Supplementary Material

Chapter 6: The Civil War and Reconstruction—Individual Rights/Property/Due Process/Test Oaths

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Cummings v. Missouri, 71 U.S. 277 (1867)

John A. Cummings was a Catholic priest at St. Joseph's Church in Pike County, Missouri. The Missouri state legislature in January 1865 passed a law requiring lawyers and ministers to take a loyalty oath. The statute specified, "No person shall be permitted to practice as an attorney or counselor at law; nor, after that time, shall any person be competent as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, sect, or denomination, to teach, or preach, or solemnize marriages, unless such person shall have first taken, subscribed, and filed" an oath declaring, "I have always been truly and loyally on the side of the United states against all enemies thereof." The Archbishop of St. Louis immediately informed all priests that they were not to take the oath. Cummings obeyed his superior. He refused to take the oath and continued to preach. He was soon was arrested, convicted, and ordered to pay a $500 fine. The Supreme Court of Missouri affirmed the conviction and sentence. Cummings appealed to the Supreme Court of the United States.

The Supreme Court by a 5–4 vote declared that Cummings had a constitutional right not to take the oath. Justice Field's majority opinion ruled that otherwise qualified persons had a constitutional right to practice such professions as the priesthood. The test oath, by depriving Cummings of his right to be a priest, was a punishment, not a regulation. That punishment violated the ex post facto clause and constitutional prohibition on bills of attainder. Cummings *was decided before the Fourteenth Amendment was ratified. On what basis did Field find a constitutional right to practice various vocations? Why did he conclude the test oath a form of punishment rather than a regulation? What was the ex post facto clause violation? What was the bill of attainder violation? Today, a court would almost certainly declare that the Missouri test oath violated the free exercise clause of the First Amendment. Why did Field not mention religious freedom in his majority opinion?*

JUSTICE FIELD delivered the opinion of the court.

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The oath thus required is, for its severity, without any precedent that we can discover. In the first place, it is retrospective; it embraces all the past from this day, and, if taken years hence, it will also cover all the intervening period. In its retrospective feature, we believe it is peculiar to this country. . . . In the second place, the oath is directed not merely against overt and visible acts of hostility to the government, but is intended to reach words, desires, and sympathies, also. And, in the third place, it allows no distinction between acts springing from malignant enmity and acts which may have been prompted by charity, or affection, or relationship. If one has ever expressed sympathy with any who were drawn into the Rebellion, even if the recipients of that sympathy were connected by the closest ties of blood, he is as unable to subscribe to the oath as the most active and the most cruel of the rebels, and is equally debarred from the offices of honor or trust, and the positions and employments specified.

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It is evident from the nature of the pursuits and professions of the parties placed under disabilities by the constitution of Missouri that many of the acts from the taint of which they must purge themselves have no possible relation to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrollment or draft in the military service of the United States and his fitness to teach the doctrines or administer the

sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counselor to practice his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the simple statement of many of the acts and of the professions and pursuits that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that, for many of them, there was no way to inflict punishment except by depriving the parties who had committed them of some of the rights and privileges of the citizen.

The disabilities created by the Constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that "to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all." The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office many be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. . . .

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The theory upon which our political institutions rest is, that all men have certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; and that, in the pursuit of happiness, all avocations, all honors, all positions are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no other wise defined.

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"No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

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If the clauses of the second article of the Constitution of Missouri to which we have referred had in terms declared that Mr. Cummings was guilty, or should be held guilty, of having been in armed hostility to the United States, or of having entered that State to avoid being enrolled or drafted into the military service of the United States, and, therefore, should be deprived of the right to preach as a priest of the Catholic Church, or to teach in any institution of learning, there could be no question that the clauses would constitute a bill of attainder within the meaning of the Federal Constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they would be no less within the inhibition of the Federal Constitution.

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The results which would follow from clauses of the character mentioned do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priests and

clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. . . . The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

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By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.

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The clauses in the Missouri Constitution which are the subject of consideration do not, in terms, define any crimes or declare that any punishment shall be inflicted, but they produce the same result upon the parties against whom they are directed as though the crimes were defined and the punishment was declared. They assume that there are persons in Missouri who are guilty of some of the acts designated. They would have no meaning in the constitution were not such the fact. They are aimed at past acts, and not future acts. They were intended especially to operate upon parties who, in some form or manner, by action or words, directly or indirectly, had aided or countenanced the Rebellion, or sympathized with parties engaged in the Rebellion, or had endeavored to escape the proper responsibilities and duties of a citizen in time of war, and they were intended to operate by depriving such persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avocations. This deprivation is punishment, nor is it any less so because a way is opened for escape from it by the expurgatory oath. The framers of the constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed. To them there is no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else.

Now some of the acts to which the expurgatory oath is directed were not offences at the time they were committed. It was no offence against any law to enter or leave the State of Missouri for the purpose of avoiding enrollment or draft in the military service of the United States, however much the evasion of such service might be the subject of moral censure. Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an *ex post facto* law—"they impose a punishment for an act not punishable at the time it was committed."

Some of the acts at which the oath is directed constituted high offences at the time they were committed, to which, upon conviction, fine and imprisonment or other heavy penalties were attached. The clauses which provide a further penalty for these acts are also within the definition of an *ex post facto* law—"they impose additional punishment to that prescribed when the act was committed."

And this is not all. The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties.

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CHIEF JUSTICE, and JUSTICES SWAYNE, DAVIS, and MILLER dissented. In behalf of this portion of the Court, a dissenting opinion was delivered by JUSTICE MILLER. This opinion applied equally or more to the case of *Ex parte Garland*. . . . The dissenting opinion is, therefore, published after the opinion of the court in that case [and included in the excerpt to that case]