Supplementary Material

Chapter 6: The Civil War and Reconstruction—Democratic Rights/Voting/Test Oaths

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Anderson v. Baker, 23 Md. 531 (1865)

Thomas Anderson sought to vote in Montgomery County, Maryland. John Baker, the local election official, refused to place Anderson's name on the list of registered voters until Anderson took a loyalty oath. Anderson refused to take the oath. He sought a writ of mandamus, ordering Baker to allow him to cast a ballot. The trial court rejected Anderson's claim. He appealed to the Court of Appeals of Maryland.

The Maryland Court of Appeals declared that the state registration laws and loyalty oath did not violate the state or federal constitution. Chief Justice Bowie's majority opinion declared that states had an "absolute, unqualified right" to regulate access to the ballot. Unlike other Reconstruction cases, which were largely limited to the constitutionality of test oaths, Anderson v. Baker *endorsed state power to pass various voting registration laws. When reading the opinion, consider why voting registration laws were increasingly important in the second half of the nineteenth century. Judge Barton's dissent maintained that registration laws threaten republican government. What reasons did he give for this conclusion? How did the justices in the majority respond to that claim? Who had the better of the argument?*

CHIEF JUSTICE BOWIE delivered the opinion of the Court

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Among the absolute, unqualified rights of the State, is that of regulating the elective franchise. It is the foundation of State authority. The most important political function exercised by the people in their sovereign capacity. The 3rd Article of the Declaration of Rights affirms, "that the people of this State ought to have the *sole and exclusive right* of regulating the internal government and police thereof."

Whilst "the right of the people to participate in the Legislature is the best security of liberty and foundation of all free government," yet it is subordinate to the higher power of regulating the qualifications of the electors and the elected. The original power of the people, in their aggregate political capacity, is delegated in the form of suffrage to such persons as they deem proper, for the safety of the Commonwealth, hence the right is limited to "*every free white male citizen* having the qualifications prescribed by the Constitution." Citizenship and suffrage are by no means inseparable; the latter is not one of the universal inalienable rights with which men are endowed by their Creator, but is altogether conventional

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None of the elementary writers include the right of suffrage among the rights of property or person. It is not an absolute, unqualified, personal right. . . .

. . . In one sense, if he is a legal voter, he has the right to vote, and is injured if deprived of it; but the law has appointed a means whereby his right to vote is decided, and for that purpose has provided judges to determine that question, and has also provided the most careful guarantees for a proper discharge of duty by the judges, by the mode of their selection and their oaths of office. In all governments, power and trust must be reposed somewhere, all that can be done is to define its limits, and provide means for its exercise; when the act in question is that of a judicial officer, all that the law can secure is, a guarantee that they shall not with impunity do wrong *willfully, fraudulently or corruptly*. If they do so act, they are liable both civilly and criminally; but for an error of judgment, they are not liable either

civilly or criminally. If the citizen has had a fair and honest exercise of judgment by a judicial officer in his case, it is all the law entitles him to, and although the judgment may be erroneous, and the party injured, it is *damnum absque injuria,* for which no action lies. . . .

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It has become a political axiom that every State should control its domestic relations. The most ultra advocate of Federal power would not deny this right to the States in the Union. It is therefore a question of the utmost consequence, whether the brief prohibition, "no State shall pass any bill of attainder or *ex post facto law,*" was designed to restrain the political power of the people over their fundamental law, or rather the civil power of the legislative branch of State Governments. No other clause of the Constitution of the United States is relied on.

Bills of attainder, as they are technically called, are such special Acts of Legislation, as inflict capital punishments (or pains or penalties,) upon persons supposed to be guilty of high offences, without any conviction in the ordinary course of judicial proceedings. . . .

"*Ex post facto laws* are technical expressions, which include every law which renders an act punishable in a manner in which it was not punishable when committed. They relate to penal and criminal proceedings which impose punishments and forfeitures, and not to civil proceedings which effect private rights retrospectively." . . .

. . . It is obvious the distinctive and obnoxious feature of *ex post facto* laws, is the exercise of a judicial function by the Legislature; punishing thereby as *crimes,* acts not before forbidden, or aggravating their punishment. . . . The right of suffrage being the creature of the organic law, may be modified or withdrawn by the sovereign authority which conferred it, without inflicting any punishment on those who are disqualified.

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JUSTICE COCHRAN concurred in the decision of the majority of the Court, and filed the following separate opinion:

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As we have seen, the right of suffrage is bestowed on the citizens as a necessary element in every representative Government, to the end, that the Government ordained, may be perpetual and permanent, and the purposes contemplated by its establishment, more effectually accomplished. . . . With us, the privilege appears to be altogether conventional and derivative, and not original or inherent in the citizens. Prescribed by the people in the exercise of their organic power, for the purpose of giving effect to their expressed will, it is impossible, in the nature of things, that it should exist, or have an existence independent of that will. It is held to be a privilege, conferable by the people for sovereign purposes on a greater or less number of citizens, and the power to confer it for purposes that they may change at pleasure, necessarily implies power to withdraw or suspend it. But this is not all. The people, in clothing a citizen with the elective franchise, for the purpose of securing a consistent and perpetual administration of the Government they ordain, charge him with the performance of a duty in the nature of a public trust, and in that respect, constitute him a representative of the whole people. This duty requires that the privilege thus bestowed, should be exercised, not exclusively for the benefit of the citizen, or class of citizens professing it, but in good faith, and with an intelligent zeal for the general benefit and welfare of the State. It is on that ground that the corruption of the privilege by bribery, is denounced as a crime; and that adherents to a public enemy, conspirators against established authority, and felons are held to be unfit, and unsafe depositaries of a privilege, the disinterested, honest and faithful exercise of which is so vital to the preservation of public justice and tranquility. In no case, so far as we have learned, has the right of suffrage ever been conferred on all the citizens of any State. In many of them, the qualifications prescribed for its exercise, are such, that large numbers of the citizens are altogether excluded from its enjoyment, while in others, the privilege, where once conferred, has been withdrawn and bestowed on citizens not before possessed of it. . . .

. . . [T]he elective franchise, within the purview of this case, is a privilege conferred on the citizen by the sovereign power of the State to subserve a general public purpose, and not for private or individual advantage; that, as against the power conferring it, the citizen acquires no indefeasable right to its continuance or enjoyment; and that the people of the State, in the exercise of their sovereign power, may qualify, suspend, or entirely withdraw it from any citizen or class of them, providing always, that representation of the people, the essential characteristic of a Republican Government, be not disregarded nor abandoned. . . .

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. . . We have found that the elective franchise is conferred on the citizen by the sovereign power of the State, to subserve a public general purpose; that, as against the sovereign power, the citizen acquires no indefeasable right, and that the right of the people to qualify, suspend or entirely withdraw the privilege, is one of its inherent conditions, impressed upon and following it from the people to the citizen. If this exposition of the nature of the privilege be the true one, it is impossible for this section to be *ex post facto* or retrospective, in the strict sense of those terms. The suspension of the privilege, no matter upon what pretext, is authorized by this inherent condition, subject to which the citizen holds it; and if it can be suspended without regard to the conduct of the citizen, certainly no deed or word done or spoken by him, could subject that power to any limitation or restriction. The condition of the privilege, as between the people and the citizen, takes it altogether out of the range of *ex post facto* legislation; and it is not too much to add that the constitutional inhibition against *ex post facto* laws, if it could be successfully invoked in aid of the citizen in such a case as this, would become an instrument for converting a conditional privilege into a vested right, as well as for disarming the people of a power essential to the safe management and control of their domestic affairs. Upon this expression of my views, I conclude that the 4th section of Article 1 of the State Constitution does not conflict with the provisions of section 10 of Article 1 of the Constitution of the United States.

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The General Assembly is required, by section 2, Article 1 of the Constitution, to provide by law for a uniform registration of the voters, which registration it declares shall be evidence of their qualification to vote; reserving to the citizen however, otherwise qualified, the right of voting until such law should be passed and carried into effect. . . .

. . . The duty of carefully excluding all disqualified persons from registration, is a special, limited and exclusive duty, involving an exercise of judgment and discretion altogether beyond the supervisory and restraining power of any other tribunal or department of the government. Whether it was consistent with sound public policy to clothe the officers of registration with a power thus beyond judicial control, is altogether foreign to the present inquiry; it is enough to find that the people have expressly conferred it by the terms of their organic law.

No citizen is compelled to undergo the examination thus proposed; the administration of the oath is made a condition of his right to registration, and, by the Constitution, he could not acquire the right to be registered as a voter, even if then, without subjecting himself to this condition: If crimination, either as to crime or disloyalty, be the result of answering questions touching the right to registration, it is clear, that in such cases the right to vote is denied by the Constitution, and that no wrong is done by the provisions of the Act. But this is not all. The proposition in the Bill of Rights, by which this objection was sought to be supported, is, "that no man ought to be compelled to give evidence against himself in a criminal case." The proceedings authorised by the Registration Act, are not criminal in their nature or purpose. The citizen is not arraigned nor called to answer, except at his own election, and then, only to enable the officers of registration to ascertain, whether he has the qualifications, made necessary by the Constitution, to his registration as a legal voter. The oath provided for here, certainly does not fall within the inhibition of the Bill of Rights, whether required by the Constitution or not. . . .

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JUSTICE WEISEL concurred in the decision of the majority of the Court, and filed the following separate opinion:

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The right of suffrage is not an original, indefeasible right, even in the most free of Republican Governments; but every civilized society has uniformly fixed, modified and regulated it for itself, according to its own free will and pleasure, and in these United States, every Constitution of Government has assumed, as a fundamental principle, the right of the people of a State to alter, abolish and modify the form of its own Government, according to the sovereign pleasure of the people. The right to vote, like the right to hold office, being thus conferred upon the voter by the sovereign will of the people in their organic law or Constitution of Government, the question, upon whom it ought to be conferred, and what should constitute its boundaries and limits; in other words, what should qualify and what should disqualify, is one which the people themselves are to settle. So various are the circumstances, habits, wants, character, conditions, pursuits, dangers and difficulties of different people, that no fixed or certain rule can be laid down, by which the right of suffrage can be imparted. No one has ever yet pretended that the right should be universal, in the most enlarged or extended sense of that term, so as to embrace every age, sex, character and condition. In every State in the American Union, females are excluded from voting and holding office, though taxable citizens, and represented in legislative bodies; so with regard to minors, though they, of the male sex, in addition to being taxed if owners of property, and represented, are also required to bear arms when of the required military age and bodily constitution. In most of the States, Africans are excluded, though they may be taxed, and, under certain circumstances of age, sex, &c., required to do military duty. . . . All these regulations and limitations are, in my judgment, clearly acts of sovereign power, to be exercised or not; and if exercised, to such degree or extent, as the sovereign power shall determine. The common good of the whole, is the end proposed by every well organized society; and if a restriction of the right of suffrage be deemed necessary or expedient by the sovereign power to attain this end, under the circumstances in which the public interests are placed, there can be no valid objection so to exercise this authority. A liberal exercise of the power may at one stage in the history of a people, be proper and judicious, whilst, at another, a more restrictive policy may be demanded. . . .

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. . . It has been well settled, that the term *ex post facto law,* is not applicable to civil laws, but to penal and criminal laws only. . . .

. . . That the 4th section does not meet the definition of a bill of attainder, is very manifest. It sits in judgment on no particular person or persons for acts done, pronouncing them crimes, applying its own rule of evidence, and inflicting punishment. Nor does it, by way of an *ex post facto* law, declare certain acts already done, as crimes, which were not so before, and hand over the offender to the public criminal tribunals for trial, conviction and punishment. . . . The denial of the right of suffrage to such as may have engaged in them, is simply a denial of a privilege to those who, because of their unlawful relations to the United States, were considered not proper and safe subjects for its enjoyment. The denial of the right to those who are excluded by the 1st section, viz: to females, Africans, aliens, minors, &c., is not by way of punishment; nor to a lunatic or person *non compos mentis,* in the 3rd section. . . .

A disqualification to vote or hold office for such cause as the popular will, may declare prejudicial to the public safety, or inconsistent with sound policy—the exclusion of a class regarded as inimical to the public welfare and interests, is not by way of punishment to the individuals affected but as a protection to the body politic. All that can be said in such cases is, that the right is not conferred, for reasons of public policy deemed expedient by the Constitution making power, the people of the State in Convention assembled.

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JUSTICE BARTOL dissented, and filed the following opinion:

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[The Constitution of Maryland] declares, "that the right of the people to participate in the Legislature, is the best security of liberty, and the foundation of all free Government; for this purpose elections ought to be free and frequent, and every free white male citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage."

The qualifications of a voter are . . . : "Every white male citizen of the United States, of the age of twenty-one years or upwards, who shall have resided in the State one year next preceding the election, and six months in any county or legislative district of Baltimore city, and who shall comply with the provisions of this Article of the Constitution, shall be entitled to vote at all elections hereafter held in this State."

The 3rd, 4th and 5th sections, declare the causes of disqualification, or causes for which the citizen forfeits the right of suffrage. With the exception of lunatics, or persons *non compos mentis,* who are incapable of doing any valid civil Act, and are therefore excluded, all the causes of disqualification named in the 3rd, 4th and 5th sections, are either for offences before known to the law, or so declared by the Constitution.

This, then, is in the nature of a criminal enactment, for it declares certain acts to be unlawful, and provides, as a consequence of their commission, that the offender shall be disfranchised. . . .

If I am right in this construction, then the 4th section is an *ex post facto* law, within the strictest definition of those terms; and therefore within the inhibition of the Constitution of the United States.

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By the Registration Act, the Legislature has conferred upon the officers of registration the most extraordinary and despotic powers, which are thus briefly but correctly stated in the appellant's brief:

1. They have the power of summoning witnesses to prove the qualification of voters, and are invested with judicial functions, the same as a Judge of a Circuit Court, for the purpose of issuing summons, attachments and commitments.

2. They are authorized to pronounce judgment against any citizen for acts committed within or without the jurisdiction of Maryland, which amounts to a forfeiture of his right to vote.

3. They are not required to give any notice of the charges to the accused party, or to confront him with witnesses, or to try him by jury, or to keep any written record of the trial.

4. They are only required to record his conviction in these words, "disqualified for disloyalty under Article 1 of the Constitution."

5. The ordinary rules of evidence are disregarded; the guilt of parties accused of treason and bribery, is permitted to be proved without trial or conviction by a competent Court; a party is required to testify against himself, particularly by section five, wherein the registrars are directed to exact an oath from the citizen to answer any questions touching his right of voting, and this even when his oath may be discredited.

6. The judgment of the registrars disfranchises the citizen forever, unless discharged by a two-thirds vote of the General Assembly.

It seems to me that the Act is in plain conflict with the 2nd Article of the Bill of Rights, by depriving the citizen of the benefit of "the common law, and the trial by jury, according to the course of that law." 2nd. With Article 20, which declares that the trial of facts when they arise, is one of the greatest securities of the lives, liberties and estate of the people. And especially with Article 23, which declares "that no man ought to be taken or imprisoned, or disseised of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land."

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The Registration Act, by making the decision of the registrars final, and failing to provide any appeal or other mode by which the right of the citizen to his franchise might be tried and determined in due course of law, deprives him of the protection of this great provision in our Bill of Rights. The powers conferred by this Act upon the registrars, are wholly dissimilar from those heretofore held and exercised by judges of election in this State, and no analogy can properly be drawn between them; nor, does it seem to me, is any precedent furnished by our past legislation for conferring upon subordinate tribunals, created by the Legislature, such extraordinary and absolute judicial powers. The provisions of the Constitution do not, in express terms, authorize the Legislature to confer such powers on the registrars, and such authority cannot be implied in the face of the express prohibitions of the Declaration of Rights.

Believing the provisions of the Registration Act to be plainly repugnant to the Declaration of Rights, I think it ought to be declared inoperative, and that the writ of *mandamus* prayed for by the appellant ought, for that reason, to be refused.