Supplementary Material

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

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Green v. Shumway, 12 Tiffany 418 (1868)

William Shumway was a "native-born white citizen, of full age, and a resident of the third ward of the city of Syracuse," New York. In 1867, New York held an election for delegates to a state constitutional convention. Thomas Green, the local inspector of elections, refused to allow Shumway to cast a ballot until he took the oath prescribed by the state legislature. That oath required Shumway to declare,

> *I, William Shumway, do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto, and did not willfully desert from the military or naval service of the United States, or leave this State to avoid a draft, during the late rebellion.*

Shumway refused to take that oath. He sued Green, claiming that he had a constitutional right to vote under New York and federal law. A lower court in New York found for Shumway and fined Green $50. Green appealed to the Court of Appeals of New York.

The Court of Appeals declared that the test oath was an unconstitutional bill of attainder and ex post facto law. Judge Miller's majority opinion asserted that voting is a fundamental right. Why did Judge Miller make this claim? How did the claim that voting is a fundamental right influence his opinion? The headnote to the opinion emphasized that Shumway was a "native-born white citizen." Suppose Shumway was a person of color or a woman. Would Judge Miller have ruled the same way in a lawsuit challenging racial or gender restrictions on voting?

JUDGE MILLER

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By this enactment, the citizen is deprived, upon declining to conform to its mandate, of a right guaranteed to him by the Constitution, and the laws of the land, and one of the most inestimable and invaluable privileges of a free government. There can be no doubt, I think, that, to deprive a citizen of the privilege of exercising the elective franchise, for any conduct of which he has previously been guilty, is to inflict a punishment for the act done. It imposes upon him a severe penalty, which interferes with his privileges as a citizen; affects his respectability and standing in the community; degrades him in the estimation of his fellow men, and reduces him below the level of those who constitute the great body of the people of which the government is composed. It moreover inflicts a penalty, which, by the laws of this State, is a part of the punishment inflicted for a felony, and which follows conviction for such a crime. It is one of the peculiar characteristics of our free institutions, that every citizen is permitted to enjoy certain rights and privileges, which places him upon an equality with his neighbors. Any law, which takes away or abridges these rights, or suspends their exercise, is not only an infringement upon their enjoyment, but an actual punishment. That such is the practical effect of the test oath required by the act

in question can admit of no doubt, in my judgment. It arbitrarily, and summarily, and without any of the forms of law, punishes for an offense created by the law itself.

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When the act in question was passed by the legislature, there was no law in this State which condemned or characterized the conduct, which is punished, in this act, by depriving the citizen of the right of suffrage. This law creates a new crime, and makes an offense which did not previously exist. It punishes for an act which was not a crime when committed. But, even if the alleged offenses incorporated in the oath prescribed were known to the law, the statute in question, in violation of the rules of the common law, pronounces judgment of condemnation, without evidence, without any opportunity to defend against the charge, and without a trial. It makes the party the accuser of himself, and his refusal to acquit himself for any cause, his own condemnation. It punishes for an offense before an accusation is made, and a trial had judicially, according to the Constitution, and the laws of the land. It compels him, in direct violation of the fifth amendment of the Constitution of the United States, "to be a witness against himself." His refusal to testify that he is innocent operates to produce his conviction, and seals his guilt. The object of the fifth amendment last cited was to prevent the party from being called upon as a witness of his own guilt, and to insure to him a full and fair trial, by due process of law. To compel him to testify, would violate this provision, and, indirectly, to make a refusal to testify, a cause for punishment, effects the very same purpose. It is only an evasion of the provision cited, to condemn a person for a refusal to swear to innocence.

That the federal Constitution is violated by the provision of the act to which I have referred, I entertain no doubt. It is essentially, in the particulars indicated, both a bill of attainder, or of pains and penalties, and an *ex post facto* law. . . .

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. . . [A]ll oaths of an expurgatory character, especially when applied as a means of punishment for past acts not at the time recognized and known to the law as penal or criminal, have been regarded in all countries in modern times, as odious and inquisitorial, and passed, as they usually are, in times of high excitement, upon the return of cool judgment and calm reason, have been condemned and repealed by legislative enactments. . . .

I am also of the opinion that the statute in question violates the Constitution of the State of New York.

The first section of the second article of the Constitution prescribes the qualifications of electors who shall be entitled to vote "for all officers that now, or hereafter, may be elected by the people."

The second section of the thirteenth article provides for the submission of the question whether a convention shall be called "to the electors qualified to vote for members of the legislature, and in case a majority of the electors so qualified, voting at such election, shall decide in favor of such convention for such a purpose, the legislature shall provide for the election of delegates to such convention."

This clause does not confer upon the legislature any power to create disabilities not existing at the time under the Constitution, or to restrict the right of suffrage which the Constitution has established. It would be extraordinary if the legislature had the right to determine who were entitled to the privilege of voting, and thus, in the exercise of an unlimited discretion, be able to disfranchise any class of citizens, when the right is already clearly established. Such a power would be liable to the grossest abuse, dangerous in the extreme, and obviously was never intended to be conferred. It is evident, I think, that the above section specifying the qualification of electors to pass upon the question whether or not there shall be a convention, plainly imports that the same electors, and no others, are qualified to vote for delegates, and any disfranchisement of any portion of said electors is a violation of this section, and therefore void.

The statute also violates section one of article one of the Constitution of this State, which declares that "no member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizens thereof, unless by the law of the land, or the judgment of his peers." The "law of the land" does not mean a statute passed for the purpose of working the wrong, but the law which existed at the time when the alleged offense was perpetrated. The provision was intended to restrict the powers of the legislature and to prevent any act which would deprive a party of his rights or disfranchise him until it

was ascertained judicially that they had been forfeited. (*Wynehammer v. The People* [1856]) The act in question pronounces a judgment, and disfranchises the election without judge or jury or any of the forms required by the ordinary cause of legal proceedings.

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JUDGE MASON (dissenting)

. . . The Constitution [of New York] prescribes the qualifications of the electors who shall vote on the question of calling the convention, but is entirely silent as the qualifications of those who shall vote for the election of delegates to such convention, and leaves the whole question to the legislature to provide by law for such election, and there is nothing in the Constitution restricting or limiting the power of the legislature upon this subject. . . .

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. . . The people of the State have the sovereign right to frame their own Constitution, and prescribe the qualifications of electors. This is a sovereign right in the States too long conceded to them to be now surrendered. It is, to my mind, a right unquestionably belonging to the State. This right, I concede, must be exercised in subordination to the Constitution of the United States. It cannot be exercised otherwise, while the right to regulate the elective franchise resides in the States, as there is nothing in the federal Constitution restricting the exercise of that right. The general government is one of limited and delegated powers, and it is provided, by the tenth article of the amendments to the Constitution, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This power over the elective franchise in the States is certainly not delegated to the United States.

It only remains to be considered, whether the free and untrammeled exercise of this power to regulate the elective franchise is prohibited to the States by the Constitution of the United States. . . .

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Attainder is . . . the stain or corruption of the blood of a criminal capitally condemned. [Joseph] Story says, bills of attainder, as they are technically called, are such special acts of the legislature as inflict capital punishments upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings.

Bills of attainder had acquired an established and technical signification long before the framing and adoption of the Constitution of the United States, and was well understood by the men who framed that instrument, and no one at that day ever imagined that it had any reference to regulating the elective franchise. The disfranchising, by depriving of the right of suffrage of any portion of the citizens of a State, was never in any country regarded as passing bills of attainder against them, and no such effect can be given to this clause of the Constitution, without doing violence to its language and pushing it by a forced construction, beyond the well recognized and received import of the word "employed."

. . . An *ex post facto* law is defined to be a law whereby an act is declared to be a crime, and made punishable as such, when it was not a crime when done, or whereby the act of a crime is aggravated in enormity or punishment. The plain and obvious meaning of this prohibition against the passage of *ex post facto* laws, is that the legislature shall not pass any law after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done, or to add to the punishment of that which was criminal, or to increase the malignity of a crime, or to retrench the rules of evidence so as to make conviction more easy. . . .

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This statute under consideration is not, in any sense, a criminal statute. It creates no criminal offense, and does not undertake to define any. Neither does it prescribe any punishment for any existing criminal offense. It simply assumes to regulate the right of suffrage, and prescribes the qualifications of persons offering to vote for delegates to the constitutional convention. Such a law, I am confident, was never intended to be embraced by this constitutional prohibition.

The right of suffrage is a political right conferred by the Constitution or laws of the States, and has ever been regarded as exclusively under State control. It may be granted, or withheld, or given

subject to such restrictions as the majority of those in whom the sovereignty resides may deem most conducive to the public welfare. If we adopt the argument of the respondent's counsel in this case, and sustain this judgment, I am not able to perceive why all power in the State governments to ever restrict the right of suffrage is not struck down by this prohibition in the federal Constitution against the passage of *ex post facto* laws. No State, under such a construction of the federal Constitution, can ever withhold the right of suffrage from any persons who have heretofore enjoyed it, however much the public welfare or safety might demand it. If such an interference with the rights of the States is to be perpetrated by a forced and hitherto unrecognized construction of this prohibitory clause of the federal Constitution, I prefer it should come to us as a mandate from the federal court, submitted to, and obeyed when it comes, by a direct decision of the very question itself. . . .

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. . . It is very clear to my mind that the decision of the Supreme Court of the United States, in [*Cummings v. Missouri* (1867) abd *Ex parte Garland* (1867)], have given an interpretation to this clause of the Constitution of the United States, never contemplated by the framers, and wholly at variance with the early expounders of that instrument, and in conflict with all the decisions of the same court, up to the time of those decisions. These cases, however, have no application to the case at bar. The statute under consideration takes away no vested right. . . . None have the right to vote except those who have the right conferred by the statute, and then only upon the terms prescribed by the statute. This act of the legislature, under consideration, is general in terms, and requires every citizen in the State who should claim the right to vote for delegates to the convention, to take the same oath if he shall be challenged before he shall be entitled to vote. None of the persons who were in a condition that they could not take this oath and were consequently deprived of the right to vote for the delegates to convention, can claim that they have been deprived of any constitutional rights, for no one had the right to vote except those prescribed by this legislative act. . . .

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