ARTICLES

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OATHS AND AFFIRMATIONS OF OFFICE UNDER THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA: A HISTORY

INTRODUCTION

The Constitution of the United States of America has, since its inception in 1789, included provisions by which persons chosen to occupy certain public offices are required to take an oath or affirmation of office as a condition of their entry into office, with all the rights, privileges and duties occupancy of the office may entail. Section 1.8 of Article II provides that before the President enters on the execution of that office, he shall take an oath or affirmation in the following form:

> I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States,

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> and will, to the best of my ability, preserve, protect and defend the Constitution of the United States.

Section 3 of Article VI provides that members of the federal and State legislatures, and also federal and State executive and judicial officers:

> [S]hall be bound by oath or affirmation to support this Constitution; but no religious test shall be required as a qualification to any office or public trust under the United States.

All that is required by these provisions is a pledge of commitment to the Constitution. Those to whom the provisions apply are not required to pledge allegiance to any person, or even to the nation. They are not required to abjure (that is, repudiate) any doctrine or belief, or to acknowledge anyone's supremacy in matters temporal or spiritual.

The oaths or affirmations of office prescribed by the United States Constitution are in stark contrast to the oaths of office which in 1789 were still prescribed by the statutes of Great Britain. The practical effect of these British statutes was to exclude from most public offices persons who were not communicants of the established Church of England. And there were many persons so debarred: Protestant dissenters of all persuasions, Roman Catholics, Jews, Hindus, Muslims, heretics and atheists.

Many of those who were involved in the task of framing a constitution for a federal union of the independent North American states would have been aware of Britain's restrictive laws in relation to oaths of office.[1] Forbears of some of them would have emigrated from that realm to escape those of its laws which visited disabilities

1 It is said that of the 55 delegates attending the Philadelphia Convention in 1781, 31 were lawyers: D J Boorstin, *The Americans: Vol 1—The Colonial Experience* (1965) 233.

and penal sanctions on Protestant non-conformists and Roman Catholics. Religious intolerance had not been unknown in the American colonies[2] and there were remnants of it even after the secession of thirteen of those colonies from Great Britain in 1776. But the act of secession, represented by the Declaration of Independence, and the War of Independence which preceded it, had prompted a review of the laws about oaths of office and had led to some reformation of them. The provisions of the United States Constitution, settled at the Federal Convention in Philadelphia in 1787 and eventually ratified by the requisite number of states, carried forward the process of reformation. The significance of those provisions in the federal Constitution cannot be appreciated fully without some understanding of the laws of the thirteen original states as of 1787 and of the laws which preceded them during the colonial period.

This article presents a history of these antecedent laws. It examines the concerns the framers of the United States Constitution sought to address in 1787 and the thinking behind the provisions which the delegates to the Philadelphia convention eventually agreed upon. Reference is made to the opposition which the provisions encountered in some of the states when the Constitution was presented for ratification and development of the laws of the states of the federal union after 1789. The impact of the First and Fourteenth Amendments to the United States Constitution is also considered. The article concludes with a postscript on what the framers of Australia's federal Constitution chose to borrow from the United States Constitution regarding tests for occupancy of public office.

THE COLONIAL PERIOD

Among those who came to settle on the eastern seaboard of what is now the United States of America, there were many who, had they

2 Particularly in Massachusetts.

remained in England, would have been disabled from occupying public offices simply because they could not, at least in good conscience, swear the prescribed oaths of office. The idea that a person chosen to occupy a public office should, before entry upon the office, take an oath was a very old one. But following England's separation from the Church of Rome during the reign of Henry VIII, England's laws had been altered so as to ensure that none could sit and vote in the nation's parliament or occupy a position in the service of the monarch without having sworn an oath of allegiance to the king (or queen) and in addition the oath of supremacy. A deponent to the latter oath abjured the doctrine that princes excommunicated by the pope might be deposed or murdered by their subjects or any others, and declared that no foreign prince, prelate or state had jurisdiction or authority, ecclesiastical or spiritual, within the realm.[3]

Oath-taking requirements were drastically revised during the Interregnum which followed the Civil War of 1642–1648 and the beheading of Charles I on 30 January 1649. In early February 1649 the parliament repealed the statutes which required the swearing of oaths of allegiance and supremacy,[4] and in March 1649 abolished the office of king and the House of Lords.[5] In May 1649 England and its dominions were declared to be a Commonwealth.[6] Officers within this Commonwealth were required to swear their fidelity to this nation.[7] Under the Instrument of Government of December 1653 the Lord Protector and members of the Council of State were required to swear prescribed oaths of office.[8] The oath of the Lord

3 A simplified oath of allegiance and supremacy was introduced by 1 Wm & M, c 8 (1689).

4 C H Firth and R S Rait (eds), *Acts and Ordinances of the Interregnum 1642–1660*, vol 2 (1911) 1.

5 S R Gardiner (ed), *The Constitutional Documents of the Puritan Revolution 1625–1660* (3rd ed rev 1906) 384-8.

6 Ibid 388.

7 Firth and Rait, above n 4, 241–2, 1273, 1418, 1422.

8 Ibid 822.

Protector, Oliver Cromwell, committed him to uphold this constitutional instrument and to 'govern . . . according to the laws, statutes and customs' of the Commonwealth.[9] Here was a precedent for an oath to be sworn by the chief executive officer elected under a republican constitution.

None of these changes in England's laws on oaths of office survived the restoration of the House of Stuart in 1660. Indeed, under Charles II the legislative prescriptions regarding oaths to be sworn by those appointed or elected to public office had the effect of excluding from office many of the Protestant dissenters who had occupied positions of public trust during the Commonwealth era.

One of the requirements of the *Corporations Act 1661*, 13 Car 2, c 1 was that persons chosen to fill offices in municipal corporations should take the sacraments according to the rites of the Church of England. By the *Test Act 1672*, 25 Car 2, c 1, persons in the king's service were subjected to the same requirement. In addition to the oaths of allegiance and supremacy, they had to make a declaration against transubstantiation, the invocation of saints and the sacrifice of mass. This stipulation was, of course, directed against adherents of the Church of Rome. By the *Parliamentary Test Act 1678*, 30 Car 2, c 1 members of the Parliament were made subject to the same tests, with the exception of the sacramental test.

Provisions such as these worked against Roman Catholics and Protestant dissenters alike. They were compounded by various penal laws[10] which were ameliorated only to a degree by the *Toleration Act 1689*, 1 Wm & M, c 18.[11] The Act of 1662, 14 Car 2, c 1, which had imposed penalties on Quakers for refusing to take an oath when it was tendered to them, or for maintaining that the swearing of oaths was unlawful, was not repealed until 1812.

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9 Article XLI.

10 Among them the *Conventicles Act 1664*, 16 Car 2, c 4, the *Five Mile Act 1665*, 17 Car 2, c 2 and the *Conventicles Act 1670*, 22 Car 2, c 1.

11 See p 125 below.

Many of those who emigrated to North America during the seventeenth century were people whose profession and practice of religion rendered them liable to punishment under England's penal laws. Relatively few of them would have had any quarrel with the notion that persons appointed or elected to public office should, before entry upon office, swear an oath of office. Their objections, if any, were more likely to have been to the nature of the oaths prescribed by English law.

The English and British settlements on the Atlantic seaboard of North America were by royal authority and their primary instruments of government were, initially, the royal charters granted to companies or proprietors. The first charter, issued in 1606, was that for Virginia.[12] A Charter for Massachusetts Bay Colony was granted in 1629.[13] For a time the proprietary colonies were the more numerous. They included Maryland (1652), Carolina (1663), New Jersey (1664), New York (1664), Delaware (1674) and Pennsylvania (1681).[14] Georgia's charter of 1732 was issued to trustees.[15] By the eighteenth century many of the charters had been revoked and the colonies to which they related converted into crown colonies, the basic instrument of government for which was often no more than the letters patent for the office of governor. Virginia became a crown colony as early as 1624. Maryland gained that status in 1688, Massachusetts in 1691, South Carolina in 1712, North Carolina in 1729 and Georgia in 1752.

The basic instruments of government for the American colonies allowed the colonists a measure of self-government by their own legislatures. But these basic instruments delimited local legislative authority and commonly insisted that locally made laws should not be contrary to the laws of England. Colonial legislation might be

12 F N Thorpe, *The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the States, Territories and Colonies* (1909) 3783.
13 Ibid 1846.
14 All these instruments are reproduced in Thorpe, above n 12.
15 Ibid 765.

disallowed by the monarch on the ground of its repugnancy to English law; indeed, on any ground.

The early royal charters had little if anything to say about oaths of office. Omission of imperial direction on this subject would no doubt have encouraged colonial legislatures to suppose that it had been left to them to decide what oaths, if any, should be required of those chosen to occupy locally created offices. The Massachusetts legislature enacted measures which effectively excluded from public office persons who were not members of its puritanical congregation.[16] These measures appear not to have been disapproved by the imperial authorities.

The royal charters and other basic instruments of government issued after the restoration of the House of Stuart in 1660 tended to be much more specific about required oaths of office than the earlier charters.[17] The imperial prescriptions in this regard were apt to reflect the policies which informed the *Corporations Act 1661* and the *Test Acts* of 1672 and 1678. A number of them insisted on the swearing of an oath of allegiance to the king.[18] The charters which were granted to lords proprietors commonly required, in addition, the swearing of an oath of fidelity to those lords.[19] That oath was

16 Boorstin, above n 1, 39. See also G L Haskins, *Law and Authority in Early Massachusetts* (1960) 41, 44, 73; J H Smith (ed), *Colonial Justice in Western Massachusetts: The Pynchon Court Record* (1961) 218.

17 See C M Andrews, *The Colonial Period of American History*, vol 2 (1936) 131, 166 n, 295; vol 3 (1937) 98, 143 n, 217, 288–9, 304.

18 Concession and Agreement of the Lords Proprietors of New Jersey 1664 (Thorpe, above n 12, 2536); Concession and Agreement of the Lords Proprietors of North Carolina 1665 (Thorpe, above n 12, 2757); Fundamental Constitution of North Carolina 1669 (Thorpe, above n 12, 2786); Charter of Massachusetts Bay 1691 (Thorpe, above n 12, 1879–81).

19 Concession and Agreement of the Lords Proprietors of New Jersey 1664 (Thorpe, above n 12, 2536); Concession and Agreement of the Lords Proprietors of North Carolina 1665 (Thorpe, above n 12, 2757); Fundamental Constitution of North Carolina 1669 (Thorpe, above n 12, 2786).

akin to the oath of fealty which, under feudal laws, tenants had sworn before their landlords.

Under the Charter of Massachusetts Bay 1691, members of the colonial legislature were required to swear not only allegiance to the king but also the oath of supremacy prescribed by English statute law and to make a declaration against transubstantiation, invocation of saints and sacrifice of the mass.[20] Roman Catholics were thus effectively disqualified from being members of the colony's legislature.

Some of the oaths of office prescribed for the American colonies were very simple and involved no more than a commitment to faithful and due execution of the office.[21] Other forms of oath were somewhat longer and borrowed phrases from the oath of judicial office which had been prescribed by an Ordinance of Edward III in 1346[22] and which in its turn had drawn on the clause in Magna Carta by which King John had declared: 'To no one will we sell, to no one will we deny or delay right or justice'.[23] The royal commission issued by Charles II in 1680 to constitute a president and council for the Province of New Hampshire in New England, for example, stipulated that the president and members of the council swear to:

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20 Charter of Massachusetts Bay 1691 (Thorpe, above n 12, 1879–81).

21 Rhode Island Charter 1664 (Thorpe, above n 12, 3216–17); Concession and Agreement of Lords Proprietors of New Jersey 1664 (Thorpe, above n 12, 2536); Concession and Agreement of Lords Proprietors of North Carolina 1665 (Thorpe, above n 12, 2757); New Hampshire Commission 168 (Thorpe, above n 12, 2247–8); Frame of Government, Pennsylvania 1696 (Thorpe, above n 12, 3072); Georgia Charter 1732 (Thorpe, above n 12, 769).

22 1 *Statutes of the Realm* 305–6 (30 Edw 1, c 1).

23 C 40. On American colonial borrowings from this clause in oaths of judicial office see A E Dick Howard, *The Road from Runnymede* (1968) 27, 59, 60, 63–4.

> [W]ell and truly administer justice to all His Majesty's subjects . . . [in the Province] under this Government: and also duly and faithfully to discharge and execute the Trust in you reposed, according to the best of your knowledge; you shall spare no person for favour or affection; nor any person grieve for hatred or ill will.[24]

A similar form of words had appeared in the Agreements and Concessions of the Lords Proprietors of New Jersey and North Carolina, issued in 1664 and 1665 respectively.[25] The oaths there prescribed were to be sworn by those chosen to occupy any public office within the colony. The Fundamental Constitution of Carolina of 1669 required all public officers to swear also to maintain government according to the Constitution.[26]

While constitutions for the American colonies sometimes ordained toleration in matters of religion, some of them stipulated that offices of public trust be occupied only by Christians. The constitution established by the proprietors of East New Jersey in 1683, for example, directed that persons should 'in no way be molested or prejudiced for their religious persuasions and exercise in matters of faith and worship; nor shall they be compelled to frequent and maintain any religious worship, place or ministry whatsoever'.[27] But the same instrument went on to provide that:

> [N]o man shall be admitted a member of the great or common Council, or any other place of public trust, who shall not profess faith in Christ Jesus, and solemnly declare that he doth no ways hold himself obliged in conscience to endeavour alteration in the government, or seeks the turning out of any in it or

24 Thorpe, above n 12, 2447–8.
25 Ibid 2536, 2757. See also Frame of Government, Pennsylvania 1696 (Ibid 3072).
26 Thorpe, above n 12, 2786.
27 Ibid 2580.

> their ruin or prejudice, either in person or estate, because they are in his opinion heretics, or differ in their judgment from him.[28]

PENNSYLVANIA AND ITS QUAKERS

In Pennsylvania, oath-taking became a subject of considerable vexation and one on which there was lengthy disputation between the colonial and imperial authorities.[29] This colony was one of the proprietary colonies. Its original proprietor was a wealthy English Quaker, William Penn, to whom proprietary right had been granted by royal charter in 1681. Penn's colony drew thousands of members of the sect - the Society of Friends - from England. In the mother country they were subject to severe penalties for profession and practice of their faith, one of the articles of which was that the swearing of oaths on any occasion was contrary to the teachings of Jesus Christ. That precept had been pronounced by the English founder of the sect, George Fox, on the basis of his reading of the Gospels.[30] It was a reading which was accepted, without question, by Fox's followers and was respected by Penn. So it was that in Pennsylvania Quakers were installed in many public offices without having been required to swear any form of oath.

Towards the end of the seventeenth century, the deviant practices in Pennsylvania came to be a continuing source of friction both within the colony, and between its local government and the imperial authorities. To understand the mainsprings of this friction, it is

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28 Ibid.

29 Boorstin, above n 1, ch 7; W R Shepherd, *History of Proprietary Government in Pennsylvania* (1967 ed) ch 7; J H Smith, 'Administrative Control of the Courts of the American Plantations' in D H Flaherty (ed), *Essays in the History of Early American Law* (1969) 281, 319–26. (This essay was originally published in (1961) 61 *Colorado Law Review* 1210). The following account draws upon these writings.

30 Fox relied on a passage in Matthew (5:33) from the Sermon on the Mount and James 5:12.

necessary to know something about what accommodations England's legislators had already made in respect of the Quakers.

Under the *Toleration Act 1689* (1 Wm & M, c 18) the English parliament had relieved Protestant dissenters from the penalties which had been imposed on them by earlier statutes, but only if they had sworn the oaths of allegiance and supremacy and had made a declaration against transubstantiation. Quakers were relieved of the penalties imposed on them by the Act of 1662 (14 Car 2, c 1) for refusing to take an oath or for maintaining that the swearing of oaths was unlawful. Section 13 of the *Toleration Act* allowed those who had scruples about the swearing of oaths to make attestations in lieu of the oaths of allegiance and supremacy. They were to 'sincerely promise and solemnly declare, before God and the world, to be faithful to William and Mary'; to renounce the doctrine that princes excommunicated by the Pope could be deposed or murdered; and to acknowledge that no foreign prince or prelate had authority within the realm. In addition they were to declare that they professed the Christian faith and acknowledged that the Old Testament and the New Testament were given by divine inspiration. This Act did not, however, make dissenters of any persuasion qualified to occupy public offices.

The *Quaker Affirmation Act 1696* (7 & 8 Wm 3, c 34) enabled Quakers to make affirmations in lieu of swearing oaths in court proceedings. But it disqualified them from giving evidence in criminal cases, from serving as jurors or from holding any place or profit in government. This was a temporary Act, but it was continued in force in 1702 (13 & 14 Wm 3, c 4) and was made permanent in 1714 (1 Geo 1, c 6).

Pennsylvania's Third Frame of Government of 1696 (a colonial instrument) adopted elements of both the *Toleration Act 1689* and the *Quaker Affirmation Act 1696*, but with significant omissions and alterations. It declared that those who should 'conscientiously scruple to take an oath' were qualified to act in 'all offices of State

and trust' within the colonial government, so long as they professed Christian belief in accordance with the *Toleration Act* and made affirmation in a prescribed form. The form made no reference to Almighty God.[31] A Pennsylvania enactment of 1700 made it clear that judicial and other officers chosen to occupy office within the colony would be qualified to enter on office on making affirmation in the terms of the *Quaker Affirmation Act 1696*.

Enactments of the American colonial legislatures were, by this time, systematically reviewed by the Lords of Trade and Plantations in London, advised in legal matters by England's Attorney-General. These Lords could recommend royal disallowance of colonial enactments and might do so on the ground that the enactments were repugnant to the laws of England. It was on their recommendation that William III ordained in 1703 (by Order in Council) that officers of government in Pennsylvania should be required, before entry upon office, to take the oath or affirmation of office prescribed by the laws of England. It was also on the recommendation of the Lords of Trade and Plantations that Pennsylvania's law of 1700 was disallowed, on the ground that the form of attestation it prescribed deviated from that prescribed by English statute.

This action on the part of the imperial authorities made the Order in Council the controlling law in Pennsylvania. Its edicts presented problems for Quakers, for they had scruples not only about taking oaths but also about administering oaths to others. The Order in Council had included a provision that those who, under the laws of England, were required to swear an oath and were willing to swear that oath, were entitled to be sworn on oath by those qualified to tender the oath. Some judges in Pennsylvania relinquished office on the ground that they could not, consistently with their religious beliefs, administer oaths of any kind.

31 Thorpe, above n 12, 3092.

For some years after the Order in Council of 1703 the question of oaths and affirmations continued to be a source of conflict between the colonial and imperial governments. Enactments of the Pennsylvania legislature sought to enable Quakers to make affirmations in terms which made no reference to Almighty God. Affirmations in that form were considered by the imperial authorities to be incompatible with the forms of affirmation authorised by statutes of the imperial parliament. Several Pennsylvanian statutes were disallowed for that reason.

An *Imperial Act* of 1714 (1 Geo 1, c 6) made the *Quaker Affirmation Act 1696* permanent and expressly declared it to apply in the plantations for the next five years. This measure overrode inconsistent colonial laws. But it did not satisfy those Quakers in Pennsylvania who could not bring themselves even to affirm in the name of Almighty God. The revised forms of affirmation introduced in England by the *Quaker Affirmation Act 1721* (8 Geo 1, c 6) removed the offending words, and a Pennsylvania law of 1725, in much the same terms as the new English statute, was found acceptable in London. The law did, however, stipulate that no official could refuse to administer an oath to any person who was willing to take it. The effect was, Daniel J Boorstin commented:

> [T]o force the most stiff-necked Friends out of judicial and some other offices. The Quaker Yearly Meetings stuck to their principles; some even advised their members not to vote for offices in which they might be tempted to violate their principle against administering oaths. A few kept their offices and disobeyed the rules, but generally Quakers refused to accept magistracies. Even in solidly Quaker communities, therefore, some offices were perforce not filled by men of that religion.[32]

32 Boorstin, above n 1, 61.

THE CONSTITUTIONS OF THE INDEPENDENT STATES OF AMERICA 1776–1789

On 4 July 1776, thirteen American colonies united in declaring their independence of Great Britain. Between 1776 and 1784 most of the thirteen states adopted new constitutions, each containing provisions on oaths or affirmations to be taken by those chosen to occupy public offices.[33] These provisions were by no means uniform.

In some of the post-independence constitutions the oath of allegiance to the king was replaced by an oath of allegiance to the constitution or state.[34] In some the prescribed oath of office included a pledge to submit to or support the constitution.[35] Under Pennsylvania's constitution of 1776 members of the legislature were required to swear or affirm:

> [T]hat as a member of this assembly, I will not propose or assent to any bill, vote, or resolution which shall appear to me injurious to the people; nor do or consent to any act or thing whatever, that shall have a tendency to lessen or abridge their rights and privileges, as declared in the constitution of this state; but will in all things conduct myself as a faithful honest representative and guardian of the people, according to the best of my judgment and abilities.[36]

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33 Delaware, Maryland, New Jersey, New York and North Carolina, South Carolina, Pennsylvania and Virginia in 1776; Georgia and Vermont in 1777; Massachusetts in 1780 and New Hampshire in 1784 (replacing one of 1776).

34 Delaware (Thorpe, above n 12, 566); Georgia (Thorpe, above n 12, 780–1); Maryland (Thorpe, above n 12, 1690, 1700); Massachusetts (Thorpe, above n 12, 1908–9); New Hampshire (Thorpe, above n 12, 245).

35 Delaware (Thorpe, above n 12 566); Vermont (Thorpe, above n 12, 3747); South Carolina (Thorpe, above n 12, 3247).

36 Section 10 (Thorpe, above n 12, 3085).

Vermont's constitution of 1777 contained essentially the same requirement.[37] A similar requirement appeared in New Jersey's constitution of 1776.[38]

Under the Massachusetts constitution of 1780 all public officers, as well as the legislators, had to take an oath or affirmation by which they pledged allegiance to the commonwealth; abjured allegiance to Great Britain or any other power; renounced the authority of any foreign prince or prelate; promised faithful and impartial discharge and performance of duties, according to the best of their abilities and understanding, 'agreeably to the rules and regulations of the constitution and the laws of the commonwealth'.[39]

Changes along these lines were obviously necessary to accommodate a republican style of government. The framers of the post-independence constitutions did not, however, always perceive a need to dispense with those provisions in the pre-independence constitutions which imposed religious tests.

After independence the constitutions of most of the American states continued to impose religious tests in relation to public offices. In some cases, the test was no more than implicit in the prescribed form of oath. The constitutions of Maryland and Massachusetts, however, required a positive profession of belief in the Christian religion.[40] In Georgia, North Carolina, New Hampshire, New Jersey and Vermont the new constitution stipulated that Protestants only were qualified to hold public office.[41] Under the constitutions

37 Thorpe, above n 12, 3743.
38 Ibid 2598.
39 Ibid 1908–9.
40 Maryland Constitution 1776, Declaration of Rights, art 35 (Thorpe, above n 12, 1700); Massachusetts Constitution 1780, ch 6, art 1 (Thorpe, above n 12, 1908). In Massachusetts, this requirement applied only to the Governor, Lieutenant-Governor and legislators.
41 Georgia Constitution 1777, art 6 (Thorpe, above n 12, 779); North Carolina Constitution 1776, art 32 (Thorpe, above n 12, 2793); New Hampshire Constitution 1784, Pt 2, House of Representatives (Thorpe,

of Delaware, Pennsylvania and Vermont, the declarations to be made by persons before they could enter upon specified (or all) public offices were more particular as to the nature of religious belief to be professed.[42]

Pennsylvania's constitution of 1776, for example, required that those chosen as members of the House of Representatives should declare that they believed in 'one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked', and also acknowledged that the scriptures of the Old and New Testaments were 'given by Divine inspiration'. Delaware's constitution of 1776 was even more exacting in that it required not merely acknowledgment of 'the holy scriptures of the Old and New Testaments to be given by divine inspiration', but also profession of 'faith in God the father, and in Jesus Christ His only Son, and in the Holy Ghost, one God evermore'. This declaration was to be made by all public officers.

The requirement that such a declaration be made was additional to the requirement that an oath of office be sworn. Only in Delaware, Massachusetts, New Jersey, Pennsylvania and Vermont were persons permitted to make an affirmation in lieu of the oath of office, though in Massachusetts this concession was made only to Quakers.

Those charged with the task of framing a constitution for a federal union of the independent American states were thus confronted with a situation in which there was considerable diversity in the laws of the states about who was qualified and who was disqualified from

above n 12, 2460); New Jersey Constitution 1776, art 19 (Thorpe, above n 12, 2597–8); Vermont Constitution 1777, Ch 2, s 9 (Thorpe, above n 12, 3756–7).

42 Delaware Constitution 1776, art 22 (Thorpe, above n 12, 566); Pennsylvania Constitution 1776, Plan or Frame of Government, s 10 (Thorpe, above n 12, 2085); Vermont Constitution 1777, ch 2, s 12 (Thorpe, above n 12, 3756–7). In Vermont as in Pennsylvania the declaration was required only of legislators.

holding public office (or particular public offices), and also about the content of prescribed oaths of office. The only common element in these state laws was a requirement of some formal commitment to support the state constitution and to perform the duties of office to the best of a person's ability. Religious tests, where prescribed or implicit, were widely divergent, though they usually operated to debar from public office those persons who were not recognisable as persons of the Christian faith.

The religious tests which were explicit or implicit in the post-independence constitutions of the American states sometimes appeared alongside other constitutional provisions under the title of a bill or declaration of rights. These sub-sets of constitutional provisions were the immediate predecessors of the United States Bill of Rights, the first article of which was introduced by formal constitutional amendment in 1791. The pre-independence bills or declarations of rights typically included a guarantee of freedom of religion and clauses which signified that no church, or other institution of a religious character, could be established as the official church of state.

But how, if at all, could the provisions in the post-independence constitutions to do with freedom of religion, and non-establishment of religions, be reconciled with other provisions in those constitutions which disqualified persons from occupying public offices simply because of their religious beliefs, or even absence of anything they would choose to describe as a belief of that nature? That was one of the important questions which the framers of a constitution for a federal union of the American states had to address in 1787. Some of the delegates to the constitutional convention assembled at Philadelphia in that year may have been supportive of the religious tests imposed by the constitutions of their states, but as one writer has pointed out: 'The practical difficulties in the way of formulating a religious test satisfactory to

the various states under their circumstances were overwhelming.'[43] The same writer has suggested that Rhode Island, which had never had any religious test, would 'never have joined the union if such a test had been imposed'.[44]

THE FEDERAL CONVENTION OF 1787

There had been talk of some form of political union of the American colonies from the middle of the eighteenth century. Delegates of these colonies had assembled in the first Continental Congress in 1774 and in May of 1775 a second Continental Congress met, principally to co-ordinate military action during the War of Independence. Once that war was won and independence had been declared, it was possible for representatives of the states to give attention to constitutional arrangements under which the states might be brought into a formal union. The result of their consideration was the Articles of Confederation. On ratification by the states, the Articles became effective from 15 November 1781.

On 6 February 1787 the Congress which had been constituted under the Articles of Confederation resolved that a convention be summoned to prepare a new constitution. Delegates to the convention assembled in Philadelphia in May 1787. Their labours were completed by mid-September 1787. Almost two years were, however, to elapse before the draft constitution was ratified by the requisite number of states (nine) and the Constitution of the United States of America came into operation.

The delegates attending the federal convention seem not to have questioned the need for constitutional provisions which prescribed oaths of office. There was, however, room for debate about the form of the oaths and about who should be required to swear them. The oath-taking requirements of the post-independence state

43 C Zollerman, 'Religious Liberty in the American Law' (1919) 17 *Michigan Law Review* 355, 356

44 Ibid.

constitutions were, after all, far from uniform and most of them still maintained religious tests. And the delegates could not have been unaware of the scruples which Quakers and members of some other Christian sects had about swearing oaths in the customary form. Some of the delegates would, presumably, have also been aware of the inability of Jews to swear or declare on the true faith of a Christian. Those who had read Noah Webster's article 'On Test Laws, Oaths of Allegiance and Abjuration, and Partial Exclusions from Office'[45] would have been reminded that the matter of oaths of office was one of no small significance.

Webster's article had been published in Philadelphia in March 1787 and was clearly intended to prompt the delegates to the constitutional convention to reflect upon the function and purpose of oaths of office. 'The time will come (and may the day be near!)', Webster declaimed, 'when all test laws, oaths of allegiance, abjuration and partial exclusions from civil offices, will be proscribed from this land of freedom'.[46] Webster offered no constructive proposals regarding what oaths of office, if any, should be required under the federal constitution.

There are no verbatim reports of the debates at the Philadelphia convention. The records of the deliberations which were assembled under the editorship of M Farrand (under the title of *The Records of the Federal Convention of 1787*) drew on an official journal and contemporaneous notes written by some of the delegates, among them James Madison. Madison was a principal contributor to debates on the matter of oaths of office. And it is in his notes that there are recorded observations by James Wilson, one of the lawyers in attendance. Wilson echoed sentiments which had been expressed by Noah Webster. Madison's notes of debate on 23 July 1787 record the following:

45 Reproduced in P B Kurland and R Lerner (eds), *The Founders' Constitution*, vol 4 (1987) 636–7.

46 Ibid 637.

> Mr Wilson said he was never fond of oaths, considering them as left handed security only. A good Govt. did not need them, and a bad one could not or ought not be supported.[47]

Mr Wilson's stance was essentially that of the Quakers.

Majorities among the delegates at the Philadelphia convention favoured inclusion within the federal constitution of oath-taking requirements, or affirmations in lieu of an oath. They agreed, with little debate, on the form of the oath to be sworn by the nation's elected President. The concluding words of that oath, by which the President pledged himself to the best of his 'judgment and power' to 'preserve, protect and defend, the Constitution', were agreed to on the motion of Colonel George Mason and James Madison.[48] At a later drafting stage the word 'judgment' was replaced by the word 'ability'.

The delegates also agreed that other officers of the national government should be sworn to support the constitution. What proved to be controversial was the proposal by Edmund Randolph, Governor of Virginia, that legislators, judges and other officers of the states should be required to swear the same oath. Those opposing this motion saw no need for such a requirement, particularly having regard to the fact that officers of the state governments were already required to take oaths under the state constitutions. But Randolph's argument was that both national and state officers should be required to swear their support for the federal constitution in order to underline its supremacy.[49] This argument prevailed at the convention, though counter arguments

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47 M Farrand (ed), *The Records of the Federal Convention of 1787* vol 2 (rev ed 1937) 427.

48 Kurland and Lerner, above n 45, 637. See also Farrand, above n 47, vol 1, 194, 203, 207, 227, 231, 237.

49 Kurland and Lerner, above n 45, 641–4. In *Federalist* No 27 (22 Dec 1787) Alexander Hamilton supported Randolph's position.

were to be repeated in some of the state conventions when the draft constitution came before them for ratification.

In his *Commentaries on the Constitution*, first published in 1833, Joseph Story offered further justifications of the requirement that state as well as national officers should pledge support of the Constitution of the United States. 'The members and officers of the state governments', Story wrote, 'have an essential agency in giving effect to the national constitution'. He referred to their role in the election of the President, 'in filling vacancies in the senate, during the recess of the legislature; in issuing writs to fill vacancies in the house of representatives; in officering the militia, and giving effect to laws for calling them; and in the surrender of fugitives from justice'.[50] Story also drew attention to the role of the courts of the states in the enforcement of the federal Constitution:

> The judges of the state courts [he wrote] will frequently be called upon to decide upon the constitution, and laws, and treaties of the United States; and upon rights and claims growing out of them. Decisions ought to be, as far as possible, uniform; and uniformity of obligation will greatly tend to such a result.[51]

During the early stages of the proceedings of the convention in Philadelphia, motions regarding the pledges to be required of public offices had been expressed in terms which envisaged that the pledges be made by oath. It was not until 30 August 1787 that it was agreed that an affirmation be permitted in lieu of an oath. This resolution was, no doubt, informed by Pennsylvania's pre-independence experience. It was followed by a further resolution (on the motion of Charles Pinkney) that there be added to the relevant section in the draft constitution the following clause:

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50 Joseph Story, *Commentaries on the Constitution,* vol 3 (1833) para 1839.

51 Ibid.

> But no religious test shall ever be required as a qualification to any office or public trust under the authority of the United States.[52]

This addition to what became s 3 of Article VI of the United States Constitution was to attract some criticism when the draft federal constitution came before state conventions for ratification.

THE STATE CONVENTIONS

The proposed prescription of religious tests for public offices was to apply only to offices within the national government. Nevertheless some of the delegates to the state conventions expressed concerns about the wisdom of such a prescription. That they should have done so is scarcely surprising when one remembers that many of the state constitutions still prescribed religious tests. North Carolina was one of the states and its religious test was particularly stringent.[53] Henry Abbot, one of the delegates to the North Carolina convention, expressed grave reservations about the exclusion of religious tests and said that these reservations were shared by others. Many people, he said, believed that a proscription of such tests was both 'dangerous and impolite'.[54] They feared

> that if there be no religious test required, pagans, deists, and Mahometans might obtain offices among us, and that the senators and representatives might all be pagans.[55]

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52 Farrand, above n 47, vol 3, 297, 310.

53 Article 32 of the Constitution of 1776 provided that 'No person who shall deny the being of God or the truth of the Protestant religion, or the divine authority of the Old or New Testaments, or 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 in the civil department within this state'.

54 J Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, vol 4 (1888) 192.

55 Ibid.

And, Abbot went on to say:

> Some are desirous to know how and by whom they are to swear, since no religious tests are required – whether they are to swear by Jupiter, Juno, Minerva, Proserpine or Pluto.[56]

James Iredell and Governor Samuel Johnston, both lawyers, attempted to allay Abbot's concerns. Iredell, who was to become one of the first associate justices of the United States Supreme Court, referred to the religious tests still imposed in England, but noted that they had proved to be ineffectual in that 'men of no religion at all have no scruple' to do what was necessary to fulfil the tests.[57] Iredell also spoke at some length on the nature of an oath and on how a requirement to swear an oath might now be satisfied. Those swearing an oath had to believe in the existence of a Supreme Being 'and in a future state of rewards and punishments'.[58] But these conditions might be satisfied by persons other than Christians and Jews and who had no belief in either the Old or New Testaments. Iredell recalled an English case in which a Hindu had been permitted by the Court of Chancery to be 'sworn according to the form of the Gentoo religion, which he professed, by touching the foot of a priest'.[59] The English judges, Iredell recalled, had been satisfied that members of the Hindu religion 'believed in a Supreme Being, and in a future state of rewards and punishments'.[60]

Governor Johnston defended the clause which prohibited the imposition of religious tests in respect of federal public offices by reminding delegates of the large number of Christian sects within the several states.[61] Governor Edmund Randolph had made the

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56 Ibid.
57 Ibid 193. See also the remarks of Samuel Spencer, ibid 200.
58 Ibid 196, 198.
59 Ibid 197.
60 Ibid.
61 Ibid 199.

same point in the Virginia convention.[62] The point each Governor sought to make was that if it were possible to impose religious tests in respect of federal public offices, there could be sharp divisions of opinion about what those tests should be.

The answers given by Iredell and others to Henry Abbot's objections apparently satisfied the delegates to the North Carolina convention. They eventually signified their approval of the constitution settled at the Philadelphia convention, though they were among the last of the state conventions to do so.[63]

STORY'S COMMENTARY

In his *Commentaries on the Constitution* (1833) Joseph Story strongly defended the provisions in the United States Constitution on oaths and affirmations of office.[64] The obligation to take such an oath or affirmation 'results', he suggested:

> [F]rom the plain right of society to require some guaranty from every officer, that he will be conscientious in the discharge of his duty. Oaths have a solemn obligation upon the minds of all reflecting men, and especially upon those, who feel a deep sense of accountability to a Supreme being.[65]

An ability to make a solemn affirmation in lieu of an oath was, Story went on to say, needed 'to prevent any unjustifiable exclusion from office' of 'denominations of men, who are conscientiously scrupulous of taking oaths'.[66]

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62 Ibid 204–5.

63 North Carolina ratified on 21 November 1789 and Rhode Island on 29 May 1790. See E Dumbould, *The Constitution of the United States* (1964) 455.

64 Story, above n 50, vol 3, paras 1838–43.

65 Ibid para 1838.

66 Ibid.

The proscription of any religious test, Story maintained, had been introduced:

> [N]ot . . . merely for the purpose of satisfying the scruples of many respectable persons, who feel an invincible repugnance to any religious test, or affirmation. It had a higher object; to cut off for ever every pretence of an alliance between church and state in the national government. The framers of the constitution were fully sensible of the dangers from this source.[67]

The framers knew something of England's history in this regard and 'there found the pains and penalties for non-conformity [with the established religion] written in unequivocal language, and enforced with stern and vindictive jealousy'.[68] And, Story continued:

> One hardly knows, how to repress the sentiments of strong indignation, in reading the cool vindication of the laws of England on this subject, (now, happily, for the most part abolished by recent enactments[69]) by Mr Justice Blackstone, a man, in many respects distinguished for habitual moderation, and a deep sense of justice.[70]

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67 Ibid para 1841.

68 Ibid.

69 The changes to which Story would have been referring were the partial repeal of the *Corporations Act* and the *Test Acts* in 1828 by 9 Geo 4, c 17 and the *Roman Catholic Relief Act 1829*, 10 Geo 4, c 17). These statutes did not, however, remove all religious disqualifications. Oaths of office continued to be expressed in forms which were objectionable to Jews, Quakers and members of some other Christian sects. Later statutes were to revise the forms of oath but the process of reform was not completed until the enactment of the *Oaths Act 1888*, (51 & 52 Vict, c 46).

70 Story, above n 50, para 1841.

The reference to Blackstone's 'cool vindication' was to what Sir William Blackstone had written in the fourth volume of his *Commentaries on the Laws of England*, the volume sub-titled 'Public Wrongs', first published in 1769 and republished in America. Story reproduced at some length those passages in Blackstone's work which he found offensive.[71] They were passages in which Blackstone had defended the English statutes which effectively precluded Roman Catholics, non-conforming Protestants and Jews from occupying public offices of any significance, and which reserved these offices for communicants of the established Church of England.[72] Blackstone had remarked that the oaths and sacramental tests prescribed by statutes enacted during the reign of Charles II were 'bulwarks erected' to 'better secure the established church against perils from nonconformists of all denominations, infidels, Turks, Jews, heretics, papists, and sectaries'.[73] Story concluded:

> It is easy to foresee, that without some prohibition of religious tests a successful sect, in our country, might, by once possessing power, pass test-laws, which would secure to themselves a monopoly of all offices of trust and profit, under the national government.[74]

The very first Act to be passed by the United States Congress was one concerning the time at which and manner in which the oaths and affirmations of office were to be sworn by both federal and State officers.[75] Story noted that some members of Congress had queried whether the Congress had power to enact such a law.[76] But the measure was, Story recorded, 'approved without much

71 From pages 52–4 and 56–8.
72 See p 123 above.
73 William Blackstone, *Commentaries on the Laws of England*, vol 4 (1769) 57.
74 Story, above n 50, vol 3, para 1839.
75 1 June 1789.
76 See Elliott, above n 54, vol 4, 343–5 (record of debate on 6 May 1789).

opposition'. Story himself had no doubts about its constitutionality.[77]

THE CONSTITUTIONS OF THE AMERICAN STATES AFTER 1789

In its original form the United States Constitution did not affect the laws of the states relating to oaths or affirmations required of those appointed or elected to state public offices, except to the extent that it provided that henceforth all state officers would be required to swear an oath or make an affirmation in support of the federal constitution. The states were not, however, prohibited from imposing religious tests as a qualification for state public offices.

Some of the original states of the federal union moved fairly quickly to adopt new constitutions which made it clear that there were to be no religious tests for state public offices.[78] A large number of the states which were subsequently admitted to the federal union did so with constitutions which also forbade the imposition of such tests.[79] State constitutions which did not

77 Story, above n 50, vol 3, para 1840. On later federal legislation on oaths and affirmations of office see L D White, *The Federalists: A Study in Administrative History 1789–1801* (1948) 425. See also United States Constitution Art 5, para 3331.

78 Delaware Constitution 1792, art I, s 2 (Thorpe, above n 12, 568); Vermont Constitution 1798, art II, ss 12, 29 (Thorpe, above n 12, 3789).

79 Alabama Constitution 1819, Declaration of Rights, art I, s 7 (Thorpe, above n 12, 97); Illinois Constitution 1818, art 8, s 4 (Thorpe, above n 12, 981); Indiana Constitution 1816, art I, s 3 (Thorpe, above n 12, 1058); Iowa Constitution 1846, art I, s 4 (Thorpe, above n 12, 1123–4); Kansas Constitution 1855, art I, s 7 (Thorpe, above n 12, 1180); Maine Constitution 1819, art I, s 3 (Thorpe, above n 12, 1647); Minnesota Constitution 1857, art I, s 17 (Thorpe, above n 12, 1993); Nebraska Constitution 1867, art I, s 16 (Thorpe, above n 12, 2350); Ohio Constitution 1802, art VIII, s 3 (Thorpe, above n 12, 1803); Oregon Constitution 1857, art I, s 4 (Thorpe, above n 12, 2998); Texas Constitution 1845, art I, s 4 (Thorpe, above n 12, 3547); Utah Constitution 1895, art I, s 4 (Thorpe, above n 12, 3702); Washington Constitution 1889, art I, s 11 (Thorpe, above n 12, 3974); West Virginia

expressly prohibit the imposition of religious tests in respect of public offices, sometimes prescribed oaths or affirmations of public office of a kind which clearly did not involve application of any religious test.[80] In several state constitutions it was provided that the prescribed oath, affirmation or declaration could not be altered by ordinary legislative enactment or supplemented.[81]

Despite the emphatic rejection by the framers of the United States Constitution of the notion that a person's religious affiliations or beliefs, if any, had any bearing on their qualification to occupy public offices, some of the original thirteen states were to retain religious tests for many years after their entry into the federal union.[82] Several of the states later admitted to that union did so with constitutions which imposed such tests, and retained these tests for many years to come.[83]

As of 1900, the constitutions of eight of the states included a provision which disqualified from office persons who denied the

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Constitution 1863, art I, s 9 (Thorpe, above n 12, 4015); Wisconsin Constitution 1848, art I, s 19 (Thorpe, above n 12, 4079); Wyoming Constitution 1889, art I, s 18 (Thorpe, above n 12, 4118–9).

80 California Constitution 1849, art 10, s 3 (Thorpe, above n 12, 403); Colorado Constitution 1876, art 12, ss 7, 8 (Thorpe, above n 12, 502); Connecticut Constitution 1818, art 10, s 1 (Thorpe, above n 12, 546); Kentucky Constitution 1792, art 7, s 1 (Thorpe, above n 12, 1272); Louisiana Constitution 1812, art 6, s 1 (Thorpe, above n 12, 1388); Mississippi Constitution 1864, art 15, s 2 (Thorpe, above n 12, 2421–2); Oklahoma Constitution 1907, art 15, s 1 (Thorpe, above n 12, 3423); Texas Constitution 1845, art 7, s 1 (Thorpe, above n 12, 3702).

81 Michigan Constitution 1835, art 7, s 1 (Thorpe, above n 12, 1939–40); Montana Constitution 1889, art 19, s 1 (Thorpe, above n 12, 2333); North Dakota Constitution 1889, art 17, s 211 (Thorpe, above n 12, 2855).

82 Notably Georgia, Maryland, Massachusetts, North Carolina, New Hampshire, New Jersey and Pennsylvania.

83 Arkansas Constitution 1836, art 7, s 2 (Thorpe, above n 12, 284); Tennessee Constitution 1796, art 8, s 7 (Thorpe, above n 12, 3420).

existence of God or a Supreme Being.[84] Yet five of the same constitutions also included a provision which specifically prohibited religious tests.[85] The disqualification of those who deny the existence of a Supreme Being remains in the constitutions of Arkansas, Maryland, Mississippi, Pennsylvania, South Carolina, Tennessee and Texas.[86] But the decision of the Supreme Court of the United States in 1961 in the case of *Torcaso v Watkins*[87] made it clear that the disqualifying provisions are incompatible with the freedom of religion guarantee contained in the First Amendment to the United States Constitution (1791) which, by force of the Fourteenth Amendment (1868), controls the constitutions and laws of the states.

This case concerned the constitutional validity of Article 37 in Maryland's' constitution. It had stipulated that a person chosen to hold a state public office should declare a belief in God. Such a requirement would not inhibit a person's freedom to profess and practise religious beliefs or to disclaim beliefs of a religious character. But to people with scruples about subscribing to declarations of beliefs with which they do not hold a requirement of the kind contained in Maryland's constitution could be quite obnoxious. On the other hand, as some of the framers of the United States' Constitution appreciated, the religious tests which had been imposed by the laws of England, and also by the laws of most of the federating American states, had not served to exclude from public

84 Arkansas Constitution 1874, art 19 (Thorpe, above n 12, 365); Maryland Constitution 1867, art 37 (Thorpe, above n 12 1782); Mississippi Constitution 1890, s 265 (Thorpe, above n 12, 2126); North Carolina Constitution 1876, art 6, s 8 (Thorpe, above n 12, 2836); Pennsylvania Constitution 1873, art 1, s 4 (Thorpe, above n 12, 3124); South Carolina Constitution 1895, art 17, s 4 (Thorpe, above n 12, 33034); Tennessee Constitution 1870, art IX, s 3 (Thorpe, above n 12, 3449); Texas Constitution 1876, art 1 of Bill of Rights, s 4 (Thorpe, above n 12, 3621).

85 Maryland, Mississippi, North Carolina, Tennessee and Texas.

86 See n 84 above.

87 367 US 488 (1961).

office men of no conscience who were prepared to go through the motions necessary to satisfy the requisite tests.

In *Torcaso v Watkins*,[88] the Supreme Court of the United States adjudged Article 37 of Maryland's constitution to be invalid to the extent that it debarred from public office those persons who were not prepared to declare belief in the existence of God or other Supreme Being. The Court so decided on the basis of the First and Fourteenth Amendments to the United States Constitution. Justice Black, who delivered the opinion of the Court, pronounced the 'policy of probing religious beliefs by test oaths or limiting public offices to persons who have or perhaps more properly profess to have a belief in some particular kind of religious concept' to be 'historically and constitutionally discredited'.[89]

In a subsequent case,[90] the Supreme Court ruled that persons who signify their preparedness to swear an oath of office cannot be interrogated about the sincerity of their beliefs. The proscription of religious tests means that people are free to take an oath, rather than an affirmation of office, notwithstanding that they have no belief in the existence of a Supreme Being, or indeed have no religious beliefs.

AN AUSTRALIAN POSTSCRIPT

The United States Constitution was to be a model for a constitution for a federation of the Australian colonies, though one which needed to be adapted to accommodate a Westminster style of responsible and representative government, and one under which the head of state would be the person occupying the throne of England. The framers of the federal Constitution thought it appropriate that those chosen to be members of the federal parliament should, before taking their seats, make and subscribe an

88 Ibid.
89 Ibid 494.
90 *Bond v Floyd* 385 US 116 (1966).

oath of allegiance to the Queen, her heirs and successors. This requirement is expressed in s 42 of the federal Constitution and the forms of the oath and affirmation are set out in the Schedule. The Constitution does not, however, prescribe oaths or affirmations for judges or officers of the executive. On the other hand, the concluding words of s 116 draw on section 3 of Article VI of the United States Constitution. They declare that 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth'.[91] This prohibition binds both the legislative and executive branches of Commonwealth government.

There is nothing in the Australian Constitution, as there is in the United States Constitution, which bears on oaths and affirmations of public office within the states. The parliaments of the states have thus been left free to make any laws they please on the subject. They and their pre-federation predecessors have legislated extensively on the subject, and prior to federation the colonial parliaments had enacted a number of statutes to simplify the forms of required oaths of office and also to eliminate what have been regarded as religious test.[92] Many of these statutes reflected changes which had been effected by United Kingdom legislation enacted since 1828. The framers of Australia's federal constitution were certainly not confronted with the problems with which the delegates to the Philadelphia constitutional convention of 1787 were confronted by reason of disparate state constitutional requirements, some of those requirements being ones which still incorporated religious tests.

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91 On the history of s 116, see C L Pannan, 'Travelling Section 116 with a US Roadmap' (1963) 4 *Melbourne University Law Review* 41.

92 See E Campbell, 'Oaths and Affirmations of Public Office' (1999) 25 *Monash Law Review* 132.