AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

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

Blair v. Ridgely, 41 Mo. 63 (1867)

Francis (Frank) Blair (1821–75) was a member of the most prominent pro-Union family in Missouri. His brother, Montgomery Blair, served as postmaster general under Lincoln. During the Civil War, Frank Blair was a member of Congress and a general in the Union Army. The Blair family abandoned the Republican Party during Reconstruction. Committed to white supremacy and reconciliation, the Blair family challenged the test oath the Missouri legislature in 1865 imposed on all voters. Although Frank Blair could truthfully declare that he had always been loyal to the Union, he refused to take the oath. Stephen Ridgely, the local election judge, refused to allow Blair to vote. Blair sued Ridgely, claiming that the test oath was an ex post facto law and a bill of attainder. After a local court rejected his claim, Blair appealed to the Supreme Court of Missouri.

The Supreme Court of Missouri declared that states could impose test oaths for voting. Judge Wagner's majority opinion declared that voting was a privilege, not a right. For this reason, Missouri was free to determine the qualifications of state voters. The Supreme Court in Cummings v. Missouri *(1867) ruled that Missouri could not impose a test oath for professionals. How did Judge Wagner distinguish* Blair *from* Cummings*? Is his distinction convincing?*

Blair appealed this decision to the Supreme Court of the United States. The justices divided evenly, 4–4. No opinions were issued. This meant that the decision of the Supreme Court of Missouri was allowed to stand.

JUDGE WAGNER

The decision of the Supreme Court of the United States in [*Cummings v. Missouri* (1867)] proceeds on the idea, that the right to pursue a calling or profession is a natural and inalienable right, and that a law precluding a person from practicing his calling or profession on account of past conduct is inflicting a penalty, and therefore void. There are certain rights which inhere in and attach to the person, and of which he cannot be deprived except by forfeiture for crimes, whereof he must be first tried and convicted according to due process of law. These are termed natural or absolute rights. . . .

. . .

But, is the right to vote, or to exercise the privilege of the elective franchise, a right either natural, absolute, or vested? It is certain that in a state of nature disconnected with government, no person has or can enjoy it; whilst his right of breathing, free locomotion, and the acquisition and enjoyment of property, is perfect and complete. . . .

That the privilege of participating in the elective franchise in this free and enlightened country is an important and interesting one, is most true; but we are not aware that it has ever been held or adjudged to be a vested interest in any individual. . . .

. . . [N]o person either has or can exercise the elective franchise as a natural right, and he only receives it upon entering the social compact, subject to such qualifications as may be prescribed. . . .

. . .

When the people, in 1865, formed and adopted a new Constitution as their organic law, they exercised an unquestioned power—an undisputed right. They altered and abolished their Constitution, and formed a new one, in which, in pursuance of their exclusive right in regulating their internal

government, they prescribed certain qualifications and conditions for the exercise of the elective franchise.

. . .

Of their perfect and exclusive right to do this, we do not entertain the slightest doubt. The right to vote is not vested—it is purely conventional, and may be enlarged or restricted, granted or withheld, at pleasure, and with or without fault. If a person loans another certain property gratuitously, and the possession is resumed on account of abuse or ill treatment, is the taking it from the borrower a penalty or punishment within the meaning of the Constitution of the United States.

But it is said that the oath of loyalty cannot be regarded as a qualification, because it is not attainable by all. Judge Field expresses this idea in the *Cummings* case, but it is a sufficient answer to say that the remark was not made on a question like the one now under consideration. The illustrations put by Judge Miller in the same case are exceedingly apposite, and seem to be incontrovertible. He says: "The Constitution of the United States provides as a qualification for the office of President and Vice President, that the person elected must be a native born citizen. Is this a punishment to all those naturalized citizens, who can never attain that qualification? The Constitutions of nearly all the States require, as a qualification for voting that the voter should be a white male citizen. Is this a punishment for all the blacks who can never become white? . . ."

It is well known that in the early history of this Government, several of the States admitted free negroes to vote on an equality with whites, and subsequently they divested them of that right, denied them that privilege, and confined the elective franchise solely to whites. They were disfranchised because they were black, and a white qualification was imposed, which it was physically impossible for them to attain. The privilege was withdrawn from them; they were disfranchised because they were black. We apprehend that it will not be contended that depriving them of the right of suffrage was a punishment, or in the nature of pains and penalties. The law-makers, we presume, owing to peculiar circumstances, thought they were not discreet persons to be entrusted with the ballot, just as the framers of our Constitution, we suppose, considered that those who had betrayed our flag, and exhibited their hostility to the Government, were, for the time being, unsafe and unfit repositories of political power.

The principle of the provision in the Constitution is involved in the power, and flows from the duty of the State to protect itself, that is, the welfare of the people. It proceeds upon the distinction between laws passed to punish for offences, in order to prevent their repetition, and laws passed to protect the public franchises and privileges from abuse by falling into unworthy and improper hands. The State may not pass laws in the form or with the effect of bills of attainder, *ex post facto* laws, or laws impairing the obligation of contracts; it may and has full power to pass laws, restrictive and exclusive, for the preservation or promotion of the common interests, as political and social emergencies may from time to time require, though in certain cases disabilities may directly flow as a consequence. It should never be forgotten that the State is organized for the public weal, as well as individual purposes; and while it may not disregard and violate the safeguards that are thrown around the citizen for his protection by the Constitution, it cannot neglect to perform and do what is demanded for the public good.