

WHAT OATHS MEANT TO THE FRAMERS'
GENERATION: A PRELIMINARY SKETCH

*Steve Sheppard**

Oaths of office are required by the second and sixth articles of the United States Constitution. Article Two requires the President, before entering on the Execution of the office to “take the following Oath or Affirmation:—I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”¹ Article Six requires that the legislators, executive and judicial officers, “both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”² The latter requirement is followed by what is now called the Religious Tests Clause, “but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”³

The first Congress passed implementing legislation for Article Six, establishing the oath that is essentially still administered to federal officials: “I, A. B., do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States.”⁴ That oath was subsequently amended, in 1862 to account for war-time loyalties by requiring the Ironclad Test Oath, a specific oath of continuous loyalty, and in 1873 to remove that test, creating in 1884 the requirement that persists.⁵ The oath required

* Steve Sheppard is Judge William Enfield Professor of Law in the University of Arkansas. Among his works is *I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS* (2009).

¹ U.S. CONST. art. II, § 1, cl. 8.

² *Id.* art. VI, cl. 3.

³ *Id.*

⁴ An Act to regulate the Time and Manner of administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789).

⁵ For a summary history of the oath, see United States Senate: Oath of Office,

today is this:

I, [name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.⁶

The oath for judges, however, has been a bit different from the very beginning. Since the Judiciary Act of 1789, which was (obviously) adopted by the same Congress that had enacted such a minimal oath for legislative and executive officers, the judicial officers have had broader and more specific obligations, which “before they proceed to execute the duties of their respective offices,” must be expressed when each “shall take the following oath or affirmation, to wit:”

I, *A. B.*, do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as [judge/justice], according to the best of my abilities and understanding, agreeably to⁷ the constitution and laws of the United States. So help me God.⁸

Recent discussion in this journal has again raised the perennial questions of the role of the oaths, and the degree to which the oaths signal some religious commitment by the Framers, or whether one can see in them any expectation for a religious leadership of the nation. The general position of Geoffrey Stone is that the Constitution enshrines no significant religious expectations.⁹ The criticism of historian Seth Tillman is that reading the whole of the text, the oaths clause and other provisions signal at least some reference to God, and the response of Robert Blomquist is to suggest that while this perhaps is true, it must be seen both in the wider context of the times, as well as understood with sensitivity to

http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm (last visited Oct. 15, 2009).

⁶ 5 U.S.C. § 3331 (2006).

⁷ In the current iteration, a line is left here in lieu of “my said office agreeably to,” and the person taking the oath is instructed to say either “judge” or “justice” and then says “under” rather than “agreeably to.” The other alteration made to the oath over the centuries has been to enclose “or affirm” within parentheses.

⁸ Judiciary Act of 1789, § 8, 1 Stat. 73, 76 (1789) (codified as amended at 28 U.S.C. § 453 (2006)).

⁹ Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1 (2008).

the changing contexts of American traditions and policy.¹⁰

My enterprise is to sketch a bit more of the context that might help shed light on the meaning of these oaths, or at least some of the meanings of these oaths as they would have been understood by a person of the Framers's generation. The enterprise here has two significant limits.

First, to ascribe universal and specific meanings to something as complex as an oath would be unhelpful, as such meanings are, at best, matters of approximation and of averages among a variety of disparate views. Individuals saw (and see) the world and any given thing in it from their own personal viewpoints, and these vary not only from person to person but even for one person as the person sees the matter differently over time. Though some value might still be had by considering the idea of the oath in both the politics and societies that affected and reflected the colonial and early federal experience, it is important to see these not as representing the views of a single person.

Second, a full discussion of the history of oaths in each colony—as matters of office, of testimony, of personal covenants, etc., arising in each of the European states from which the colonists came—is beyond the scope of this article and, anyway, not the purpose of the editors of *de novo*. Rather, I here raise a few points of reference, illustrating some of them with a few examples from British, colonial, and early federal history.

Perhaps the most important suggestion I may make is that oaths harbor great paradox. In a way, it seems as if the very nature of the oath is to contain and to manage competing influences—competing arguments—for the commitments that are to be made.

10 Seth Barrett Tillman, *Blushing Our Way Past History*, 2009 CARDOZO L. REV. DE NOVO 46, available at http://www.cardozolawreview.com/index.php?option=com_content&view=article&id=106:tillman200946&catid=18:other-de-novo-articles&Itemid=20 (abridged version); Seth Barrett Tillman, *Blushing Our Way Past Historical Fact and Fiction: A Response to Professor Geoffrey R. Stone's Melville B. Nimmer Memorial Lecture and Essay*, 114 PENN ST. L. REV. 391 (forthcoming 2009), available at <http://www.ssrn.com/abstract=1333576> (unabridged version); Robert F. Blomquist, *Beyond Historical Blushing: A Plea for Constitutional Intelligence*, 2009 CARDOZO L. REV. DE NOVO 244, available at http://www.cardozolawreview.com/index.php?option=com_content&view=section&layout=blog&id=5&Itemid=24.

I. THE OATH IS A PERSONAL OBLIGATION,
BUT THE OATH IS A PUBLIC OBLIGATION

The oath, by definition, is created by a public institution, indeed drafted by officials of those institutions, but it must be taken personally by the individual, who is required to perform the office with particular care and (sometimes impliedly and sometimes explicitly) for the benefit of the public. This duality is inherent in the “subscription” by which a person takes an oath, and the “office” that requires the oath itself.

The public nature of the oath is reflected in the customs of its administration. Oaths must be administered by a person appropriate to the task; an oath cannot be taken alone. And, the very language by which people talk of “making” or “taking” an oath in the context of these oaths is different from the usual language of “utterance” of an oath, in that there is always the institutional predicate of the creation of the form of the oath, and there is always the official predicate of administration. An official presents the oath in a form repeated by its taker, and the officials tend to be jealous of the monopoly of institutions of law in creating this form, seeing this consolidation of power as a benefit to the citizen. Thus, one of the Liberties of colonial Massachusetts reserved to the Assembly the power to prescribe the forms of oaths.¹¹

Yet the oath is a personal, solemn undertaking. As Joseph Story described it, the oath is an act of conscience in which the person must make an inner acceptance of the proffered, institutional obligation.¹²

¹¹ The Liberty No. 3 of the Liberties of Massachusetts, 1641, provided:

It is ordered and decreed, and by this Court declared; that no man shall be urged to take any oath, or subscribe any Articles, Covenants, or remonstrance of publick and civil nature but such as the General Court hath considered, allowed and required. And that no oath of Magistrate, Counciller or any other Officer shall binde him any farther, or longer then he is resident, or reputed an Inhabitant of this Jurisdictiō [1641]

THE LAWS AND LIBERTIES OF MASSACHUSETTS 43 (Huntington Library, rev. ed. 1998) (1648) (presenting a type facsimile of THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSSETS (1648)).

¹² In his commentaries on the Constitution, Justice Story wrote:

That all those, who are entrusted with the execution of the powers of the national government, should be bound by some solemn obligation to the due execution of the trusts reposed in them, and to support the constitution, would seem to be a proposition too clear to render any reasoning necessary in support of it. It results from 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.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1838 (1833), available at

Oaths mattered a great deal to the people of this age. They were well aware of the commitments that oaths demanded, and they spent great effort to craft oaths. Massachusetts colonists, for instance, had thirty-two different oaths for different offices.¹³ The significance went far beyond the specificities of duty, however. English (and colonial) arguments over nation, identity, and religion were manifest in many arguments centering on oaths, one illustration among many being the Scots uprising of the Solemn League and Covenant of 1643,¹⁴ echoed in Boston in 1774¹⁵ and memorialized by Burns in 1795.¹⁶

II. THE OATH IS THE SOURCE OF OBLIGATION, BUT THE OBLIGATION OF OFFICE EXISTS INDEPENDENTLY

The oaths of office, by their terms, refer not only to existing obligations but incorporate obligations of a variety of forms that arise from the office itself, building them into the commitment expressed by the oath. Thus, even the oath to “support the Constitution of the United States” is an acceptance of an obligation that one would reasonably infer from reading the Constitution itself. Having accepted the office, to later promise “to perform the duties of my office” or even to then promise to perform “all the duties incumbent on me as [judge/justice]” is—to a degree—redundant.

In every instance, the acceptance of an office and the nature of the office imply a set of obligations, not the least

http://press-pubs.uchicago.edu/founders/documents/a6_3s27.html.

¹³ See the inventory of the Massachusetts Lawes and Liberties in STEVE SHEPPARD, *I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS* 267 (2009).

¹⁴ See, e.g., Edward Vallance, ‘*An Holy and Sacramentall Paction: Federal Theology and the Solemn League and Covenant in England*, 116 *ENG. HIST. REV.* 50 (2001).

¹⁵ For the influence of the Scots oaths and league on revolutionaries in America in the 1770’s see 12 *PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY* 42 (1871).

¹⁶ Burns wrote:

The Solemn League and Covenant,
Cost Scotland blood—cost Scotland tears,
But it sealed Freedom’s sacred cause,
If thou’rt a slave, indulge thy sneer.

2 ROBERT BURNS, *Solemn League and Covenant*, in *THE POETRY OF ROBERT BURNS* 446 (William Ernest Henley & Thomas F. Henderson eds., 1897). Some renditions read these middle lines, “Now brings a smile, now brings a tear; But sacred Freedom, too, was theirs.”

being to perform that office according to its purpose and for the benefit of those whom the office is created to serve. That an oath requires such a function be performed is a bit superfluous. Writing just before American independence, Sir William Blackstone, interpreting the earlier work of Sir Edward Coke, recognized this inherent duplication in oaths of allegiance, the oath serving only to add a civil sanction of perjury to the moral sanctions of disloyalty, and adding a religious commitment to the prior social commitment.¹⁷

III. THE FORM OF THE OATH CREATES SPECIFIC OBLIGATIONS AMIDST VERY GENERAL OBLIGATIONS

The institutions create the offices and also determine which oaths shall be required of those who take them. This monopoly by which to specify the form of the oath to be taken by the official was taken very seriously. Not only do we see this in the difference in the form of oath given to judges as opposed to other officers, but also we see it in the many forms of oath required in the colonies and the states. This point is essential in understanding the oaths themselves, particularly when they are written as broadly as the presidential oath. For instance, the oath of the judges of Virginia was sufficient not only for Chancellor George Wythe to find he may not evade a question before him, that he must apply his skill and learning to the question, and, applying that skill, that he must abide by the state's constitution to such a degree as to void an unconstitutional act by the state's legislature.¹⁸

The specificity of oaths appears to have been important to the drafters of oaths, who required sometimes quite specific undertakings unique to certain roles, such as the

¹⁷ In his discussion of "People, Whether Aliens, Denizens or Natives," Blackstone wrote:

The formal profession therefore, or oath of subjection, is nothing more than a declaration in words of what was before implied in law. . . . The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason; but it does not encrease the civil obligation to loyalty; it only strengthens the social tie by uniting it with that of religion.

¹ WILLIAM BLACKSTONE, COMMENTARIES *357.

¹⁸ *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (Sup. Ct. App. 1782) (Wythe, C.) ("I approach the question which has been submitted to us: and, although, it was said the other day, by one of the judges, that, imitating that great and good man lord Hale, he would sooner quit the bench than determine it, I feel no alarm; but will meet the crisis as I ought; and, in the language of my oath of office, will decide it, according to the best of my skill and judgment.").

requirements of assistant census takers.¹⁹ Yet the oaths were also prone to use terms understood to hold great generality and duty, such as “just” and “perfect.” The simplicity of the oath required of the President turns, in part, on the breadth of the duties it prescribes: to execute the office, and to “preserve, protect, and defend” the Constitution. Thus, the judge is specifically charged to favor neither the rich nor the poor but more generally to “do justice.”

IV. THE OATH TRADES ON A RELIGIOUS COMMITMENT, BUT THE OBLIGATION DOES NOT DEPEND ON GOD

The oath is, by customary understanding, an undertaking made according to a commitment to God. This implied invocation of God in most oaths distinguishes it from an affirmation, in which there is no expressed or implied invocation of God’s name, although there remained an understanding that the obligation was a solemn obligation that would be immoral to breach.

That said, it is a mistake to think of the affirmation as God-less. Rather an affirmation was made patently without reference to God in order to allow the devout Quakers or others—whose fear of God would not allow a reference to God’s name in any other undertaking than one fit for religious observance—to enter the commitments of the oath none the less. The undertaking remained quite clearly one in which violating one’s word would be a serious act, as a statement in perjury. But the very nature of the prohibition on the swearing of oaths being religious, the areligious nature of the affirmation was seen as acceptable to those who sought a religious basis for such undertakings.

This differed from concerns for those who took oaths without such scruples. Thus, Massachusetts, and indeed most states, allowed Quakers to avoid swearing oaths but to affirm obligations under the threat of perjury.²⁰ More, affirmations

¹⁹ Congress required the assistant to the district marshal to swear:

I, A. B. do solemnly swear (or affirm) that I will make a just and perfect enumeration and description of all persons resident within the division assigned to me by the marshal of the district of [district name] and make due return thereof to the said marshal, agreeably to the directions of an act of Congress, intituled ‘An act providing for the enumeration of the inhabitants of the United States,’ according to the best of my ability.

Act of Mar. 1, 1790, § 1, 1 Stat. 101 (1790) (providing for the “enumeration of the Inhabitants of the United States”).

²⁰ See MASS. CONST. amend. VI.

were *only* available for Quakers or others whose objection to an oath was religious.²¹ There was no thought that the Quakers were the heretics whom St. George Tucker feared when he scored atheists and Papists who might take oaths.²²

Even so, it is a mistake to think that the Founding generation saw the oath as a thoroughly religious commitment. Indeed, Blackstone saw the Oath as a way of bringing religion to bear in enforcing an independent obligation, arising from the acceptance of office, not from the oath itself.²³

In many instances, the nature of the oath, and the obligations of it, were seen as effectively secular, and whatever religious trappings the oath brought were simply overlooked. Thus, when the oath of allegiance was taken by the executive and legislative officers, no reference to God was expected (in part, no doubt, owing to respect for the Religious Tests Clause). Whatever implied notion of religious significance in the oath is there was seen generally as an option, like the presidential oath, in which “So help me God” was added by the president-elect to the constitutionally required text, a practice that became a common custom.²⁴

Indeed, in one of the more famous expositions of the judicial oath, which does have a required statement of invocation to God, Chief Justice John Marshall did not feel compelled to quote the reference to God at all. In *Marbury v. Madison*, Marshall relied on his obligation under his oath, which he quoted in full, but for the last lines and their reference to God. These, he omitted.²⁵

²¹ *State v. Putnam*, 1 N.J.L. 260 (Sup. Ct. 1794) (“The exception was, that it appeared to be taken ‘on the oaths or affirmations’ of A, B, C, &c., without setting forth that they are quakers or conscientiously scrupulous of taking an oath. A case of *The State v. Cook*, in Middlesex, was cited, in which this error had been held fatal.”).

²² “Atheism destroys the sacredness and obligation of an oath. But is there not also a religion (so called) which does this, by teaching, that there is power which can dispense with the obligation of oaths; that pious frauds are right, and that faith is not to be kept with heretics.” 2 ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE* app. 3–11 (Philadelphia, 1803); see also 1 TUCKER, *supra*, at app. 267–97. This hyperbolic fear of Catholics contrasts with the acceptance of Quakers.

²³ See *supra* note 13.

²⁴ President Washington chose to add the phrase in taking his own oath, and the custom has been continued as a matter of the choice of many, but not, all Presidents. See *Inauguration of the President: George Washington*, <http://inaugural.senate.gov/history/chronology/gwashington1789.cfm>.

²⁵ Chief Justice Marshall wrote:

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, “I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will

We can, quite safely I think, read the Constitutional text and its commitment to oaths without believing that the oath signaled a requirement of a religious pledge or a God-fearing basis for acceptance of the oath. The Oaths of Office Clause is immediately followed by the Religious Tests Clause. The Framers could hardly have more clearly signaled that an oath, whatever religious significance it has for its taker, is not required to assure the taker's religion.

V. THE OATH OFFICIALS DRAFTED COMMITS A PERSON TO SUPPORT A STATE, BUT THE OATH DOES NOT COMMIT TO SUPPORT ITS OFFICIALS

The oaths required by the Constitution differ markedly from their great antecedents, the oaths of allegiance. These oaths, given by lords and officials on taking office, were declarations of fealty to the monarch, a personal commitment to the person of the king. True, the monarch accepted such fealty in the official role of the kingship, in a division of the king's person between the official and the personal, but in practice the division was less than clear, when for instance, new oaths were made for the new monarch.

The personal aspect of the commitment had long ago begun to break down. Sir Edward Coke, for instance, believed that his commitment to the king and to the law as a judge transcended mere obedience to the monarch's whim.²⁶ The oaths as written in the Constitution and then by the first Congress reflect this impersonal, institutional view of office, the oaths being written to commit the oath-taker to abstract principles, rather than to a President, or to the Congress, or other personal authorities.

faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?
Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

²⁶ See Steve Sheppard, *Introduction* to 1 SIR EDWARD COKE, THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE (Steve Sheppard ed., 2003).

VI. THE OATH IS A MATTER OF PERSONAL COMPLIANCE, BUT
 THE INSTITUTIONS OF LAW ENFORCE OATHS

As Blackstone says, an oath adds the threat of perjury to the stated obligation. This idea of the enforcement of the oath is more commonly encountered in the early federal court in adjudicating the claims arising from the false statement of a witness or a claimant.²⁷ Yet, the possibility of enforcement by institutions is proved by even this limited use.

VII. THE OATH IS A PRESENT PROMISE, BUT IT ACCEPTS A
 COMMITMENT OF FUTURE SACRIFICE

The promises made in the oath are a precondition on the entry into an office, and the effects of the promise last as long as the oath-taker remains in office. The expectation is that the oath binds the official from the moment it is made, and its effects will persist, regardless of the challenges that the oath-taker might face—whether in obstacles to performance or lures toward corruption in that performance, and whether those obstacles could be known or would be unknown at the time of the oath.

EPILOGUE. THE SPECIAL PROBLEM OF RELIGION

The argument raised by Mr. Tillman in this journal is that the Oath of Office Clause, at least indirectly, is a constitutional reference to God. This is probably true. Yet the more general point made by Prof. Stone is that the Constitution's specific rejection of Holy Writ as the foundation of the state and the obligations of its officials is quite different from great declarations of state in the colonial experience, for instance the earlier instruments to govern Massachusetts. This also is true.

It appears that the common-law understanding of the oath was to require an avowedly moral commitment, not merely a legal commitment, while at the same time creating a legally enforceable duty. Certainly, some oaths were written with the invocation to God, yet many weren't, and the

²⁷ See *Rue v. Mitchell*, 2 U.S. (2 Dall.) 58 (Pa. Ct. Com. Pl. 1790).

differences between those that were and those that weren't seem quite arbitrary, and at least to John Marshall, irrelevant.

More generally, there is no great reason to segregate religious or God-fearing bases of morality from other sources of morality, and even the most committed deist would have no objection to a requirement of right conduct that must be secured according to the moral notions of the oath-taker. The constitutional structures of the oaths allowed great breadth and flexibility for such notions, and we know that in short order, the oaths were taken by Episcopalians, Presbyterians, Congregationalists, Jews, and Catholics, and quite a few deists.

There are, indeed, other bases of morality underlying the oath required for a given constitutional office. Not only the ancient notion that one must carry out one's promise, but also the complex arrangements one accepts when agreeing to act for others and the special obligations that arise from legal office—all of these combine to create particular obligations that transcend the legal descriptions of that office. The oaths were structured and understood to incorporate these claims, as well as the claims of religion and of nation. What mattered to the drafters of oaths and to the Framers was not so much a particular commitment from one moral source or another. What mattered was that there would be a solemn, personal commitment—individually made but publicly known and, if need be, publicly enforced—to use good faith and best efforts in the performance of the whole duty of the office and in the preservation of the Constitution.