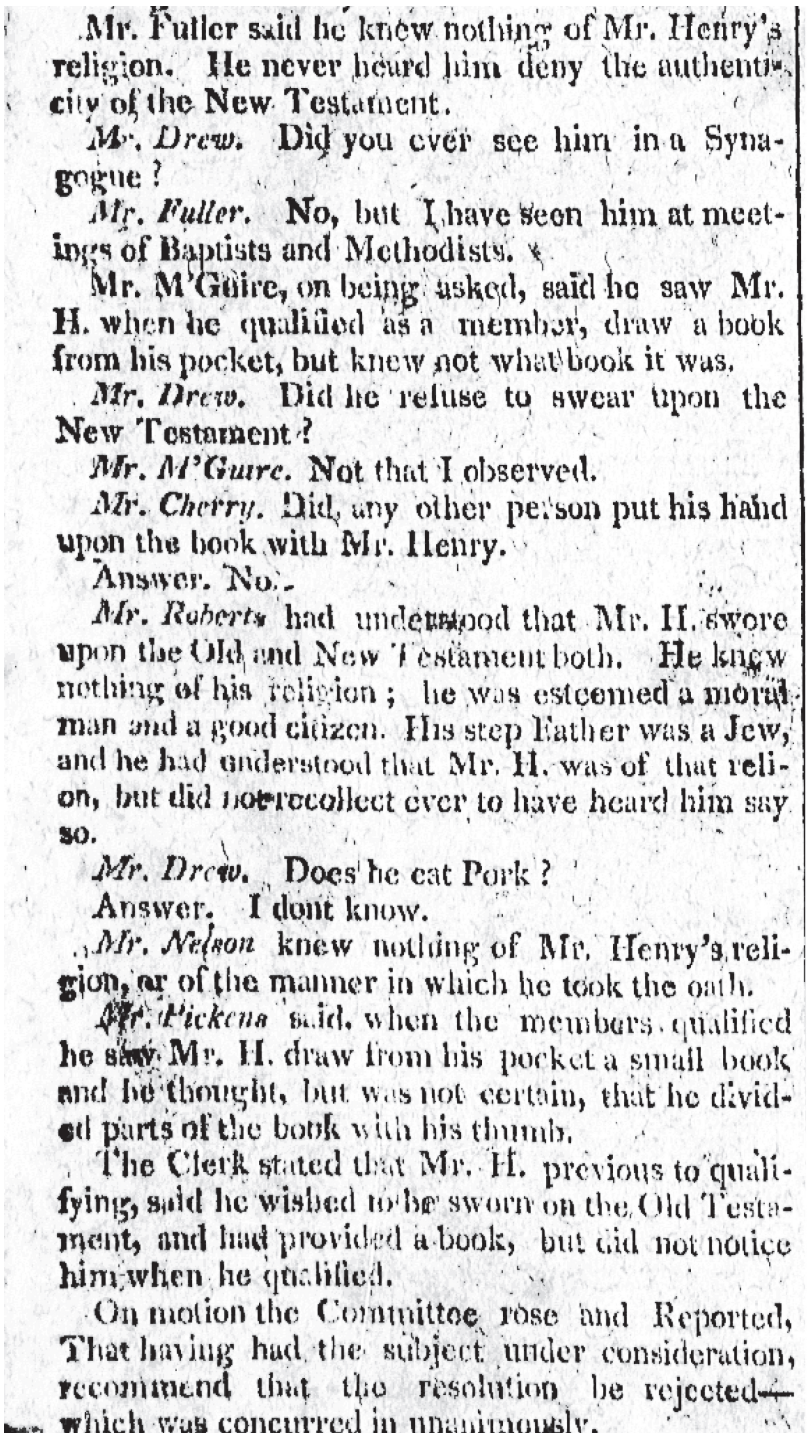
120. *Journal of the House of Commons*, 1–2 (November 20, 1809) (spelling "Laurence" with a "u"). "Lawrence Moore" served in the House of Commons from 1807 to 1809, and in the state senate from 1814 to 1816. *Legislative Manual 1874*, 158. Apparently, "[h]e served his country as a soldier during the Revolutionary [W]ar." *Biographical and Historical Memoirs of Mississippi*, 2 vols. (Chicago: Goodspeed Publishing Co., 1891), vol. 2: Part 1:459.

121. *Journal of the House of Commons*, 1–2 (November 20, 1809) (spelling "Moring" with a single "o"). "John Mooring" served as one of the two House members for Pitt County between 1804 and 1809. *Legislative Manual 1874*, 315.

122. Thomas Love served in the House for ten terms for Buncombe County, then served in the House in 1809 for the first of nine terms for Haywood County, and, finally, served in the Senate six terms for Haywood County, ending in 1828. *Legislative Manual 1874*, 173, 249. Love's title, "General," may have been in connection with the part he played in the late 1780s opposing the State of Franklin and supporting reintegration of North Carolina's western counties back into North Carolina. *History of Carroll County, Tennessee*, multiple vols. (Paducah, Ky.: Turner Publishing Co., 1986), 1:240. In 1839, after he had moved to Tennessee, Love was elected to the state senate, and was afterward chosen as Speaker of the Senate from the Western District of Tennessee. *History of Carroll County*, 1:240.

123. *Raleigh Star*, January 4, 1810.

124. Joseph Pickens was one of two House members for Buncombe County, serving three terms in the House. *Legislative Manual 1874*, 173.



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. Hickens 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.

Belcher Fuller, the single senator for Carteret County, "said he knew nothing of Mr. Henry's religion." *Raleigh Star*, January 4, 1810. Newspaper from Genealogy Bank.

Samuel M'Guire (Chowan County).[125] One witness was a member of the Senate, Belcher Fuller (Carteret County).[126] The report also shows that the committee of the whole heard from two other witnesses—John S. Nelson, one of two House members for Craven County,[127] and the clerk of the Commons, Pleasant Henderson.[128] The members who were specifically identified as posing questions to the witnesses included William Drew (who had also participated in the debate prior to the committee of the whole's interrogation of the witnesses) and Joel Cherry—one of two House members for Martin County.[129]

Roberts was not listed in the House's *Journal* by the returning officers among those persons who had been duly elected to the Commons. There was a John Robards[130]—who, like Henry, was one of two House members for Carteret County. Roberts was likely Robards.[131] Belcher Fuller was the single senator for Carteret County—again, the same county as Jacob Henry and John Robards. Because all three represented the same county, it would not be particularly surprising if they knew one another before the 1809 proceedings. And, of course, it is likely that the members of the committee of the whole thought that those who already knew Henry would make some of the most useful witnesses. Moreover, Jacob Henry and Belcher Fuller were both from the county seat of Beaufort and may have lived just a few blocks from one

125. Samuel M'Guire (or McGuire) was one of two House members for Chowan County. He served seven terms in the House. *Legislative Manual 1874*, 197.

126. Belcher Fuller served in the Senate for five terms continuously from 1809 to 1813. *Legislative Manual 1874*, 185. During the War of 1812, it appears Fuller was a private in the state militia company that Capt. Jacob Henry commanded. See "Pay Voucher: Belcher Fuller," North Carolina Digital Collections, https://digital.ncdcr.gov/digital/collection/p16062coll7/id/4302; Rogoff, *Down Home: Jewish Life in North Carolina*, 43. Fuller was also "a notary public, justice of the peace, and lieutenant colonel of militia in 1823." Newsome, "A Miscellany from the Thomas Henderson Letter Book," 400 n. 7. Fuller's elevation from private to lieutenant colonel in roughly a decade seems a meteoric rise.

127. John S. Nelson, one of two House members for Craven County, served ten terms in the House. *Legislative Manual 1874*, 206. In 1809, the other House member for Craven County was William Blackledge, and Gaston represented the town of New Bern, which is in Craven County. See notes 49 and 113, above.

128. *Journal of the House of Commons*, 2 (November 20, 1809); *Raleigh Star*, January 4, 1810. Pleasant Henderson had a long and varied political and military career, in which he reached the rank of major during the American War of Independence. He held the position of clerk of the Commons continuously from 1807 to 1830, and it was the last public office he held. *Dictionary of North Carolina Biography*, s.v. "Henderson, Pleasant."

129. Joel Cherry was one of two House members for Martin County. He served nine terms in the House. *Legislative Manual 1874*, 278–279.

130. *Journal of the House of Commons*, 1–2 (November 20, 1809).

131. John Robards was one of two House members for Carteret County in 1809. *Journal of the House of Commons*, 1–2 (November 20, 1809). He served twelve continuous terms in the House from 1804 to 1815. In 1816, he served one term in the Senate. *Legislative Manual 1874*, 185. The highest-ranking militia officer in Beaufort, during the War of 1812, was Lt. Col. John Roberts. John W. Moore, *History of North Carolina: From the Earliest Discoveries to the Present Times*, 2 vols. (Raleigh, N.C.: Alfred Williams and Co., 1880), 2:446. Is it possible that these records are somehow confused—and that Robards and Roberts were the same person? See Cheney, *North Carolina Government*, 255 (listing members of the 1808 House of Commons, including John Robards, Willliam Robards, and Jacob Henry), 257 (listing members of the 1809 House of Commons, including John Roberts and Jacob Henry), 1085–1086 (listing historical members of the legislature for Carteret County).

another. Afterward, they would serve together in the War of 1812, and they had some common commercial contacts.[132]

The *Star* reported on the committee of the whole's interrogation of the witnesses: Several things are noticeable from this exchange.[133] First, Jacob Henry was not called as a witness,[134] nor is there any indication that Henry interrogated any of the witnesses. Second, the issue was not primarily whether Henry was born Jewish or whether he, in his own mind or conscience, adhered, intellectually or theologically, to Judaism, or to some other non-Protestant religion. Rather, the precise legal issue was defined by Article 32's language: that is, Did Henry "deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments"? There had to be evidence—by observable word or deed—that Henry actively and, perhaps, publicly "denied" what was required under the religious test. As no one had firm firsthand knowledge what book Henry swore his oath on, what he ate, or what religion (if any) he practiced, there was no concrete evidence of his having "denied" anything. Finally, the only persons expressly identified as having asked the witnesses questions were Drew and Cherry. Indeed, Cherry asked only a single question; Drew asked all the other questions (where the person posing the question was identified). Moreover, the exchange above seems to indicate that Drew, who was posing questions like a religious inquisitor, was Henry's opponent. But perhaps this was all for affect. Drew's questions illustrate how ridiculous the members looked (or would look to others, and to posterity) just by asking these questions. It is unlikely that anyone—including Mills and Henry—was pleased with how the *Star* reported the testimony from the committee of the whole.

The report closed by noting that "the Committee rose and [r]eported, [t]hat having had the subject under consideration, recommend that the resolution [to vacate Henry's seat] be rejected—which was concurred in unanimously" by the full House. One does wonder: Did Mills vote against his own motion?

132. Jacob Henry's house is located at 229 Front Street, Beaufort, North Carolina. Henry purchased the property in 1794. National Register of Historic Places Inventory—Nomination Form, https://files.nc.gov/ncdcr/nr/CR0005.pdf. Mary Warshaw, "Fuller Family—Beaufort NC," More Beaufort, North Carolina History ("The block in Beaufort adjoining Orange Street, Ann Street, Turner Street and *Front Street* was known as Fuller land." [emphasis added]), https://tinyurl.com/yxgphp8d. See notes 7 and 126 (describing Fuller's and Henry's militia service during the War of 1812), above. Circa 1810, it appears that Sen. Belcher Fuller settled Henry's account with the *Raleigh Star*, which may have been the first newspaper to report Henry's 1809 speech in full. Newsome, "A Miscellany from the Thomas Henderson Letter Book," 400 n. 7.

133. Many participants in the Henry proceedings had or would go on to have substantial military or militia experience. In total, there were two generals, a lieutenant colonel, two majors, a captain, and a soldier in the Henry proceedings. See notes 7, 88, 115, 120, 122, 126, and 128, above. Furthermore, Thomas Henderson Jr., the *Star*'s editor, was also described as a "colonel," but for what military or militia service (if any) is unclear. See note 102, above.

134. Perhaps this is not all that surprising. In the common law world, prior to modern statutory reforms, parties in civil cases were precluded from appearing as witnesses. In England, the restriction against parties' appearing as witnesses in civil cases was not swept away until legislative reforms during the 1840s and

Philip S. Foner wrote that Henry's speech "made a profound impression on progressive Americans by a brilliant reply to narrow-minded bigots."[135] If the North Carolina political world of 1776, 1809, or 1835 were inhabited by a substantial number of "narrow-minded bigots," would there not be a rich history of attempts to exclude religious nonconformists? Instead, there is a very thin record of such efforts.[136] Has anyone uncovered anything like discussion or debate, much less active political efforts, to exclude Justice Gaston from his high office? Aside from Hugh C. Mills, is there any reason to believe that any of Jacob Henry's colleagues in the Commons in 1809—or, even, any of the drafters of the 1776 state constitution—were narrow-minded or bigots? Is it possible that Article 32 itself was not rooted in parochialism and bigotry directed against non-Protestants? If one accepts Gaston's wider perspective, i.e., that Article 32 had a limited bite,[137] one might even suspect that the North Carolina Constitution of 1776 and Article 32 were rooted, in part, in disestablishment-related values.[138]

One might also consider Article 32's constitutional neighbor, Article 31, which provided: "That no clergyman, or preacher of the gospels of any denomination, shall be capable of being a member of either the Senate, House of Commons, or Council of State, while he continues in the exercise of the pastoral function."[139] "In 1801, the Reverend John Culpepper and the Reverend William Taylor were declared ineligible and expelled from their seats in the state senate. In 1820, the Reverend Crudup met

1850s, and the restriction against defendants' appearing as witnesses in criminal cases continued until late nineteenth-century legislative reforms. Colin Tapper, *Cross and Tapper on Evidence*, 12th ed. (Oxford, Engl.: Oxford University Press, 2010), 40, 223, 223 n. 2, 324, 324 n. 2. On the other hand, although he was not called as a witness, Henry did give a speech in his own defense, notwithstanding that he was an interested party. Perhaps this explains Blau's mysterious suggestion that Henry's speech arose in connection with "a special privilege." Joseph L. Blau, "Jacob Henry: On Religion and Elective Office," 220. Of course, parliamentary inquiries—such as the Henry motion—are not precise analogues to either judicial civil or criminal proceedings.

135. Philip S. Foner, *The Jews in American History 1654–1865* (New York: International Publishers Co., 1945), 34.

136. See notes 4 and 6, above. Stephen Beauregard Weeks, *Church and State in North Carolina* (Baltimore: Johns Hopkins Press, 1893), 265–266 (explaining that no one contested Gaston's holding a seat on the state Supreme Court).

137. See notes 48, 80 to 84, and accompanying text, above.

138. See, for example, North Carolina Const. of 1776, art. 34 ("That there shall be no establishment of any one religious church or denomination in this State, in preference to any other. . . ."); Peter Wiernik, *History of the Jews in America: From the Period of the Discovery of the New World to the Present Time* (New York: Jewish Press Publishing Co., 1912), 118 (characterizing Article 32 as an "exception" to the "liberty of worship" provided for by the North Carolina Constitution of 1776); see generally Luke Beck, "The Constitutional Prohibition on Religious Tests," *Melbourne University Law Review* 35 (2011): 323; Gerard V. Bradley, "The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself," *Case Western Reserve Law Review* 37 (1987): 674; Daniel L. Dreisbach, "The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban," *Journal of Church and State* 38 (1996): 261; Paul Horwitz, "Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations," *William and Mary Bill of Rights Journal* 15 (2006): 75; Bryan H. Wildenthal, "Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–1873," *Journal of Contemporary Legal Issues* 18 (2009): 153.

139. North Carolina Const. of 1776, art. 31.

the same fate."[140] This is "the peculiar state of affairs [by modern sensibilities] into which political life in North Carolina had drifted."[141] The records available indicate that the only people who were actually expelled from the North Carolina legislature, based on a religious test during the antebellum period, were three Protestant ministers. For this reason and others, it is possible that in 1776, the higher purpose of Articles 31 and 32 was not essentially exclusionary—although that was certainly their effect. Rather, the goal may have been simply to model the newly independent state of North Carolina's Revolutionary-era constitution as closely as possible on the extant British constitution and its conventions,[142] taking into account the loss of royal officers and different circumstances in the New World, including, for example, the movement toward religious disestablishment.[143] This might explain why men like Gaston, although they opposed Article 32 to some degree, did not feel aggrieved or moved by it in any strong or deeply personal sense.[144] To put it another way, political disqualification—based on a religious test—is wholly un-American, as American identity is now conceived. But the Constitution of North Carolina in 1776, with its House of Commons,[145] and its two House members (elected countywide) for each county (or "shire"?) and its separate representation in the House for each town (or "borough"), and its exclusion of the clergy from the Commons, was modeled, in part, on an older English identity—even if, perhaps, it was only an English identity of the North Carolinian imagination.[146] For example, many of the names of the

140. Hurley, "The Political Status of Roman Catholics in North Carolina," 271.
141. Ibid.
142. Harry Simonhoff, *Jewish Notables in America 1776–1865: Links of an Endless Chain* (New York: Greenberg Publisher, 1956), 137. Jacob Henry hinted at this possibility in his speech in his own defense. "Jacob Henry in the North Carolina Legislature," in Agar, *The American Orator's Own Book*, 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.").
143. See notes 1 and 113, above. See, for example, *McDaniel v. Paty*, *United States Reports*, 435 (Supreme Court of the United States 1978) 618, 622 (Burger, CJ, plurality opinion); Griffith J. McRee, ed., *Life and Correspondence of James Iredell*, 2 vols. (New York: D. Appleton and Co., 1857), 1:339. See also North Carolina Const. of 1776, art. 34.
144. See note 80 (quoting Gaston and Hurley), above. Compare Brown, *Self-Evident Truths*, 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, *North Carolina through Four Centuries*, 275 ("[M]any able North Carolinians of the time, though not actually guilty of religious bigotry, had no quarrel with the provision."), and Simonhoff, *Jewish Notables in Americas*, 137–138, with Henry G. Connor and Joseph B. Cheshire Jr., *The Constitution of the State of North Carolina Annotated* (Raleigh, N.C.: Edwards and Broughton Printing Co., 1911), xxvii (asserting that Article 32 was an "attempt to discriminate against Christians, other than Protestants"), and Ready, *The Tar Heel State*, 173 ("At the heart of the issue lay the ancient animosity between Protestants and Catholics.").
145. Kabala, *Church-State Relations in the Early American Republic*, 109 (mistakenly identifying, and thereby modernizing and Americanizing, the name of the North Carolina "House of Commons," as the North Carolina "House of Representatives").
146. Ready, *The Tar Heel State*, 170 (describing the town or "borough franchise" as "an ancient English custom kept by North Carolina's revolutionary founders"); "Jacob Rees-Mogg teaches SNP a History Lesson,"

counties the participants in the Henry proceedings hailed from were connected with English and wider imperial transatlantic history: Anson, Carteret, Craven, Cumberland, Duplin, Halifax, Martin, Onslow, Pitt, and Rockingham Counties.[147] Still, in North Carolina, in 1776, and even as late as 1809, the transition had not yet been completed from the older English identity to the political mores that twenty-first century Americans now take for granted.

One concludes that what prior commentators have written about the Henry motion is largely a reflection of who they were (or are) and what they wanted to find because they found things absent straightforward documentary support. The writers of the secondary and tertiary literature who concluded that the motion to vacate Henry's seat was rejected based on Henry's speech or on the member/officer argument or on both—were right in part and wrong in part. These commentators were right in believing—even if they lacked good evidentiary support on which to base their beliefs—that both of those arguments were advanced in 1809. They were wrong in asserting that these were the only, much less the most significant, arguments advanced on the floor of the House of Commons on December 6, 1809. Likewise, the position of the authors of the tertiary literature—that it was one or both arguments that convinced the members to vote against the motion to vacate Henry's seat—lacked substantial evidentiary support at the time they made that argument, as indicated by the newspaper reports from December 1809 and early 1810. However, it is conceivable that one or both arguments convinced the members to vote as they did. It is not surprising that the historical record is unclear on this point. What may be surprising is the clarity so many prior commentators thought they had found.

It is possible, but not certain, that Henry's supporters might have carried the day based on either or both of those arguments. In fact, though, Henry and his supporters were unwilling (if not, unable) to press the point on a preliminary vote prior to submitting the matter to the committee of the whole. Had Henry's supporters lost that vote, the entire issue might have been resolved on the "deny" argument standing alone, and perhaps *that* argument also would not have carried majority support. Based on the historical records—even as augmented by the newspaper reports from December 1809 and early 1810—it is impossible to tell what reasons (if any) persuaded the members to vote as they did.

It is certainly possible that the "deny" argument is what carried the day—or, more likely, put Henry's majority over the top. Most members who voted to reject the motion likely acted for a variety of reasons and motives.[148] That too is not surprising.

YouTube, https://www.youtube.com/watch?v=OOWqpF6cKEg ("House of Commons . . . started in 1265. . . . 1265 is when the burgesses come from the towns.") (at 2:50ff); see also note 37, above.

147. *Legislative Manual 1874*, 157, 184, 204, 207, 218, 243, 277, 292, 298, 314, and 326 (explaining the origin of each county's name).

148. Andrew Verstein, "The Jurisprudence of Mixed Motives," *Yale Law Journal* 127 (March 2018): 1106.

It is not difficult to imagine that many members liked Henry[149] and Gaston, and that some—with a Jeffersonian outlook—disliked Article 32, and especially disliked being cast in the role of religious inquisitors, but felt duty bound to enforce that provision in some fashion broadly consistent with their legislative oaths. But an admitted, abstract duty to enforce an unpopular[150] constitutional provision is not inconsistent with enforcing the provision only in cases where its violation is reasonably (if not convincingly) clear. And the "deny" argument gave a lawyer-like rule-of-law grounded riposte to any who might have accused the members of having failed to do their sworn duty. One might call this tactic parliamentary "strict constructionism." If it is fair to expect politicians to act like politicians, it is reasonable to expect, like Henry's contemporaries, that lawyers, judges, and others in elected assemblies act like lawyers, judges—and other sophisticated parliamentarians.

The prior extant secondary and tertiary literature focuses almost entirely on Henry and Gaston (and occasionally on Judge Taylor). But as the newspapers report, there were other important actors. We might reconsider Hugh C. Mills, not for his memory's sake, but for our own better understanding. There are many possibilities. Was he an officious bigot—a vexatious intermeddler? Or was he a fair-minded Cato-like guardian of the constitution, burdened with an unrelenting and undesired duty to see that that constitution, as written, was enforced?[151] Who is to say? If the

149. Marcus, *United States Jewry*, 1:507–508 ("[H]e retained his seat despite his arguments. They liked the man; that was sufficient for them."); Marcus, *The Jew in the American World*, 94; Jonathan D. Sarna and Benjamin Shapell, *Lincoln and the Jews: A History* (New York: Thomas Dunne Books, 2015), 8; Hühner, *The Struggle for Religious Liberty*, 48. On the other hand, Henry occasionally found himself in court for disputes involving debts and contracts—including disputes about slaves. P. W. Fisher, *One Dozen Pre-Revolutionary War Families of Eastern North Carolina and Some of their Descendants* (New Bern, N.C.: Owen G. Dunn Co., 1958), 13.

150. Harry L. Golden, "The Jewish People of North Carolina," *North Carolina Historical Review* 32 (April 1955): 194, 197 (affirming that there was "no pride in this [state] constitutional provision"). Alternatively, some might have been very attached to Article 32. Ready, *The Tar Heel State*, 174 (explaining that in 1835 state convention debate on Article 32: "The religious test . . . stirred so much passion that delegates too ill to walk asked to be carried on litters to hear the debates."); see also E. W. Caruthers, *A Sketch of the Life and Character of the Rev. David Caldwell, D.D.* (Greensborough, N.C.: Swaim and Sherwood, 1842), 190 ("[M]any still doubt the propriety of altering . . . [A]rticle [32], as was done in 1835.").

151. See The Honorable Edward H. Levi, "Bicentennial Address of the Attorney General at Touro Synagogue," *Rhode Island Jewish Historical Notes* 7 (November 1976): 320, 322 ("In 1809 the North Carolina legislature unsuccessfully tried to exclude Jacob Henry, who, as a Jew, did not subscribe to the Divine authority of the New Testament as required by the state constitution."). One notes Attorney General Levi's hyperbole: it was not the legislature (as a whole) but only the Commons that was involved. The Commons did not "try" to exclude Henry, it was only Hugh C. Mills; and Mills—in the final vote—may not have supported his own motion. Finally, Levi's framing the situation in terms of what Henry "subscribe[d] to" as opposed to what he "den[ied]" is also misplaced. North Carolina Const. of 1776, art 32. Such hyperbole can be found in much of the literature on the Jacob Henry incident. See, for example, Gilpatrick, *Jeffersonian Democracy in North Carolina*, 181 n. 6 (describing the incident as a "prolonged contest"); James Ingram Martin Sr., "Judaism," in *Religious Traditions of North Carolina*, 132 n. 4; Jonathan D. Sarna and David G. Dalin, *Religion and State in the American Jewish Experience* (Notre Dame, Ind.: University of Notre Dame Press, 1997), 4; David Sorkin, *Jewish Emancipation: A History across Five Centuries* (Princeton, N.J.: Princeton University Press, 2019), 227. Indeed, some historians paint strikingly different pictures based on the same small constellation of known

newspaper reports of unanimous rejection of Mills's resolution were correct, then he was part of that unanimous block of members (unless he had been absent when the proceedings ended or simply chose not to vote). If he voted against his own resolution, there is little reason to believe that he or any significant number of his colleagues were religious bigots seeking an auto-da-fé at the first opportunity.[152] Also, why did Mills not challenge Henry's qualifications when the members took their oaths on November 20, 1809? Why did he wait until December 5—after Henry had qualified?

If you, the reader, have stubbornly persisted in going with the author thus far, I would ask you to go with me a bit farther still. But here, admittedly, I shift from law and history, to conjecture and hypothesis. Perhaps some future sibyl will fill in the intellectual gaps that I cannot. Is not the quality of the reported debate on the Henry motion—the sophistication, the complexity, and the sheer number of arguments marshaled on each side—all on one day's notice—more than somewhat surprising? Is it just possible, may we not hope, that the debate was pre-planned and pre-arranged, that Henry was set up?[153] Perhaps the motion and subsequent proceedings had been arranged to provide a public vehicle for debating Article 32 and to create a record toward its amendment or abolition? If a cabal of members were quietly engineering such strategic parliamentary politics for the consumption of their colleagues and the wider demos, for what reason should we be surprised?

And if you or I were consigned, by a trick of fate, to similar circumstances, could we aspire to do any more than these members did in the winter of 1809?

facts. Compare Marcus, *United States Jewry*, 1:507 (positing that "after consulting with eminent Christian jurists, Henry wrote a letter [i.e, his speech] to his colleagues in the House of Commons"), with Meacham, *American Gospel*, 108 (characterizing the Jacob Henry incident as "[a] standoff . . . with Christian lawmakers refusing to seat [Henry]").

152. Some might argue that Mills's effort to enforce the law of the 1776 North Carolina state constitution, as he understood it, presumptively establishes that he was a bigot. Alternatively, the circumstantial evidence involving Mills's delay in seeking to unseat Henry, and Mills's not opposing the apparently unanimous vote against his motion to vacate Henry's seat—both would seem to indicate that reasons and motives beyond mere bigotry were at work. Harry L. Golden, *Jewish Roots in the Carolinas: A Pattern of American Philo-Semitism* (Greensboro, N.C.: Deal Printing Co., 1955), 12 (noting "that during the entire ninety-year debate for the repeal of [Article 32], I have been unable to uncover a single derogatory reference to the Jews, as a people"). Of course, not all have agreed (and will agree) with this. See Andrews, review of *Ante-Bellum North Carolina: A Social History*, 171 ("One notices furthermore a trace of anti-Semitism in the attempt to exclude a Jew named Jacob Henry from a seat in the House of Commons in 1809."); see also Hühner, *The Struggle for Religious Liberty*, 46 (asserting that Mills was "actuated by some spiteful motive").

153. To be sure, at the start of his speech in his own defense, Henry made clear that he had no advance knowledge of Mills's motion. On the other hand, a fair number of newspaper editors might not have believed Henry—some newspapers introduced Henry's speech with the following language: "The speech is alledged to be from the impulse of the moment." *Northern Whig* (Hudson, N.Y.), March 8, 1810 (quoting "the Philadelphia Register," and ascribing the speech to "Henry Jacobs"). Other newspapers also used this "alleged" language.

Dublin, on the Liffey, 28 Kislev 5780

Seth Barrett Tillman, JD is a Lecturer in the Maynooth University Department of Law. Roinn Dlí Ollscoil Mhá Nuad. *He has downloaded the more difficult to find sources (along with folio pages and like material) in a PDF. Seth Barrett Tillman, Jacob Henry: Primary Documents, Social Science Research Network, https://ssrn.com/abstract=3488584. This article is posted here: https://ssrn.com/abstract=3498217. He thanks Paul Finkelman, John V. Orth, Leonard Rogoff, Paul Seaward, James White, House principal clerk, North Carolina House of Representatives, and the archivists, editors, and reviewers at the* North Carolina Historical Review *and the North Carolina State Archives for their comments and also for sharing helpful materials, which were difficult to access in Ireland. He also participated in a podcast on this paper. See Brian L. Frye and Seth Barrett Tillman, Podcast,* A Religious Test in America?—The Motion to Vacate Jacob Henry's State Legislative Seat, Ipse Dixit *(December 4, 2019), https://shows.pippa.io/ipse-dixit/episodes. He thanks Brian Frye.*