A

TREATISE

ON THE

CONSTITUTIONAL LIMITATIONS

WHICH REST UPON

THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION.

BY

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SIXTH EDITION,

WITH LARGE ADDITIONS, GIVING THE RESULTS OF THE RECENT CASES,

By ALEXIS C. ANGELL,

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PREFACE TO THE SECOND EDITION.

In the Preface to the first edition of this work, the author stated its purpose to be, to furnish to the practitioner and the student of the law such a presentation of elementary constitutional principles as should serve, with the aid of its references to judicial decisions, legal treatises, and historical events, as a convenient guide in the examination of questions respecting the constitutional limitations which rest upon the power of the several State legislatures. In the accomplishment of that purpose, the author further stated that he had faithfully endeavored to give the law as it had been settled by the authorities, rather than to present his own views. At the same time, he did not attempt to deny — what he supposed would be sufficiently apparent — that he had written in full sympathy with all those restraints which the caution of the fathers had imposed upon the exercise of the powers of government, and with faith in the checks and balances of our republican system, and in correct conclusions by the general public sentiment, rather than in reliance upon a judicious, prudent, and just exercise of authority, when confided without restriction to any one man or body of men, whether sitting in legislative capacity or judicial. In this sympathy and faith, he had written of jury trials and the other safeguards to personal liberty, of liberty of the press, and of vested rights; and he had also endeavored to point out that there are on all sides definite limitations which circumscribe the legislative authority, independent of the specific restrictions which the people impose by their State constitutions. But while not predisposed to discover in any part of our system the rightful existence of any unlimited power, created by the Constitution,

neither on the other hand had he designed to advance new doctrines, or to do more than state clearly and with reasonable conciseness the principles to be deduced from the judicial decisions.

The unexpected favor with which the work has been received having made a new edition necessary, the author has reviewed every part of it with care, but without finding occasion to change in any important particular the conclusions before given. Further reflection has only tended to confirm him in his previous views of the need of constitutional restraints at every point where agents are to exercise the delegated authority of the people; and he is gratified to observe that in the judicial tribunals the tendency is not in the direction of a disregard of these restraints. The reader will find numerous additional references to new cases and other authorities; and some modifications have been made in the phraseology of the text, with a view to clearer and more accurate expression of his views. Trusting that these modifications and additions will be found not without value, he again submits his work "to the judgment of an enlightened and generous profession."

THOMAS M. COOLEY.

UNIVERSITY OF MICHIGAN,
ANN ARBOR, July, 1871.

PREFACE TO THE THIRD EDITION.

THE second edition being exhausted, the author, in preparing a third, has endeavored to give full references to such decisions as have recently been made or reported, having a bearing upon the points discussed. It will be seen on consulting the notes that the number of such decisions is large, and that some of them are of no little importance.

THOMAS M. COOLEY.

UNIVERSITY OF MICHIGAN,
ANN ARBOR, December, 1873.

PREFACE TO THE FOURTH EDITION.

NEW topics in State Constitutional Law are not numerous; but such as are suggested by recent decisions have been discussed in this edition, and it is believed considerable value has been added to the work by further references to adjudged cases.

THOMAS M. COOLEY.

UNIVERSITY OF MICHIGAN,
ANN ARBOR, April, 1878.

PREFACE TO THE FIFTH EDITION.

IN this edition numerous cases reported since the last was published are referred to, and such modifications of text and notes as the new cases seemed to call for have been made.

THOMAS M. COOLEY.

UNIVERSITY OF MICHIGAN,
ANN ARBOR, February, 1883.

PREFACE TO THE SIXTH EDITION.

THE period that has elapsed since the last preceding edition of this work was published, has been prolific in Constitutional questions, and a new edition seems therefore important. The official duties of the author putting it out of his power to perform in person the necessary labor, the services of Mr. Alexis C. Angell of the Detroit bar were secured for the purpose, and by him the

edition now offered to the public has been prepared. Mr. Angell has examined all the new cases, making use of them so far as seemed important, and adding to the references till the whole number now reaches over ten thousand. Where it seemed necessary, the text has been changed and added to. It is hoped the edition will be found satisfactory, not only to the legal profession, but to others who may have occasion to examine constitutional questions in the light of the judicial decisions.

THOMAS M. COOLEY.

ANN ARBOR,
June, 1890.

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OF RELIGIOUS LIBERTY.

A CAREFUL examination of the American constitutions will disclose the fact that nothing is more fully set forth or more plainly expressed than the determination of their authors to preserve and perpetuate religious liberty, and to guard against the slightest approach towards the establishment of an inequality in the civil and political rights of citizens, which shall have for its basis only their differences of religious belief. The American people came to the work of framing their fundamental laws after centuries of religious oppression and persecution, sometimes by one party or sect and sometimes by another, had taught them the utter futility of all attempts to propagate religious opinions by the rewards, penalties, or terrors of human laws. They could not fail to perceive, also, that a union of Church and State, like that which existed in England, if not wholly impracticable in America, was certainly opposed to the spirit of our institutions, and that any domineering of one sect over another was repressing to the energies of the people, and must necessarily tend to discontent and disorder. Whatever, therefore, may have been their individual sentiments upon religious questions, or upon the propriety of the State assuming supervision and control of religious affairs under other circumstances, the general voice has been, that persons of every religious persuasion should be made equal before the law, and that questions of religious belief and religious worship should be questions between each individual man and his Maker. Of these questions human tribunals, so long as the public order is not disturbed, are not to take cognizance, except as the individual, by his voluntary action in associating himself with a religious organization, may have conferred upon such organization a jurisdiction over him in ecclesiastical matters.[1]

[1] The religious societies which exist in America are mere voluntary societies, having little resemblance to those which constitute a part of the machinery of government in England. They are for the most part formed under general laws, which permit the voluntary incorporation of attendants upon religious worship, with power in the corporation to hold real and personal estate for the purposes of their organization, but not for other purposes. Such a society is "a volun-

These constitutions, therefore, have not established religious toleration merely, but religious equality; in that particular being

tary association of individuals or families, united for the purpose of having a common place of worship, and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances of baptism. &c. Although a church or body of professing Christians is almost uniformly connected with such a society or congregation, the members of the church have no other or greater rights than any other members of the society who statedly attend with them for the purposes of divine worship. Over the church, as such, the legal or temporal tribunals of the State do not profess to have any jurisdiction whatever, except so far as is necessary to protect the civil rights of others, and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatories, to which they have voluntarily subjected themselves. But, as a general principle, those ecclesiastical judicatories cannot interfere with the temporal concerns of the congregation or society with which the church or the members thereof are connected." *Walworth*, Chancellor, in Baptist Church *v.* Wetherell, 3 Paige, 296, 301; s. c. 24 Am. Dec. 223. See Ferraria *v.* Vasconcellos, 31 Ill. 25; Lawyer *v.* Cipperly, 7 Paige, 281; Shannon *v.* Frost, 3 B. Monr. 253; German, &c. Cong. *v.* Pressler, 17 La. Ann. 127; Sohier *v.* Trinity Church, 109 Mass. 1; Calkins *v.* Cheney, 92 Ill. 463. Equity will not determine questions of faith, doctrine, and schism unless necessarily involved in the enforcement of ascertained trusts. Fadness *v.* Braunborg, 73 Wis. 257. Such a corporation is not an ecclesiastical, but merely a private civil corporation, the members of the society being the corporators, and the trustees the managing officers, with such powers as the statute confers, and the ordinary discretionary powers of officers in civil corporations. Robertson *v.* Bullions, 11 N. Y. 243; Miller *v.* Gable, 2 Denio, 492. Compare Watson *v.* Jones, 13 Wall. 679. The church connected with the society, if any there be, is not recognized in the law as a distinct entity; the corporators in the society are not necessarily members thereof, and the society may change its government, faith, form of worship, discipline, and ecclesiastical relations at will, subject only to the restraints imposed by their articles of association, and to the general laws of the State. Keyser *v.* Stansifer, 6 Ohio, 363; Robertson *v.* Bullions, 11 N. Y. 243; Parish of Bellport *v.* Tooker, 29 Barb. 256; s. c. 21 N. Y. 267; Burrel *v.* Associated Reform Church, 44 Barb. 282; O'Hara *v.* Stack, 90 Pa. St. 477; Warner *v.* Bowdoin Sq. Bapt. Soc., 148 Mass. 400. In New Hampshire the signers of the articles of association and not the pew-owners are the corporators. Trinitarian Cong. Soc. *v.* Union Cong. Soc. 61 N. H. 384. See also Holt *v.* Downs, 58 N. H. 170. An action will not lie against an incorporated ecclesiastical society for the wrongful expulsion of a member by the church. Hardin *v.* Baptist Church, 51 Mich. 137; Sale *v.* First Baptist Ch., 62 Iowa, 26. The courts of the State have no general jurisdiction and control over the officers of such corporations in respect to the performance of their official duties; but as in respect to the property which they hold for the corporation they stand in position of trustees, the courts may exercise the same supervision as in other cases of trust. Ferraria *v.* Vasconcellos, 31 Ill. 25; Smith *v.* Nelson, 18 Vt. 511; Watson *v.* Avery, 2 Bush, 332; Watson *v.* Jones, 13 Wall. 679; Hale *v.* Everett, 53 N. H. 9; Boxwell *v.* Affleck, 79 Va. 402; First Ref. Pres. Ch. *v.* Bowden, 14 Abb. N. C. 356. Where a bishop holds property in trust, upon his insolvency courts will prevent the diversion of the property to his creditors. Mannix *v.* Purcell, 19 N. E. Rep. 572 (Ohio). But the courts will interfere where abuse of trust is alleged, only in clear cases, especially if the abuse alleged be a departure from the tenets of the founders of a charity. Happy *v.* Morton, 33 Ill. 398. See Hale *v.* Everett, 53 N. H. 9. It is competent to form such societies on the basis of a community of property. Scribner *v.* Rapp, 5 Watts, 311; s. c. 30 Am. Dec. 327; Gass *v.* Wilhite, 2 Dana, 170; s. c. 26 Am. Dec. 446; Waite *v.* Merrill, 4

far in advance not only of the mother country, but also of much of the colonial legislation, which, though more liberal than that

Me. 102; s. c. 16 Am. Dec. 288. The articles of association will determine who may vote when the State law does not prescribe qualifications. State *v.* Crowell, 9 N. J. 391. Should there be a disruption of the society, the title to the property will remain with that part of it which is acting in harmony with its own law; seceders will be entitled to no part of it. McGinnis *v.* Watson, 41 Pa. St. 9; M. E. Church *v.* Wood, 5 Ohio, 283; Keyser *v.* Stansifer, 6 Ohio, 363; Shannon *v.* Frost, 3 B. Monr. 253; Gibson *v.* Armstrong, 7 B. Monr. 481; Hadden *v.* Chorn, 8 B. Monr. 70; Ferraria *v.* Vasconcellos, 23 Ill. 456; Fernstler *v.* Siebert, 114 Pa. St. 196; Dressen *v.* Brameier, 56 Iowa, 756. And this even though there may have been a change in doctrine on the part of the controlling majority. Keyser *v.* Stansifer, 6 Ohio, 363. See Petty *v.* Tooker, 21 N. Y. 267; Horton *v.* Baptist Church, 34 Vt. 309; Eggleston *v.* Doolittle, 33 Conn. 396; Miller *v.* English, 21 N. J. 317; Niccolls *v.* Rugg, 47 Ill. 47; Kinkead *v.* McKee, 9 Bush, 535; Baker *v.* Ducker, 79 Cal. 365. Whichever body the ecclesiastical authorities recognize as the church, whether it contains a majority of members or not, is entitled to the property. Gaff *v.* Greer, 88 Ind. 122; White Lick Meeting *v.* White Lick Meeting, 89 Ind. 136. Peculiar rights sometimes arise on a division of a society; as to which we can only refer to Reformed Church *v.* Schoolcraft, 65 N. Y. 134; Kinkead *v.* McKee, 9 Bush, 535; Niccolls *v.* Rugg, 47 Ill. 47; Smith *v.* Swormstedt, 16 How. 288; Henry *v.* Deitrich, 84 Pa. St. 286. The administration of church rules or discipline the courts of the State do not interfere with, unless civil rights become involved, and then only for the protection of such rights. Hendrickson *v.* Decow, 1 N. J. Eq. 577; Harmon *v.* Dreher, Speers Eq. 87; Dieffendorf *v.* Ref. Cal. Church, 20 Johns. 12; Wilson *v.* Johns Island Church, 2 Rich. Eq. 192; Den *v.* Bolton, 12 N. J. 206; Baptist Church *v.* Wetherell, 3 Paige, 301; German Reformed Church *v.* Seibert, 3 Pa. St. 282; State *v.* Farris, 45 Mo. 183; McGinnis *v.* Watson, 41 Pa. St. 9; Watson *v.* Jones, 13 Wall. 679; Chase *v.* Cheney, 58 Ill. 509; Calkins *v.* Cheney, 92 Ill. 463; Gartin *v.* Penick, 5 Bush, 110; Lucas *v.* Case, 9 Bush, 297; People *v.* German, &c. Church, 53 N. Y. 103; Grosvenor *v.* United Society, 118 Mass. 78; State *v.* Hebrew Congregation, 30 La. Ann. 205; s. c. 33 Am. Rep. 217; State *v.* Bibb St. Ch., 84 Ala. 23; Livingston *v.* Rector, &c., 45 N. J. L. 230; Richardson *v.* Union Cong. Soc., 58 N. H. 187; Matter of First Pres. Soc., 106 N. Y. 251; Fadness *v.* Braunberg, 73 Wis. 257. Decision of church tribunal as to the election of a deacon is conclusive. Atty.-Gen. *v.* Geerlings, 55 Mich. 562. But trustees may be prevented by the courts from continuing to employ a minister who has been deposed: Isham *v.* Fullager, 14 Abb. N. C. 363; see Hatchett *v.* Mt. Pleasant Ch., 46 Ark. 291; from closing a church building: Isham *v.* Trustees, 65 How. Pr. 465; and may be compelled to open it to a regularly assigned pastor. People *v.* Conley, 42 Hun, 98; Whitecar *v.* Michenor, 37 N. J. Eq. 6. In a congregationally governed church a minority of officers may be enjoined from putting in an organ against the wish of the majority of the officers and members: Hackney *v.* Vawter, 39 Kan. 615; and a minority of members from excluding the majority from using the church. Bates *v.* Houston, 66 Ga. 198. But an excommunication will not be allowed to affect civil rights. Fitzgerald *v.* Robinson, 112 Mass. 371. As to the nature and effect of the contract between the society and the minister, see Avery *v.* Tyringham, 3 Mass. 160; s. c. 3 Am. Dec. 105 and note; Perry *v.* Wheeler, 12 Bush, 541; East Norway Lake Ch. *v.* Froislie, 37 Minn. 447; Downs *v.* Bowdoin Sq. Bapt. Soc., 149 Mass. 185; West *v.* First Pres. Ch., 42 N. W. Rep. 922 (Minn.). Under New York statute unless a minister's salary is fixed in a certain way the church is not liable. Landers *v.* Frank St. M. E. Ch., 97 N. Y. 119. The civil courts may intervene as to a breach of contract for salary. Bird *v.* St. Mark's Church, 62 Iowa, 567. As to what is *extra vires* for such a society, see Harriman *v.* Baptist Church, 63 Ga. 186; s. c. 36 Am. Rep. 117.

of other civilized countries, nevertheless exhibited features of discrimination based upon religious beliefs or professions.[1]

Considerable differences will appear in the provisions in the State constitutions on the general subject of the present chapter; some of them being confined to declarations and prohibitions whose purpose is to secure the most perfect equality before the law of all shades of religious belief, while some exhibit a jealousy of ecclesiastical authority by making persons who exercise the functions of clergyman, priest, or teacher of any religious persuasion, society, or sect, ineligible to civil office;[2] and still others show some traces of the old notion, that truth and a sense of duty do not consort with scepticism in religion.[3] There are excep-

[1] For the distinction between religious toleration and religious equality, see Bloom *v.* Richards, 2 Ohio St. 889; Hale *v.* Everett, 53 N. H. 1. And see Madison's views, in his Life by Rives, Vol. I. p. 140. It was not easy, two centuries ago, to make men educated in the ideas of those days understand how there could be complete religious liberty, and at the same time order and due subordination to authority in the State. "Coleridge said that toleration was impossible until indifference made it worthless." Lowell, "Among my Books," 336. Roger Williams explained and defended his own views, and illustrated the subject thus: "There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or human combination or society. It hath fallen out sometimes that both Papists and Protestants, Jews and Turks, may be embarked in one ship; upon which supposal I affirm that all the liberty of conscience I ever pleaded for turns upon these two hinges: that none of the Papists, Protestants, Jews, or Turks be forced to come to the ship's prayers or worship if they practise any. I further add that I never denied that, notwithstanding this liberty, the commander of this ship ought to command the ship's course, yea, and also command that justice, peace, and sobriety be kept and practised, both among the seamen and all the passengers. If any of the seamen refuse to perform their service, or passengers to pay their freight; if any refuse to help, in person or purse, towards the common charges or defence; if any refuse to obey the common laws and orders of the ship, concerning their common peace and preservation; if any shall mutiny and rise up against their commanders and officers; if any should preach or write that there ought to be no commanders or officers, because all are equal in Christ, therefore no masters nor officers, no laws nor orders, no corrections nor punishments; I say I never denied but in such cases, whatever is pretended, the commander or commanders may judge, resist, compel, and punish such transgressors according to their deserts and merits." Arnold's History of Rhode Island, Vol. I. p. 254, citing Knowles, 279, 280. There is nothing in the first amendment to the federal Constitution which can give protection to those who practise what is forbidden by the statute as criminal, *e. g.* bigamy, — on the pretence that their religion requires or sanctions it. Reynolds *v.* United States, 98 U. S. 145.

[2] There are provisions to this effect, more or less broad, in the Constitutions of Tennessee, Delaware, Maryland, and Kentucky.

[3] The Constitution of Pennsylvania provides "that no person who acknowledges the being of God, and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth." Art. 1, § 4. — The Constitution of North Carolina: "The following classes of persons shall be disqualified for office: First: All persons who shall deny the existence of Almighty God," &c. Art. 6, § 5. — The Constitutions of Mississippi and South Carolina: "No person who denies

tional clauses, however, though not many in number; and it is believed that, where they exist, they are not often made use of to deprive any person of the civil or political rights or privileges which are placed by law within the reach of his fellows.

Those things which are not lawful under any of the American constitutions may be stated thus: —

1. Any law respecting an establishment of religion. The legislatures have not been left at liberty to effect a union of Church and State, or to establish preferences by law in favor of any one religious persuasion or mode of worship. There is not complete religious liberty where any one sect is favored by the State and given an advantage by law over other sects.[1] Whatever estab-

the existence of the Supreme Being shall hold any office under this Constitution." — The Constitution of Tennessee: "No person who denies the being of a God, or a future state of rewards and punishments, shall hold any office in the civil department of this State." — On the other hand, the Constitutions of Georgia, Kansas, Virginia, West Virginia, Maine, Delaware, Indiana, Iowa, Oregon, Ohio, New Jersey, Nebraska, Minnesota, Arkansas, Texas, Alabama, Missouri, Rhode Island, Nevada, and Wisconsin expressly forbid religious tests as a qualification for office or public trust. Very inconsistently the Constitutions of Mississippi and Tennessee contain a similar prohibition. In the Constitutions of Alabama, Colorado, Georgia, Illinois, Iowa, Kentucky, Michigan, New Jersey, Rhode Island, and West Virginia, it is provided that no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions. — The Constitution of Maryland provides "that no religious test ought ever to be required as a qualification for any office of trust or profit in this State, other than a declaration of belief in the existence of God; nor shall the legislature prescribe any other oath of office than the oath prescribed by this constitution." Declaration of Rights, Art. 37. — The Constitution of Illinois provides that "the free exercise and enjoyment of religious profession and worship without discrimination shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship." Art. 2, § 3. — The Constitutions of California, Colorado, Connecticut, Florida, Georgia, Illinois, Maryland, Minnesota, Mississippi, Missouri, Nevada, New York, and South Carolina contain provisions that liberty of conscience is not to justify licentiousness or practices inconsistent with the peace and moral safety of society.

[1] A city ordinance is void which gives to one sect a privilege denied to others. Shreveport *v.* Levy, 26 La. Ann. 671. It is not unconstitutional to permit a school-house to be made use of for religious purposes when it is not wanted for schools. Nichols *v.* School Directors, 93 Ill. 61; s. c. 34 Am. Rep. 160; Davis *v.* Boget, 50 Iowa, 11. But in Missouri it seems the school directors have no authority to permit such use. Dorlin *v.* Shearer, 67 Mo. 301. Under the Illinois Constitution of 1848 the legislature had no authority to take a private school-house, erected under the provisions of a will as a school-house and place of worship, and constitute it a school district, and provide for the election of trustees, and invest them with taxing power for the support of a school therein. People *v.* McAdams, 82 Ill. 356. But the basement of a church may be used for a school, and teachers of one sect employed. And if religious instruction is given daily, though not required by the

lishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and if based on religious grounds, a religious persecution. The extent of the discrimination is not material to the principle; it is enough that it creates an inequality of right or privilege.

2. Compulsory support, by taxation or otherwise, of religious instruction. Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary. It is not within the sphere of government to coerce it.[1]

3. Compulsory attendance upon religious worship. Whoever is not led by choice or a sense of duty to attend upon the ordinances of religion is not to be compelled to do so by the State. It is the province of the State to enforce, so far as it may be found practicable, the obligations and duties which the citizen may be under or may owe to his fellow-citizen or to society; but those which spring from the relations between himself and his Maker are to be enforced by the admonitions of the conscience, and not by the penalties of human laws. Indeed, as all real worship must essentially and necessarily consist in the free-will offering of adoration and gratitude by the creature to the Creator, human laws are obviously inadequate to incite or compel those internal and voluntary emotions which shall induce it, and human penalties at most could only enforce the observance of idle ceremonies, which, when unwillingly performed, are alike valueless to the participants and devoid of all the elements of true worship.

4. Restraints upon the free exercise of religion according to the dictates of the conscience. No external authority is to place itself between the finite being and the Infinite when the former is seeking to render the homage that is due, and in a mode which commends itself to his conscience and judgment as being suitable for him to render, and acceptable to its object.[2]

authorities, a taxpayer cannot have equitable relief. Millard *v.* Board of Education, 121 Ill. 297.

[1] We must exempt from this the State of New Hampshire, whose constitution permits the legislature to authorize "the several towns, parishes, bodies corporate, or religious societies within this State to make adequate provisions, at their own expense, for the support and maintenance of public Protestant teachers of piety, religion, and morality;" but not to tax those of other sects or denominations for their support. Part 1, Art. 6. As to meaning of Protestant, see Hale *v.* Everett, 53 N. H. 1. The attempt to amend the above provision by striking out the word "Protestant" was made in 1876, but failed, though at the same time the acceptance of the Protestant religion as a test for office was abolished, and the application of moneys raised by taxation to the support of denominational schools was prohibited.

[2] This guaranty does not prevent adopting reasonable rules for the use of streets, and forbidding playing therein on an instrument, though it be done as

5. Restraints upon the expression of religious belief. An earnest believer usually regards it as his duty to propagate his opinions, and to bring others to his views. To deprive him of this right is to take from him the power to perform what he considers a most sacred obligation.

These are the prohibitions which in some form of words are to be found in the American constitutions, and which secure freedom of conscience and of religious worship.[1] No man in religious matters is to be subjected to the censorship of the State or of any public authority; and the State is not to inquire into or take notice of religious belief, when the citizen performs his duty to the State and to his fellows, and is guilty of no breach of public morals or public decorum.[2]

an act of worship. Com. *v.* Plaisted, 148 Mass. 374; State *v.* White, 64 N. H. 48.

1 This whole subject was considered very largely in the case of Minor *v.* The Board of Education, in the Superior Court of Cincinnati, involving the right of the school board of that city to exclude the reading of the Bible from the public schools. The case was reported and published by Robert Clarke & Co., Cincinnati, under the title, "The Bible in the Public Schools," 1870. The point of the case may be briefly stated. The constitution of the State, after various provisions for the protection of religious liberty, contained this clause: "Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction." There being no legislation on the subject, except such as conferred large discretionary power on the Board of Education in the management of schools, that body passed a resolution, "that religious instruction and the reading of religious books, including the Holy Bible, are prohibited in the Common Schools of Cincinnati; it being the true object and intent of this rule to allow the children of the parents of all sects and opinions, in matters of faith and worship, to enjoy alike the benefit of the Common School fund." Certain taxpayers and citizens of said city, on the pretence that this action was against public policy and morality, and in violation of the spirit and intent of the provision in the constitution which has been quoted, filed their complaint in the Superior Court, praying that the board be enjoined from enforcing said resolution. The Superior Court made an order granting the prayer of the complaint: but the Supreme Court, on appeal, reversed it, holding that the provision in the constitution requiring the passage of suitable laws to encourage morality and religion was one addressed solely to the judgment and discretion of the legislative department; and that, in the absence of any legislation on the subject, the Board of Education could not be compelled to permit the reading of the Bible in the schools. Board of Education *v.* Minor, 23 Ohio St. 211. On the other hand, it has been decided that the school authorities, in their discretion, may compel the reading of the Bible in schools by pupils, even though it be against the objection and protest of their parents. Donahoe *v.* Richards, 38 Me. 376; Spiller *v.* Woburn, 12 Allen, 127.

2 Congress is forbidden, by the first amendment to the Constitution of the United States, from making any law respecting an establishment of religion, or prohibiting the free exercise thereof. Mr. Story says of this provision: "It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, exemplified in our domestic, as well as in foreign annals, that it was deemed advisable to exclude from the national government all power to act upon the subject. The situation, too, of the

But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the Universe, and of acknowledging with thanksgiving His boundless favors, or bowing in contrition when visited with the penalties of His broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse.[1] This public recognition of religious worship, however, is not based entirely, perhaps not even mainly, upon a sense of what is due to the Supreme Being himself as the author of all good and of all law; but the same reasons of State policy which induce the government to aid institutions of charity and seminaries of instruction, will incline it also to foster religious worship and religious institutions, as conservators of the public morals, and valuable, if

different States equally proclaimed the policy as well as the necessity of such an exclusion. In some of the States, Episcopalians constituted the predominant sect; in others, Presbyterians; in others, Congregationalists; in others, Quakers; and in others again there was a close numerical rivalry among contending sects. It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions; and the Catholic and Protestant, the Calvinist and the Arminian, the Jew and the infidel, may sit down at the common table of the national councils, without any inquisition into their faith or mode of worship." Story on the Constitution, § 1879; 1 Tuck. Bl. Com. App. 296. For an examination of this amendment, see Reynolds *v.* United States, 98 U. S. 145.

[1] See Trustees First M. E. Ch. *v.* Atlanta, 76 Ga. 181.

not indispensable assistants in the preservation of the public order.

Nor, while recognizing a superintending Providence, are we always precluded from recognizing also, in the rules prescribed for the conduct of the citizen, the notorious fact that the prevailing religion in the States is Christian. Some acts would be offensive to public sentiment in a Christian community, and would tend to public disorder, which in a Mahometan or Pagan country might be passed by without notice, or even be regarded as meritorious; just as some things would be considered indecent, and worthy of reprobation and punishment as such, in one state of society, which in another would be in accord with the prevailing customs, and therefore defended and protected by the laws. The criminal laws of every country are shaped in greater or less degree by the prevailing public sentiment as to what is right, proper, and decorous, or the reverse; and they punish those acts as crimes which disturb the peace and order, or tend to shock the moral sense or sense of propriety and decency, of the community. The moral sense is largely regulated and controlled by the religious belief; and therefore it is that those things which, estimated by a Christian standard, are profane and blasphemous, are properly punished as crimes against society, since they are offensive in the highest degree to the general public sense, and have a direct tendency to undermine the moral support of the laws, and to corrupt the community.

It is frequently said that Christianity is a part of the law of the land. In a certain sense and for certain purposes this is true. The best features of the common law, and especially those which regard the family and social relations; which compel the parent to support the child, the husband to support the wife; which make the marriage-tie permanent and forbid polygamy, — if not derived from, have at least been improved and strengthened by the prevailing religion and the teachings of its sacred Book. But the law does not attempt to enforce the precepts of Christianity on the ground of their sacred character or divine origin. Some of those precepts, though we may admit their continual and universal obligation, we must nevertheless recognize as being incapable of enforcement by human laws. That standard of morality which requires one to love his neighbor as himself we must admit is too elevated to be accepted by human tribunals as the proper test by which to judge the conduct of the citizen; and one could hardly be held responsible to the criminal laws if in goodness of heart and spontaneous charity he fell something short of the Good Samaritan. The precepts of Christianity, moreover,

affect the heart, and address themselves to the conscience: while the laws of the State can regard the outward conduct only; and for these several reasons Christianity is not a part of the law of the land in any sense which entitles the courts to take notice of and base their judgments upon it, except so far as they can find that its precepts and principles have been incorporated in and made a component part of the positive law of the State.[1]

Mr. Justice *Story* has said in the Girard Will case that, although Christianity is a part of the common law of the State, it is only so in this qualified sense, that *its divine origin and truth are admitted*, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or to the injury of the public.[2] It may be doubted, however, if the punishment of blasphemy is based necessarily upon an admission of the divine origin or truth of the Christian religion, or incapable of being otherwise justified.

Blasphemy has been defined as consisting in speaking evil of the Deity, with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning the Supreme Being calculated and designed to impair and destroy the reverence, respect, and confidence due to him, as the intelligent Creator, Governor, and Judge of the world. It embraces the idea of detraction as regards the character and attributes of God, as calumny usually carries the same idea when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence of God, by denying his existence or his attributes as an intelligent Creator, Governor, and Judge of men, and to prevent their having confidence in him as such.[3] Contumelious reproaches and profane ridicule of Christ or of the Holy Scriptures have the same evil effect in sapping the foundations of society and of public order, and are classed under the same head.[4]

In an early case where a prosecution for blasphemy came before Lord *Hale*, he is reported to have said: "Such kind of wicked,

[1] Andrews *v.* Bible Society, 4 Sandf. 156, 182; Ayres *v.* Methodist Church, 3 Sandf. 351; State *v.* Chandler, 2 Harr. 553; Bloom *v.* Richards, 2 Ohio St. 387; Board of Education *v.* Minor, 23 Ohio St. 210. The subject is largely considered in Hale *v.* Everett, 53 N. H. 1, 204 *et seq.*, and also by Dr. S. T. Spear in his book entitled "Religion and the State."

[2] Vidal *v.* Girard's Ex'rs, 2 How. 127, 198. Mr. Webster's argument that Christianity is a part of the law of Pennsylvania is given in 6 Webster's Works, p. 175.

[3] *Shaw*, Ch. J., in Commonwealth *v.* Kneeland, 20 Pick. 206, 213.

[4] People *v.* Ruggles, 8 Johns. 289; s. c. 5 Am. Dec. 335; Commonwealth *v.* Kneeland, 20 Pick. 206; Updegraph *v.* Commonwealth, 11 S. & R. 394; State *v.* Chandler, 2 Harr. 553; Rex *v.* Waddington, 1 B. & C. 26; Rex *v.* Carlile, 3 B. & Ald. 161; Cowan *v.* Milbourn, Law R. 2 Exch. 230.

blasphemous words are not only an offence to God and religion, but a crime against the laws, State, and government, and therefore punishable in the Court of King's Bench. For to say religion is a cheat, is to subvert all those obligations whereby civil society is preserved; that Christianity is a part of the laws of England, and to reproach the Christian religion is to speak in subversion of the law."[1] Eminent judges in this country have adopted this language, and applied it to prosecutions for blasphemy, where the charge consisted in malicious ridicule of the Author and Founder of the Christian religion. The early cases in New York and Massachusetts[2] are particularly marked by clearness and precision on this point, and Mr. Justice *Clayton*, of Delaware, has also adopted and followed the ruling of Lord Chief Justice *Hale*, with such explanations of the true basis and justification of these prosecutions as to give us a clear understanding of the maxim that Christianity is a part of the law of the land, as understood and applied by the courts in these cases.[3] Taken with the explanation given, there is nothing in the maxim of which the believer in any creed, or the disbeliever of all, can justly complain. The language which the Christian regards as blasphemous, no man in sound mind can feel under a sense of duty to make use of under any circumstances, and no person is therefore deprived of a right when he is prohibited, under penalties, from uttering it.

[1] The King *v.* Taylor, 3 Keb. 607, Vent. 293. See also The King *v.* Woolston, 2 Stra. 834, Fitzg. 64, Raym. 162, in which the defendant was convicted of publishing libels, ridiculing the miracles of Christ, his life and conversation. Lord Ch. J. *Raymond* in that case says: "I would have it taken notice of, that we do not meddle with the difference of opinion, and that we interfere only where the root of Christianity is struck at."

[2] People *v.* Ruggles, 8 Johns. 289; s. c. 5 Am. Dec. 335; Commonwealth *v.* Kneeland, 20 Pick. 206. See also Zeisweiss *v.* James, 63 Pa. St. 465, 471; McGinnis *v.* Watson, 41 Pa. St. 9, 14.

[3] State *v.* Chandler, 2 Harr. 553. The case is very full, clear, and instructive, and cites all the English and American authorities. The conclusion at which it arrives is, that "Christianity was never considered a part of the common law, so far as that for a violation of its injunctions independent of the established laws of man, and without the sanction of any positive act of Parliament made to enforce those injunctions, any man could be drawn to answer in a common-law court. It was a part of the common law, 'so far that any person reviling, subverting, or ridiculing it, might be prosecuted at common law,' as Lord *Mansfield* has declared; because, in the judgment of our English ancestors and their judicial tribunals, he who reviled, subverted, or ridiculed Christianity, did an act which struck at the foundation of our civil society, and tended by its necessary consequences to disturb that common peace of the land of which (as Lord *Coke* had reported) the common law was the preserver. The common law . . . adapted itself to the religion of the country just far as was necessary for the peace and safety of civil institutions; but it took cognizance of offences against God only, when, by their inevitable effects, they became offences against man and his temporal security." See also what is said on this subject by *Duer*, J., in Andrew *v.* Bible Society, 4 Sandf. 156, 182.

But it does not follow, because blasphemy is punishable as a crime, that therefore one is not at liberty to dispute and argue against the truth of the Christian religion, or of any accepted dogma. Its "divine origin and truth" are not so far admitted in the law as to preclude their being controverted. To forbid discussion on this subject, except by the various sects of believers, would be to abridge the liberty of speech and of the press in a point which, with many, would be regarded as most important of all. Blasphemy implies something more than a denial of any of the truths of religion, even of the highest and most vital. A bad motive must exist; there must be a wilful and malicious attempt to lessen men's reverence for the Deity, or for the accepted religion. But outside of such wilful and malicious attempt, there is a broad field for candid investigation and discussion, which is as much open to the Jew and the Mahometan as to the professors of the Christian faith. "No author or printer who fairly and conscientiously promulgates the opinions with whose truths he is impressed, for the benefit of others, is answerable as a criminal. A malicious and mischievous intention is, in such a case, the broad boundary between right and wrong; it is to be collected from the offensive levity, scurrilous and opprobrious language, and other circumstances, whether the act of the party was malicious."[1] Legal blasphemy implies that the words were uttered in a wanton manner, "with a wicked and malicious disposition, and not in a serious discussion upon any controverted point in religion."[2] The courts have always been careful, in administering the law, to say that they did not intend to include in blasphemy disputes between learned men upon particular controverted points.[3] The constitutional provisions for the protection of religious liberty not only include within their protecting power all sentiments and professions concerning or upon the subject of religion, but they guarantee to every one a perfect right to form and to promulgate such opinions and doctrines upon religious matters, and in relation to

[1] Updegraph *v.* Commonwealth, 11 S. & R. 394. In Ayres *v.* Methodist Church, 3 Sandf. 351, 377, *Duer*, J., in speaking of "pious uses," says: "If the Presbyterian and the Baptist, the Methodist and the Protestant Episcopalian, must each be allowed to devote the entire income of his real and personal estate, forever, to the support of missions, or the spreading of the Bible, so must the Roman Catholic his to the endowment of a monastery, or the founding of a perpetual mass for the safety of his soul; the Jew his to the translation and publication of the Mishna or the Talmud, and the Mahometan (if in that *collumes gentium* to which this city [New York], like ancient Rome, seems to be doomed, such shall be among us), the Mahometan his to the assistance or relief of the annual pilgrims to Mecca."

[2] People *v.* Ruggles, 8 Johns. 289, 293; s. c. 5 Am. Dec. 335, per *Kent*, Ch. J.

[3] Rex *v.* Woolston, Stra. 834; Fitzg. 64; People *v* Ruggles, 8 Johns. 289; s. c. 5 Am. Dec. 335, per *Kent*, Ch. J.

the existence, power, attributes, and providence of a Supreme Being as to himself shall seem reasonable and correct. In doing this he acts under an awful responsibility, but it is not to any human tribunal.[1]

1 Per *Shaw*, Ch. J., in Commonwealth *v.* Kneeland, 20 Pick. 206, 234. The language of the courts has perhaps not always been as guarded as it should have been on this subject. In The King *v.* Waddington, 1 B. & C. 26, the defendant was on trial for blasphemous libel, in saying that Jesus Christ was an impostor, and a murderer in principle. One of the jurors asked the Lord Chief Justice (*Abbott*) whether a work which denied the divinity of the Saviour was a libel. The Lord Chief Justice replied that "a work speaking of Jesus Christ in the language used in the publication in question was a libel, Christianity being a part of the law of the land." This was doubtless true, as the wrong motive was apparent; but it did not answer the juror's question. On motion for a new trial, the remarks of *Best*, J., are open to a construction which answers the question in the affirmative: "My Lord Chief Justice reports to us that he told the jury that it was an indictable offence to speak of Jesus Christ in the manner that he is spoken of in the publication for which this defendant is indicted. It cannot admit of the least doubt that this direction was correct. The 53 Geo. III. c. 160, has made no alteration in the common law relative to libel. If, previous to the passing of that statute, it would have been a libel to deny, in any printed book, the divinity of the second person in the Trinity, the same publication would be a libel now. The 53 Geo. III. c. 160, as its title expresses, is an act to relieve persons who impugn the doctrine of the Trinity from certain penalties. If we look at the body of the act to see from what penalties such persons are relieved, we find that they are the penalties from which the 1 W. & M Sess., 1 c. 18, exempted all Protestant dissenters, except such as denied the Trinity, and the penalties or disabilities which the 9 & 10 W. III. imposed on those who denied the Trinity. The 1 W. & M. Sess. 1, c. 18, is, as it has been usually called, an act of toleration, or one which allows dissenters to worship God in the mode that is agreeable to their religious opinions, and exempts them from punishment for non-attendance at the Established Church and non-conformity to its rites. The legislature, in passing that act, only thought of easing the consciences of dissenters, and not of allowing them to attempt to weaken the faith of the members of the church. The 9 & 10 W. III. was to give security to the government by rendering men incapable of office, who entertained opinions hostile to the established religion. The only penalty imposed by that statute is exclusion from office, and that penalty is incurred by any manifestations of the dangerous opinion, without proof of intention in the person entertaining it, either to induce others to be of that opinion, or in any manner to disturb persons of a different persuasion. This statute rested on the principle of the test laws, and did not interfere with the common law relative to blasphemous libels. It is not necessary for me to say whether it be libellous to argue from the Scriptures against the divinity of Christ; that is not what the defendant professes to do; he argues against the divinity of Christ by denying the truth of the Scriptures. A work containing such arguments, published maliciously (which the jury in this case have found), is by the common law a libel, and the legislature has never altered this law, nor can it ever do so while the Christian religion is considered the basis of that law." It is a little difficult, perhaps, to determine precisely how far this opinion was designed to go in holding that the law forbids the public denial of the truth of the Scriptures. That arguments against it, made in good faith by those who do not accept it, are legitimate and rightful, we think there is no doubt; and the learned judge doubtless meant to admit as much when he required a malicious publication as an ingredient in the offence. However, when we are considering what is the common law of England and of this country as regards offences against God and religion, the existence of a State Church in that

Other forms of profanity, besides that of blasphemy, are also made punishable by statutes in the several States. The cases these statutes take notice of are of a character no one can justify, and their punishment involves no question of religious liberty. The right to use profane and indecent language is recognized by no religious creed, and the practice is reprobated by right-thinking men of every nation and every religious belief. The statutes for the punishment of public profanity require no further justification than the natural impulses of every man who believes in a Supreme Being, and recognizes his right to the reverence of his creatures.

The laws against the desecration of the Christian Sabbath by labor or sports are not so readily defensible by arguments the force of which will be felt and admitted by all. It is no hardship to any one to compel him to abstain from public blasphemy or other profanity, and none can complain that his rights of conscience are invaded by this forced respect to a prevailing religious sentiment. But the Jew who is forced to respect the first day of the week, when his conscience requires of him the observance of the seventh also, may plausibly urge that the law discriminates against his religion, and by forcing him to keep a second Sabbath in each week, unjustly, though by indirection, punishes him for his belief.

The laws which prohibit ordinary employments on Sunday are to be defended, either on the same grounds which justify the punishment of profanity, or as establishing sanitary regulations, based upon the demonstration of experience that one day's rest in seven is needful to recuperate the exhausted energies of body and mind. If sustained on the first ground, the view must be that such laws only require the proper deference and regard which those not accepting the common belief may justly be required to pay to the public conscience. The Supreme Court of Pennsylvania have preferred to defend such legislation on the second ground rather than the first;[1] but it appears to us that if the benefit to

country and the effect of its recognition upon the law are circumstances to be kept constantly in view.

In People *v.* Porter, 2 Park. Cr. R. 14, the defence of *drunkenness* was made to a prosecution for a blasphemous libel. *Wadsworth*, Circuit Judge, presiding at the trial, declared the intoxication of defendant, at the time of uttering the words, to be an aggravation of the offence rather than an excuse.

[1] "It intermeddles not with the natural and indefeasible right of all men to worship Almighty God according to the dictates of their own consciences; it compels none to attend, erect, or support any place of worship, or to maintain any ministry against his consent; it pretends not to control or to interfere with the rights of conscience, and it establishes no preference for any religious establishment or mode of worship. It treats no religious doctrine as paramount in the State; it enforces no unwilling attendance upon the celebration of divine worship. It says not to Jew or Sabbatarian, 'You shall desecrate the day you esteem as holy, and keep sacred to religion that

the individual is alone to be considered, the argument against the law which he may make who has already observed the seventh day of the week, is unanswerable. But on the other ground it is clear that these laws are supportable on authority, notwithstanding the inconvenience which they occasion to those whose religious sentiments do not recognize the sacred character of the first day of the week.[1]

Whatever deference the constitution or the laws may require to be paid in some cases to the conscientious scruples or religious convictions of the majority, the general policy always is, to avoid with care any compulsion which infringes on the religious scruples of any, however little reason may seem to others to underlie them. Even in the important matter of bearing arms for the public defence, those who cannot in conscience take part are excused, and

we deem to be so.' It enters upon no discussion of rival claims of the first and seventh days of the week, nor pretends to bind upon the conscience of any man any conclusion upon a subject which each must decide for himself. It intrudes not into the domestic circle to dictate when, where, or to what god its inmates shall address their orisons; nor does it presume to enter the synagogue of the Israelite, or the church of the Seventh-day Christian, to command or even persuade their attendance in the temples of those who especially approach the altar on Sunday. It does not in the slightest degree infringe upon the Sabbath of any sect, or curtail their freedom of worship. It detracts not one hour from any period of time they may feel bound to devote to this object, nor does it add a moment beyond what they may choose to employ. Its sole mission is to inculcate a temporary weekly cessation from labor, but it adds not to this requirement any religious obligation." Specht *v.* Commonwealth, 8 Pa. St. 312, 325. See also Charleston *v.* Benjamin, 2 Strob. 508; Bloom *v.* Richards, 2 Ohio St. 387; McGatrick *v.* Wason, 4 Ohio St. 566; Hudson *v.* Geary, 4 R. I. 485; Bohl *v.* State, 3 Tex. App. 683: Johnston *v.* Commonwealth, 22 Pa. St. 102; Commonwealth *v.* Nesbit, 34 Pa. St. 398; Commonwealth *v.* Has, 122 Mass. 40; Commonwealth *v.* Starr, 144 Mass. 359; State *v.* Bott, 31 La. Ann. 663; s. c. 33 Am. Rep. 224; State *v.* Judge, 39 La. Ann. 132; State *v.* Balt. & O. R. R. Co., 15 W. Va. 362; s. c. 36 Am. Rep. 803.

[1] Commonwealth *v.* Wolf, 3 S. & R. 48; Commonwealth *v.* Fisher, 17 S. & R. 160; Shover *v.* State, 7 Ark. 529; Scales *v.* State, 47 Ark. 476; Voglesong *v.* State, 9 Ind. 112; State *v.* Ambs, 20 Mo. 214; Cincinnati *v.* Rice, 15 Ohio, 225; *Ex parte* Koser, 60 Cal. 177; Parker *v.* State, 16 Lea, 476. A proviso in a Sunday law for the benefit of observers of Saturday is valid. Johns *v.* State, 78 Ind. 332. In Simonds's Ex'rs *v.* Gratz, 2 Pen. & Watts, 412, it was held that the conscientious scruples of a Jew to appear and attend a trial of his cause on Saturday were not sufficient cause for a continuance But *quære* of this. In Frolickstein *v.* Mayor of Mobile, 40 Ala. 725, it was held that a statute or municipal ordinance prohibiting the sale of goods by merchants on Sunday, in its application to religious Jews "who believe that it is their religious duty to abstain from work on Saturdays, and to work on all the other six days of the week," was not violative of the article in the State constitution which declares that no person shall, "upon any pretence whatsoever, be hurt, molested, or restrained in his religious sentiments or persuasions." For decisions sustaining the prohibition of liquor sales on Sunday, see State *v.* Common Pleas, 36 N. J. 72; s. c. 13 Am. Rep. 422; State *v.* Bott, 31 La. Ann. 663; s. c. 33 Am. Rep. 224; State *v.* Gregory, 47 Conn. 276; Blaint *v* State, 34 Ark. 447; and of dramatic entertainments, see Menserdorff *v.* Dwyer, 69 N. Y. 557.

their proportion of this great and sometimes imperative burden is borne by the rest of the community.[1]

Some of the State constitutions have also done away with the distinction which existed at the common law regarding the admissibility of testimony in some cases. All religions were recognized by the law to the extent of allowing all persons to be sworn and to give evidence who believed in a superintending Providence, who rewards and punishes, and that an oath was binding on their conscience.[2] But the want of such belief rendered the person incompetent. Wherever the common law remains unchanged, it must, we suppose, be held no violation of religious liberty to recognize and enforce its distinctions; but the tendency is to do away with them entirely, or to allow one's unbelief to go to his credibility only, if taken into account at all.[3]

[1] There are constitutional provisions to this effect more or less broad in Alabama, Arkansas, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Missouri, New Hampshire, New York, North Carolina, Oregon, and South Carolina, and statutory provisions in some other States. In Tennessee "no citizen shall be compelled to bear arms, provided he will pay an equivalent to be ascertained by law." Art. 1, § 28.

[2] See upon this point the leading case of Ormichund *v.* Barker, Willes, 538, and 1 Smith's Leading Cases, 535, where will be found a full discussion of this subject. Some of the earlier American cases required of a witness that he should believe in the existence of God, and of a state of rewards and punishments after the present life. See especially Atwood *v.* Welton, 7 Conn. 66. But this rule did not generally obtain; belief in a Supreme Being who would punish false swearing, whether in this world or in the world to come, being regarded sufficient. Cubbison *v.* McCreary, 7 W. & S. 262; Blocker *v.* Burness, 2 Ala. 354; Jones *v.* Harris, 1 Strob. 160; Shaw *v.* Moore, 4 Jones (N. C.), 25; Hunscom *v.* Hunscom, 15 Mass. 184; Brock *v.* Milligan, 10 Ohio, 121; Bennett *v.* State, 1 Swan, 411; Central R. R. Co. *v.* Rockafellow, 17 Ill. 541; Arnold *v.* Arnold, 13 Vt. 362; Butts *v.* Swartwood, 2 Cow. 431; Free *v.* Buckingham, 59 N. H. 219. But one who lacked this belief was not sworn, because there was no mode known to the law by which it was supposed an oath could be made binding upon his conscience. Arnold *v.* Arnold, 13 Vt. 362; Scott *v.* Hooper, 14 Vt. 535; Norton *v.* Ladd, 4 N. H. 444; Cent. R. R. Co. *v.* Rockafellow, 17 Ill. 541.

[3] The States of Iowa, Minnesota, Michigan, Oregon, Wisconsin, Arkansas, Florida, Missouri, California, Indiana, Kansas, Nebraska, Nevada, Ohio, and New York have constitutional provisions expressly doing away with incompetency from want of religious belief. Perhaps the general provisions in some of the other constitutions declaring complete equality of civil rights, privileges, and capacities are sufficiently broad to accomplish the same purpose. Perry's Case, 3 Gratt. 632. In Michigan and Oregon a witness is not to be questioned concerning his religious belief. See People *v.* Jenness, 5 Mich. 305. In Georgia the code provides that religious belief shall only go to the credit of a witness, and it has been held inadmissible to inquire of a witness whether he believed in Christ as the Saviour. Donkle *v.* Kohn, 44 Ga. 266. In Maryland, no one is incompetent as a witness or juror "provided he believes in the existence of God, and that, under His dispensation, such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or the world to come." Const. Dec. of Rights, § 36. In Missouri an atheist is competent. Londener *v.* Lichtenheim, 11 Mo. App. 385.