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Taking Oaths Seriously: A Comment on Carter and Sunstein

Sanford Levinson

Lief Carter and Cass Sunstein once again have proved themselves incapable of writing anything uninteresting. Both offer thoughtful observations about the social practice of oaths, and both indicate as well a measure of justifiable skepticism about the practice. The skepticism is derived from a mixture of normative opposition to the induced conformity often associated with oaths and doubts about the empirical likelihood of oaths actually contributing to the behavior sought. Carter, typically, includes in his arguments apt reference to his personal experience; Sunstein, just as typically, presents the reader with a masterful tour d'horizon of the various circumstances in which societies look to oaths to accomplish some social good. Still, having acknowledged the clear strengths of their essays, I confess that I find something missing in each of the pieces. In spite of Carter’s personalism, I find both ultimately too detached and almost dismissive of the powerful role that oaths play in the lives of almost each and every one of us.

At one level what I would like, and sought to encourage in my book Constitutional Faith, which contains an extensive discussion of loyalty oaths,¹ is more personal reflection about the oaths we have in fact taken with pleasure and pride, those we have taken with feelings of discomfort and a loss of self-respect, and, finally, those, if any, we have refused to take. More precisely, I am interested in the phenomenological experience of taking such common oaths as those indicating one’s assent, among other things, to uphold the Constitution of the United States; uphold the Constitution of Texas (or Connecticut); become wedded to someone “until death do us part”; or acknowledge the sovereignty of God or the trinitarian nature of the Godhead. It is almost certainly easiest for most of us to impute a special emotional significance to such “private” experiences as exchanging wedding vows.² But with some frequency one can find evidence of a strong (positive) emotional valence attached to more “public” oaths as well. Thus Gaetano Salvemini, a refugee from Mussolini’s Italy, wrote

¹ S. Levinson, Constitutional Faith 90-121 (1988).
² The purpose of the “scare quotes” is to suggest some dubiousness about the separation of “public” and “private.” Marriage is an especially obvious example of how public decisions and discourse actually control what one may wish to view as the private realm of one’s life.
Felix Frankfurter, who is unique among Justices of the Supreme Court for having been a naturalized citizen, about the meaning of the oath of allegiance to the Constitution required of new citizens. "I took the oath with a joyous heart," wrote Salvemini, "and I am sure I will keep it with the whole of my heart as long as I am alive." ³

To be sure, there are many less happy reminiscences about compulsory oaths, and there is indeed good reason to be wary of them. Yet, whatever the qualms that many of us might have with one or another of these oaths, can we truly imagine our own lives devoid of oaths? Do we plausibly regard their continuing presence even in our own lives as merely a survival of more "primitive" (or simply repressive) ways of thinking about the world and of our place in it? Might they instead continue to perform powerful, and necessary, functions even for sophisticated "moderns"? As I noted in Constitutional Faith, a remarkable number of even "advanced" intellectuals continue to mark the status of the relationship with their most significant other by going through wedding ceremonies and the exchange of oaths. (I am less certain, though, that such intellectuals make oaths a constitutive aspect of the organizations that they form.) Assuming the truth of these observations, what can we learn from them?

One way of addressing the social meaning of oaths is to ask if we—i.e., writers for and readers of journals like this one—would really wish to eliminate some of the specific oaths that now arise in our lives. Sunstein spends a great deal of time on an oath (or, more accurately, a "pledge of allegiance") that I assume most of us would in fact eliminate or, at the very least, make the refusal to recite it costless. But there is something misleading about emphasizing the pledge to the flag, which Sunstein accurately notes is a relative newcomer to the array of standard American cultural ceremonies. There are others both older and much deeper in cultural resonance than the pledge. Thus, in offering some comments about Carter's and Sunstein's presentations at the conference at which they were initially given, I noted the oath, going back some 350 years to the 1640s, that Connecticut to this day requires of those who would vote in its elections:

You solemnly swear that you will be true and faithful to the state of Connecticut, and to the constitution and the government thereof, as a free and independent state, and to the constitution of the United States; . . . and, that whenever you are called upon to give your vote or choice touching any matter which concerns this state or the United States, you will do this in a manner which you shall judge

3. Quoted in S. Levinson, Constitutional Faith, supra note 1, at 3.
Levinson contributes to the best interests of Connecticut and the nation, without respect or favor of any person.

I am interested in how we—and again, I must insist that the “we” here is you and I, the actual communicants in this article, as opposed to a much vaguer and amorphous “society” to which “we” as individuals may feel no strong sense of attachment—assess an oath that applies to almost every member of the Yale Law School student body and faculty, or at least those who conceive of themselves as Connecticut citizens and desire to participate in the state or national electoral process.

This oath is clearly linked to the republican vision of taming the egocentricity of citizens by binding them to the more embracing community and its general interests; genuine citizens do not cast their ballots merely to maximize their selfish interests. I was particularly interested in Sunstein’s reaction, given the role he has played, along with Frank Michelman of Harvard, as an especially vigorous proponent of the so-called “neorepublican revival” in the contemporary legal academy. Does Sunstein believe that Connecticut is committing a mistake by retaining this aspect of its own republican heritage? That is, would Sunstein (or any reader of these remarks) support its repeal in 1989 because of a general skepticism about, or perhaps outright antipathy to, the notion of a state-imposed oath on such a fundamental aspect of citizenship as voting? Or, even if one does not counsel Connecticut to repeal the oath, would one (and especially Sunstein) be opposed to the adoption by Illinois of such an oath as part of an effort to re-establish a more republican social order in the heartland of interest-group liberalism? Adopting the tone of a final exam giver, I asked Sunstein in particular these questions followed by “if so, why; if not, why not?” Because I think that the answers to such questions will take us surprisingly deeply into some of the most complex and important features of political thought, I am disappointed at the failure of both Carter and Sunstein to address this example.

Other oaths raise similar questions. Consider, for example, the presidential oath set out in Article II of the Constitution. Does Carter’s justified skepticism about the efficacy of oaths lead him to support omitting that oath? Or, for those who are in fact perturbed by the possibility of no oath at all, what about a revision to require that the President “behave as I believe to be in the best interests of the United States of America” rather than the present promise to pay particular heed to the Constitution of the United States? Finally, how many of us would truly be comfortable revising our naturalization practices so as to eliminate the oath to which Pro-

6. See Levinson, Suffrage and Community, supra note 4, for an extensive discussion of various conceptions of the meaning of (and prerequisites to) participation as a community decisionmaker.
fessor Salvemini made such glowing reference? Should we be truly indifferent to the political commitments of those who would join our polity? I, for one, have a hard time expressing such indifference, even as I continue to defend maximal tolerance for diversity of (even pernicious) views articulated by those who are already citizens.

Without overemphasizing the point, I think it is worth noting that the very first act to pass the new United States Congress in 1789 dealt with the oaths to be taken by public officials. To be sure, the importance ascribed by our eighteenth-century forbears to oaths may simply exemplify yet one more way in which they inhabited a radically different conceptual world from our own. If so, though, the implications of our contemporary inability to take oaths seriously may call into question, rather more ominously, the ability to take seriously the overarching enterprise of maintaining a constitutional republic.

In the course of presenting arguments about oaths in a variety of venues, I have discovered that persons of all ideological stripes are in fact remarkably hesitant either to support the omission of oaths entirely or, just as tellingly, to support their change in the directions suggested. Even many die-hard legal realists seem surprisingly resistant to the notion that oaths are just so much mumbo-jumbo that should be sloughed off in our more sophisticated, post-modernist society. Is this hesitancy simply a failure of imagination, or does it tell us something significant about the limits of post-modernity and the linkages that remain to earlier worlds and their presuppositions?

Carter's rather charming social-psychological explanation for the Ulysses-at-the-mast aspect of wedding ceremonies applies, of course, far more to the overall ceremonial festivities than to the oath as such. That is, it is almost certainly the inviting of the guests and the booking of the caterer that serve to pull newly dubious couples through the ordeal of actually committing themselves to one another, rather than the specifics of the wedding vow. It is the particular role of the vow (and its particular content) that I find most intriguing, and I am not sure that Carter ultimately speaks to these points.

In any event, even while applauding the remarks of Carter and Sunstein, I believe that much more remains to be said. More importantly, the persons who must do the saying are ultimately we ourselves, in our role as ordinary citizens, spouses, and social beings. We should, I strongly believe, develop a stronger willingness to speak in our own voices, presenting the meanings we ascribe to the events of our own lives, rather than retreat so quickly to the voice of the detached academic who might, for all one knows, be analyzing some society ten thousand miles away. It is not that

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the latter has no place. But to privilege this more detached voice, even putting aside obvious questions about the possibility of becoming truly "detached" from one's own perspective, is to ignore the pressing need to understand better how we are constituted as defined selves in communion with others.