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Abstract

Cummings v. Missouri (1867) is often overlooked in modern legal history, and very little scholarly literature exists chronicling the case's implications for contemporary constitutional jurisprudence. When awareness does exist, there is a tendency to classify *Cummings* as simply a Civil War-era religious liberty case—a mischaracterization which reflects a fundamental misunderstanding of the ruling's background and modern relevance. In reality, born out of post-war paranoia over loyalty and past Confederate allegiances, the *Cummings* case is most notable as landmark judicial precedent in defining the U.S. Constitution's proscriptions of bills of attainder and *ex post facto* laws, and possesses very little significance today for religious liberty jurisprudence. Beginning with an analysis of the contemporary historical and political circumstances at hand, this article seeks to reframe the scholarly conversation surrounding *Cummings* to reflect the true place of importance it holds in the anthology of American legal history.

Keywords

Cummings v. Missouri, Missouri Test-Oath, Ironclad Oath, Ex parte Garland, Father John Cummings, Charles D. Drake, Samuel Field.

HISTORY AND IMPLICATIONS OF THE MISSOURI TEST-OATH CASE

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Introduction

On the morning of September 3, 1865, the Rev. John A. Cummings, a Roman Catholic priest of the Archdiocese of St. Louis, stood up to preach to the congregation of St. Joseph Catholic Church in northeastern Missouri's Pike County at the regular Sunday Mass. The next day, a grand jury was empaneled to indict him, and by the end of the week, Father Cummings had been arrested and brought before a local judge for his arraignment.[1] The cleric, prosecutors charged, had run afoul of Missouri state law—not for a felony or other criminal offense, but for the act of preaching at Sunday Mass. A new statute had gone into effect on September 2, and Father Cummings, according to its provisions, could not lawfully preach or otherwise function as a religious minister in Missouri because he had not sworn a loyalty oath to the United States. Father Cummings was quickly convicted of violating the oath law

[1] Bradley, Harold C. "In Defense of John Cummings," *Missouri Historical Review* 57, no. 1 (October 1962): 4.

by the county circuit court and fined five-hundred dollars (a significantly larger sum today), but he refused to pay the fine and swiftly appealed his conviction. Thus was inaugurated a years-long litigatory marathon involving compounded constitutional questions—one which eventually culminated in the 1867 United States Supreme Court decision *Cummings v. Missouri*. In his appeal, Father Cummings and his supporters argued that the oath law—commonly known as the 'Ironclad Test-Oath'—was unconstitutional because it violated constitutional prohibitions on *ex post facto* laws, bills of attainder, and laws impeding the free exercise of religious practice. Beginning with a summary of the contemporary historical and political circumstances at hand and proceeding with a detailed analysis of the court's ruling, this essay will examine the Supreme Court's decision in *Cummings* and will scrutinize the ruling's constitutional implications and its impact on future case law.

Background

The origins of Missouri's 'Ironclad Test-Oath' and the *Cummings* case can be traced to the waning days of the Civil War. During the bloody conflict, Missouri was officially a part of the Union, holding a similar status to

Kentucky, Maryland, and Delaware as a slaveholding 'border state.' But the state was a bitterly contested battleground, with various parts of Missouri falling under Confederate occupation during the war and the state harboring a large number of Southern sympathizers. Still, by early 1865 and with the Confederacy in retreat, Missouri was firmly back under the Union's control—the state was essentially under federal military occupation—and fiercely unionist Radical Republicans had seized control of state government.[2] The Radical Republicans, motivated by a fervent zeal for vengeance and more practical desires to preserve their newfound political hegemony in Missouri, called a convention to draft a new state constitution in January 1865. Under the leadership of Charles D. Drake, a future United States Senator and federal judge, Missouri's Radical Republicans proposed a wide swath of changes to the state constitution principally meant to "excommunicate from the political community those who had supported secession."[3] Under the new constitution's provisions,

[2] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 162-163.

[3] Kohl, Martha. "Enforcing a Vision of Community: The Role of the Test Oath in Missouri's Reconstruction." *Civil War History* 40, no. 4 (December 1994): 293.

slavery would be abolished, African-Americans would be given the right to vote, and all citizens would be required to swear the 'Ironclad Test-Oath' or face disenfranchisement and restriction from a wide array of professions—including law, teaching, business, and religious ministry. Crucially, the test-oath was retroactive—it required oath-takers to affirm the state constitution's requirement that they had never in the past "been in armed hostility to the United States, or to the lawful authorities thereof, ... or been in the service, of the so-called 'Confederate States of America.'"[4] The 'Ironclad Test-Oath' was passed by the convention

[4] The full text of the 'Ironclad Test-Oath,' according to the syllabus of *Cummings v. Missouri*: "I,[name], do solemnly swear that I am well acquainted with the terms of the third section of the second article of the Constitution of the State of Missouri, adopted in the year eighteen hundred and sixty-five, and have carefully considered the same; that I have never, directly or indirectly, done any of the acts in said section specified; that I have always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic; that I will bear true faith and allegiance to the United States, and will support the Constitution and laws thereof as the supreme law of the land, any law or ordinance of any State to the contrary notwithstanding; that I will, to the best of my ability, protect and defend the Union of the United States, and not allow the same to be broken up and dissolved, or the government thereof to be destroyed or overthrown, under any circumstances, if in my power to prevent it; that I will support the Constitution of the State of Missouri; and that I make this oath without any mental reservation or evasion, and hold it to be binding on me." The terms of the state constitution referenced in the oath are what is quoted in the body of this essay. *Cummings v. The State of Missouri*, 71 U.S. 277, 332 (1867).

along with the rest of the 'Drake Constitution' in April 1865, and the new constitution was narrowly ratified by Missouri voters via statewide referendum in June.[5]

The intentions and practical effects of the new state constitution's test-oath provision were clear—because of the oath's retroactive nature, any individual who had previously supported the Confederacy or had otherwise demonstrated disloyalty to the Union cause could not truthfully swear the oath, even if they were willing to swear future loyalty. But rather than being merely a "punitive, partisan act," the disenfranchisement *en masse* of former Confederates and Southern sympathizers precipitated by the 1865 Missouri Constitution was part of Radical Republicans' broader strategy to "transform Missouri into a truly Northern state" through a dual-pronged approach of encouraging Confederate sympathizers to leave for more friendly states and incentivizing Northern Unionists and African-Americans to immigrate to Missouri.[6] This context is helpful

[5] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 164.

[6] Kohl, Martha. "Enforcing a Vision of Community: The Role of the Test Oath in Missouri's Reconstruction." *Civil War History* 40, no. 4 (December 1994): 293.

in understanding why Missouri's Radical Republicans were not satisfied with merely restricting the right to vote and the partisan voting advantage that would result—and why they chose to go further, essentially barring those who could not or would not swear the oath from significant aspects of public and professional life.

The constitutional requirement that members of certain professions swear the "Ironclad Test-Oath" came into force on September 2, 1865, and the state government was eager to strictly impose the provision. Republican Governor Thomas C. Fletcher ordered that state militia forces be deployed throughout Missouri to enforce the new requirements.[7] Father Cummings was among the first to be targeted for violating the new statute. Arrested and brought before Pike County Circuit Court Judge Thomas J.C. Fagg, the outraged priest refused to defend himself, demanded an immediate trial, and defiantly offered to plead guilty, freely acknowledging that he had violated the constitutional test-oath provision while maintaining that the provision itself

[7] *Historical and Biographical Notes*; Thomas Clement Fletcher, 1865-1869; Office of Governor, Record Group 3.18; Missouri State Archives, Jefferson City.

was unjust and unconstitutional.[8] Father Cummings repeatedly reiterated what he said was his natural and constitutional right to preach his Catholic faith without state interference; his defense cited guidance from his superior, Archbishop Peter Kenrick of St. Louis, who wrote a July 28, 1865 letter to priests in Missouri advising them to refuse to take the test-oath because it amounted to a "sacrifice of ecclesiastical liberty."[9] But his appeals to morality and justice had little impact on the circuit court; Judge Fagg found Father Cummings guilty of violating the constitutional provision and remanded him to jail until he paid the five-hundred dollar fine, which the cleric refused to do as a matter of principle.

With the assistance of a small team of sympathetic, politically prominent local attorneys, Father Cummings decided to appeal his conviction to the Supreme Court of Missouri, arguing that the 1865 constitution's test-oath provisions were unconstitutional under the terms of the

[8] "Finally, he declared that, although he had done what the indictment charged, it was patently false that he had violated any just or rightful law." Bradley, Harold C. "In Defense of John Cummings," *Missouri Historical Review* 57, no. 1 (October 1962): 7.

[9] Johnson, William T. Missouri Test-Oath. In The Catholic Encyclopedia. (New York: Robert Appleton Company, 1912).

United States Constitution. Father Cummings's constitutional argument against the test-oath law was essentially three-fold: first, he asserted that the test-oath was an *ex post facto* law, and thus unconstitutional; second, that it was a bill of attainder, and thus unconstitutional; and third, that it infringed upon his rights to freedom of religion and conscience, and was thus unconstitutional.[10] Defining a "penalty or punishment" as the act of "depriving a man of a right enjoyed…in consequence of some act done by him" and arguing that the test-oath law "punish[es] an offence previously committed by a penalty not prescribed at the time of the commission of the act," Father Cummings's attorneys attempted to widen the scope of what could be considered bills of attainder and *ex post facto* laws as beyond those which merely imposed criminal penalties by legislative fiat, or which retroactively criminalized once-legal activity, respectively. They also alleged that the test-oath violated constitutional protections of freedom of religion, arguing that the test-oath privileged one 'church' over another ("the loyal church over the disloyal church") and "destroyed" the

[10] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 172-173.

ability of religious ministers to freely preach without state interference.[11]

Attorneys for Missouri argued that the test-oath law could not be a bill of attainder, since it "convicted no one of anything"—essentially, because the state legislature acted to restrict Father Cummings's ability to undertake a future action (namely, exercising his ministry), rather than convicting him for any prior criminal offense, which would infringe upon his right to not be attainted for a past action.[12] As to Father Cummings's *ex post facto* claim, the state ascribed a specific "technical" definition to *ex post facto* laws; one that confined them to legislative enactments making an act "punishable as a crime" which was not so when committed.[13] Missouri's attorneys argued that laws "restricting or prohibiting the exercise of any trade or profession" or "prescribing the qualification of persons who exercise such trade," even when they exercised a retroactive nature in their effects on individuals who previously practiced a given trade or profession, fundamentally

[11] State v. Cummings, 36 Mo. 263 (1865).
[12] Bradley, Harold C. "In Defense of John Cummings." *Missouri Historical Review* 57, no. 1 (October 1962): 11.
[13] State v. Cummings, 36 Mo. 263 (1865).

pertained to the creation of new laws and did not necessarily amount to the state's imposition of an *ex post facto* law. The test-oath law, Missouri maintained, was merely an exercise of the state's rightful duty to establish qualifications for those seeking to hold certain offices. Finally, the state argued, the religious freedom protections contained within the U.S. Constitution's First Amendment do not represent "a limitation of State power, but of the United States only." Missouri's claim here is relevant to the development of a constitutional doctrine of incorporation—in other words, the constitutional theory that protections afforded in the Bill of Rights are also applicable to the states—which is a legal doctrine whose history will be examined in greater detail later in this essay.

The Supreme Court of Missouri ruled against Father Cummings's appeal on October 30, 1865, in St. Louis. In a wide-ranging opinion, the state's high court unanimously rejected Father Cummings's constitutional claims, asserting that the 1865 constitution was neither an *ex post facto* law nor a bill of attainder and declaring that the judiciary had no authority to rule on the priest's broader moral appeals to liberty of conscience and religious practice. In short, the court essentially concurred with the sum of the state's

arguments. Writing for the court, Chief Justice David Wagner, a Pennsylvania-to-Missouri transplant, put forth a narrow interpretation of the U.S. Constitution's proscription of "any bill of attainder, *ex post facto* law, or laws impairing the obligation of contracts." Bills of attainder, wrote Wagner, are defined as legislative acts promulgating a criminal conviction and inflicting either capital punishment or a lesser criminal punishment—in the latter case, those being punishments which inflict "pains and penalties" such as corporal punishment, imprisonment, or the forfeiture of property.[14] The test-oath law, Wagner ruled, "confiscates no estates, declares no forfeitures, nor does it inflict any pains and penalties…it passes judicially on nothing." Therefore, he asserted, the test-oath could not reasonably be understood to amount to a bill of attainder, and Father Cummings had himself not been "attainted" according to the term's proper definition.

Wagner dismissed Father Cummings's *ex post facto* claim by writing that the test-oath was enacted "not with a view to punishment for any past offence, but for future protection." By making the test-oath a requirement for

[14] State v. Cummings, 36 Mo. 263 (1865).

various professions after a set future date, Wagner said, Missouri intended to exclude those who refused to take the oath from their professions after the law's enactment. Thus, in his view, the test-oath law could not be called *ex post facto* because, rather than necessarily entailing the retroactive proscription of past disloyal acts themselves, it merely sought to restrict persons who had committed disloyal acts from occupying certain professions in the future.[15] On the religious liberty question, Wagner and the court demurred entirely. Wagner wrote that the court did not have jurisdiction over the claims of "justice and injustice" raised by Father Cummings. He said that it was the court's duty to presume the legislature and constitutional convention's best intentions when they promulgated the test-oath statute and added that it was "not for the judiciary" to decide whether the test-oath violated "the general principles of liberty or natural justice." If Father Cummings thought the test-oath was morally wrong and infringed upon his just religious rights, Wagner wrote, he should seek to change the law's provisions either through the state legislature or through "the

[15] "He is not held liable for any acts supposed to have been done or committed antecedently, but for violating an actual subsisting law after its enactment." State v. Cummings, 36 Mo. 263 (1865).

people in their political capacity at the polls." As it stood, the state's high court held that religious freedom protections in Missouri were sufficient, and that the test-oath law's effects on religious practice were permissible under the state's ability to regulate religion.[16]

Missouri historian Lucas Volkman notes that Father Cummings faced a state Supreme Court which was composed entirely of Radical Republican-aligned jurists steadfastly unsympathetic to the cleric's unwillingness to submit to the test-oath and prove his loyalty to the Union. After all, the court's judges had been "handpicked" to sit on the court only a few months earlier by Governor Fletcher, after their predecessors were removed by the constitutional convention's March 17, 1865 'Ousting Ordinance' over allegations of disloyalty to the Unionist cause.[17] The extent to which political loyalties seemed to influence the judges'—and Missouri authorities'—treatment of the *Cummings* case was largely unprecedented before this period, and will be another important consideration for this

[16] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 173.
[17] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 173.

essay when it examines the U.S. Supreme Court's ruling in this case.

A relevant contrast can be drawn between Missouri Unionists' treatment of Father Cummings and another notable case of this period—that of Samuel Brown McPheeters, a prominent Presbyterian minister in St. Louis. Suspected by many in his congregation of harboring Confederate sympathies due to his Southern ties, McPheeters had been ordered banished from Missouri by the provost-marshal overseeing the Union's wartime military occupation after he refused to submit a written oath of loyalty to the United States.[18] Nevertheless, after the intervention of powerful allies seeking the return of political moderation in Missouri, McPheeters was granted an audience with President Abraham Lincoln in Washington, D.C. Lincoln, similarly inclined against the most radical Unionist elements in Missouri, ordered that Union forces—to their great consternation—rescind the order exiling McPheeters. "The U.S. government must not…undertake to run the churches," he wrote in a January 2, 1863, letter to the

[18] Apperson, George M. "Presbyterians and Radical Republicans: President Lincoln, Dr. McPheeters, and Civil War in Missouri." *American Presbyterians* 73, no. 4 (1995): 239–240.

commander of the Missouri occupation.[19] While Lincoln and the federal government in Washington were keen to place limits on wartime efforts to restrain religious practice, Unionist authorities in Missouri were eager to enact far-reaching policies to suppress dissident congregations—such as a test-oath law targeting religious ministers. Juxtaposing the *Cummings* case with the McPheeters affair highlights contemporary internal tensions between the Republican Party's moderate and radical factions, both of which viewed maintaining free religious practice and religious liberty with very different levels of importance.

Cummings v. Missouri

Father Cummings appealed the Missouri Supreme Court's ruling to the Supreme Court of the United States, which granted a writ of *certiorari* and heard oral arguments in the case during the court's December 1866 term. Both sides assembled fresh ranks of high-profile attorneys, each of which included a sitting United States Senator—

[19] "When an individual, in a church or out of it, becomes dangerous to the public interest, he must be checked; but let the churches, as such take care of themselves." *Lincoln to Curtis*, 2 Jan. 1863. From Lincoln, Abraham. *The Collected Works of Abraham Lincoln*, ed. Roy P. Basier, 8 vols. (New Brunswick, NJ, 1953-55) 6: 33-34.

Maryland Democrat Reverdy Johnson for Father Cummings, and Missouri Unionist John B. Henderson for the state. The self-evident partisanship of both sides' legal teams reflected the increased national attention the case was receiving, as *Cummings*—along with *ex parte Garland* (1867), a related case which this essay will refer to later—began to take shape as something of a judicial referendum on loyalty oaths and Reconstruction's most far-reaching policies. Nevertheless, despite the new attorneys, the substance of both sides' arguments remained essentially unchanged from when the Missouri Supreme Court first heard the appeal. After deliberations, the U.S. Supreme Court handed down a decision in January 1867.

The central constitutional questions put before the U.S. Supreme Court in *Cummings* were as follows: Can bills of attainder be broadly interpreted as laws that penalize citizens in any manner, including by the deprivation of rights once afforded, or are they only laws which inflict capital punishment, or "pains and penalties" as understood in the traditional sense? Are *ex post facto* laws strictly those which retroactively punish acts as crimes which were not crimes when they were committed, or are they broadly laws which render an act "punishable in a manner in which it was not

punishable when committed"?[20] Finally, regarding the doctrine of incorporation: are the federal Constitution's Free Exercise Clause and Establishment Clause protections applicable to the states, or can states discriminate on the basis of religion—and if so, to what degree?

In a narrow five-to-four ruling, the Supreme Court decided in favor of Father Cummings, and overturned the Missouri Constitution's test-oath statute as both an *ex post facto* law and a bill of attainder. The ruling was effectively a wholesale vindication of Father Cummings; his conviction was vacated, and the test-oath he had been subject to had its legal validity quashed. Additionally, the constitutional arguments presented by his attorneys were largely accepted by the court—including the broader definitions of bills of attainder and *ex post facto* laws which they maintained the Constitution should be interpreted as proscribing. Justice Stephen Field, writing for the court's majority, explained the court's rationale in invalidating the test-oath law as a bill of attainder. The test-oath's effects meant that "there would be the legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the

[20] State v. Cummings, 36 Mo. 263 (1865).

security of the citizen in the administration of justice by the established tribunals."[21] In other words, a "deprivation" of once-held privileges and rights was being imposed by an act of a legislative body, rather than by the courts and without the presence of typical forms of judicial recourse and remedy. As can be seen, this definition of what exactly constitutes a bill of attainder, and of what the federal Constitution's proscription of bills of attainder actually entailed, largely mirrors the claims Father Cummings's attorneys had presented to the court.

A crucial judicial precedent for the *Cummings* decision was *Fletcher v. Peck* (1810), which Field cited for its statements on *ex post facto* laws and its attempts to define the limits of state sovereignty in times of crisis. Field referred to Chief Justice John Marshall's definition of *ex post facto* laws in the *Fletcher* decision, in which the jurist wrote that such a law is one "which renders an act punishable in a manner in which it was not punishable when it was committed." The test-oath law fulfilled *Fletcher*'s description of an *ex post facto* law, Field said, because the statute was intended to target past actions—it was "aimed at

[21] Cummings v. The State of Missouri, 71 U.S. 277, 332 (1867).

past acts, and not future acts." Critically, the court held that the test-oath was intended to, and effectively did, impose penalties for past actions that were not liable to be penalized when they were committed. Field further noted that the drafters of the 'Drake Constitution' had full knowledge that "whole classes of individuals"—namely, anyone who had supported the Confederate cause at any point in the past—would be "unable" to swear to the test-oath, lest they commit perjury. Importantly, however, the Supreme Court declined to rule on the religious liberty and conscience claims presented by Father Cummings. Volkman notes that this was likely because, even for justices broadly sympathetic to Father Cummings, it would have been near impossible (with essentially no existing judicial precedent to draw on) for them to promulgate a decision establishing the federal judiciary's right to regulate religious liberty in the states prior to the Fourteenth Amendment's enactment in 1868.[22]

Unsurprisingly, as had occurred with the Missouri Supreme Court, the U.S. Supreme Court's divisions in *Cummings* reflected the political allegiances of the court's membership. Four of the five justices who voted to overturn

[22] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 174.

the test-oath law and vacate Father Cummings's conviction were appointed by Democratic presidents and were seen as ideologically aligned with Chief Justice Roger Brooke Taney, the overtly Confederate-sympathizing jurist who delivered the court's infamous ruling in *Dred Scott v. Sanford* (1857) which held that an African-American could not be a United States citizen. On the other hand, the four justices who would have upheld the test-oath law's constitutionality were appointed by President Abraham Lincoln and were aligned with the Republican Party and antislavery movements to varying degrees. Field was the court's anomaly—while he was a Unionist and had been appointed by Lincoln, he was also a Democrat from California, and had been chosen by the president to sit on the high court "in part to achieve sectional and ideological balance."[23] Essentially, Field had been selected as a sort of compromise nominee and was consequently more of a political nonconformist than the other eight justices.

Justice Samuel Miller, a Republican and staunch ally of Lincoln, authored the four-justice minority's dissent in the *Cummings* case. Miller wrote the dissent to apply both to

[23] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 175.

Cummings and *ex parte Garland*, another test-oath case which involved an Arkansas attorney, Augustus Hill Garland, who had been barred from resuming his profession after the Civil War because he could not swear a loyalty oath affirming that he had always been loyal to the United States.[24] The dissent denied that test-oaths amounted to bills of attainder or *ex post facto* laws because they lacked, according to the justices, essential features of both. Like the attorneys for Missouri, the dissenting justices echoed the state Supreme Court's ruling—they maintained that test-oaths do not themselves "inflict any punishment," and consequently could not reasonably be understood to "attaint" anyone according to the legal definition of the word, while also asserting that *ex post facto* laws "applied to criminal causes alone."[25]

While the majority left Father Cummings's religious liberty arguments essentially unanswered, Miller's dissent repudiated them. He excoriated "allusions…to the

[24] Garland had, at various points over the course of the war, been a member of the Confederate Senate and the Confederate House of Representatives. *Ex parte Garland*, like *Cummings* for Missouri, resulted in Arkansas's test-oath law being overturned as a bill of attainder and *ex post facto* law. Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 175.

[25] Cummings v. The State of Missouri, 71 U.S. 277, 332 (1867).

inviolability of religious freedom in this country," arguing that the courts had no power to question states' ability to regulate religion. Staunchly opposed to the notion that the First Amendment's Free Exercise Clause and Establishment Clause protections could be "incorporated" so as to be applicable to the states, he wrote that the U.S. Constitution places "no restraint" on the states to uphold religious liberty in any respect. Additionally, quoting the words of Justice Joseph Story in Story's *Commentaries on the Constitution of the United States*, Miller maintained that "the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions."[26]

The impact of the *Cummings* decision on Father Cummings was immediate. Intermittently incarcerated since his conviction due to his continued refusal to pay the fine, the U.S. Supreme Court ordered state authorities to release him and allow him to resume public ministry as a Catholic priest. He continued his ministry as pastor of a different Catholic parish, St. Stephen's in Monroe County, before he

[26] Cummings v. The State of Missouri, 71 U.S. 277, 332 (1867) and Story, Joseph. "Commentaries on the Constitution of the United States."

retired due to illness in 1870.[27] Father Cummings died on June 11, 1873, at St. Vincent's Hospital in St. Louis in obscurity, but nonetheless as a judicially vindicated man. The principal legacy of the *Cummings* case, however, lies not in Father Cummings's exculpation, but rather in the impact that the decision had on future constitutional jurisprudence—both in the case's status as one of the last repudiations of efforts to apply Bill of Rights protections to the states, and in its precedent-setting interpretation of the federal Constitution's bans on bills of attainder and *ex post facto* laws. The following section will examine *Cummings*'s implications as judicial precedent and its practical effects on American constitutional jurisprudence.

Constitutional Implications

Justice William O. Douglas explained the important precedent set by the *Cummings* decision in his *An Almanac of Liberty* in 1954, in which he wrote that the case was crucial in guiding the Supreme Court's modern interpretation of the U.S. Constitution's proscriptions of bills of attainder and *ex post facto* laws. According to Douglas,

[27] Bradley, Harold C. "In Defense of John Cummings," *Missouri Historical Review* 57, no. 1 (October 1962): 13-14.

Cummings, to the delight of civil libertarians and civil rights advocates, correctly established a more expansive reading of the Constitution's prohibitions as precedent in future jurisprudence. In its invalidation of the test-oath law as a bill of attainder, Douglas argued that the court correctly found that by barring Father Cummings from his "calling" to ministry, the law "was in a real sense punishment for his conduct." Such an effect, wrote Douglas, was expressly forbidden under the Constitution's terms because a bill of attainder is—as the court held—simply defined as a "legislative act which inflict[s] punishment without a judicial trial."[28] Though it did not directly inflict a criminal conviction on Father Cummings, the test-oath law, Douglas noted, was "merely a means" of punishing him "because he had sympathized with the South," and thus had effectively attainted him. The *Cummings* decision's definition of *ex post facto* laws as broadly legislation "which punishes an act which was not punishable when it was committed" was also of critical importance—according to Douglas, it established the precedent that conduct could not be punished with laws that have "retroactive effect," lest those laws be struck down

[28] Douglas, William O. "An Almanac of Liberty." 205.

as *ex post facto*. This essay maintains that Douglas's view on *Cummings*'s importance as judicial precedent is substantially correct. Subsequent paragraphs will analyze the case's short-term impacts on contemporary historical and political events, along with its longer-term influence on modern constitutional jurisprudence.

The immediate effects of *Cummings* on Reconstruction 'Ironclad Test-Oath' laws were devastating for Radical Republicans and those seeking a heavy-handed government approach in dealing with former Confederates. In Missouri, many individuals facing prosecution for violating the test-oath statute had their charges dropped, and those found guilty had their convictions overturned.[29] The 'Ironclad Test-Oath' itself was formally repealed on November 8, 1870, when an amendment to the Missouri state constitution was adopted abolishing the test-oath provision.[30] At the national level, the widespread prevalence and harshness of test-oath laws began to recede in the period after the *Cummings* decision. State-enacted test-oaths were

[29] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 177.
[30] Bradley, Harold C. "In Defense of John Cummings," *Missouri Historical Review* 57, no. 1 (October 1962): 14.

gradually repealed, and in 1871, Congress enacted a law allowing former Confederates to swear to a watered-down oath promising future loyalty only.[31] The final Reconstruction test-oaths were done away with in 1884, when, after numerous unsuccessful attempts by congressional Democrats to formally repeal the remaining federal test-oath statutes, President Chester A. Arthur signed legislation to do so.

Cummings's effects on American jurisprudence, though less observable in the period immediately following the decision, were crucial. Supreme Court cases beginning in the late 19th Century have relied on *Cummings* to various degrees in setting the judiciary's baseline interpretation of federal constitutional bans on *ex post facto laws* and bills of attainder. For example, in *Duncan v. Missouri* (1894), the court explicitly cited *Cummings*'s definition of an *ex post facto* law to rule that Missouri's decision to enact a law restructuring its state Supreme Court did not constitute one.[32] And in *Bouie v. City of Columbia* (1964), a Civil

[31] Hyman, Harold M. "To Try Men's Souls." 264-265.

[32] "It may be said, generally speaking, that an ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different

Rights-era case involving a segregated business's attempt to retroactively apply a trespassing policy to two African-American sit-in protestors, the court, referencing *Cummings*, affirmed that an *ex post facto* law was one "that makes an action done before the passing of the law, and which was innocent when done, criminal."[33] [34] On bills of attainder, the Supreme Court ruled in *United States v. Lovett* (1946) that Congress acted unconstitutionally when it promulgated a law restricting the payment of one specific government employee's salary. "Legislative acts…that apply either to named individuals or to easily ascertainable members of a

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testimony is sufficient to convict than was then required; or, in short, in relation to the offense or its consequences, alters the situation of a party to his disadvantage, (Cummings v. Missouri, 4 Wall. 277; Kring v. Missouri, 107 U.S. 221, 2 Sup. Ct. 443;) but the prescribing of different modes of procedure, and the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of [the] crime, are not considered within the constitutional inhibition." Duncan v. Missouri, 152 U.S. 377 (1894).

[33] Continued: "and punishes such action, or that aggravates a crime, or makes it greater than it was, when committed." Bouie v. City of Columbia, 378 U.S. 347 (1964).

[34] See Footnote 4. Bouie v. City of Columbia, 378 U.S. 347 (1964). "Thus, it has been said that 'No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offence was committed, and which existed as a law at the time.'" *Kring v. Missouri*, 107 U.S. 221, 107 U.S. 235. See *Fletcher v. Peck*, 6 Cranch 87, 10 U.S. 138; *Cummings v. Missouri*, 4 Wall. 277, 71 U.S. 325-326.

group in such a way as to inflict punishment on them without a judicial trial, are bills of attainder prohibited by the Constitution," the justices, citing *Cummings*, wrote in the case's brief, going on to refer to *Cummings*'s definition of bills of attainder as principal precedent for striking down the law.[35] The court's affirmation of *Cummings*'s definition of bills of attainder in *United States v. Lovett* influenced a series of the court's later cases dealing with the same subject, such as *United States v. Brown* (1965) and *Nixon v. Administrator of General Services* (1977).

One particularly cogent example of *Cummings*'s continued relevance in shaping the parameters of the Supreme Court's definition of bills of attainder and *ex post facto* laws is *Garner v. Board of Public Works of the City of Los Angeles* (1951). In the *Garner* case, the court evaluated the constitutionality of a required loyalty oath which the City of Los Angeles was attempting to apply to municipal employees—the oath, importantly and distinctly from *Cummings*, applied only to past conduct within a set period of time, and had been enacted for several years longer than that set period of time prior to the first instance of its

[35] United States v. Lovett 328 U.S. 303, 315 (1946).

enforcement.[36] While the municipal loyalty-oath's constitutionality was ultimately upheld by the court, justices on both sides of the decision cited *Cummings* as precedent to justify their position. Justice Tom C. Clark, writing for the court's majority in upholding the oath, described *Cummings* (along with *ex parte Garland*) as the "leading" Supreme Court precedents in "applying the federal constitutional prohibitions against bills of attainder." The majority's opinion in *Garner* was careful to uphold Los Angeles's municipal test-oath in a nuanced manner, interpreting *Cummings* more narrowly than dissenting justices in the case but maintaining it as a starting point and as overarching judicial precedent nonetheless. Unsurprisingly, dissenting justices similarly adhered to *Cummings* as correctly decided precedent on *ex post facto* laws and bills of attainder, differing from the majority only in the particulars of how they interpreted the decision's applications. Justice Douglas, along with Justice Hugo Black, wrote that *Cummings* defined potential "punishment" imposed by a bill of

[36] The case, of course, also pertained to public employees and not privately employed individuals or private occupations.

attainder, for the Supreme Court's purposes, as including "the deprivation of the right to follow one's profession."[37]

Cummings's influence on modern religious liberty jurisprudence, has, in contrast to its effects on cases involving alleged bills of attainder or *ex post facto* laws, been far more limited. Prior to the Fourteenth Amendment's enactment in 1868—more than a year after *Cummings* was decided—there was essentially no means by which the courts could apply the federal Constitution's religious freedom protections to the states. In 1867, the doctrine of incorporation, which is rooted in a modern interpretation of the Fourteenth Amendment's Due Process Clause and would not begin to enjoy jurisprudential prominence until decades after the amendment's adoption, was non-existent.[38] Indeed, in *Barron v. Mayor and City Council of Baltimore* (1833), the Supreme Court explicitly held that protections contained within the Bill of Rights were "intended solely as a limitation on the exercise of power by the Government of the United States" and were "not applicable to the legislation of the

[37] Garner *et al*. v. Board of Public Works of the City of Los Angeles *et al.*, 341 U.S. 716, 730 (1951).

[38] The Due Process Clause, contained within Section One of the Fourteenth Amendment: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

States."[39] This was the precedent that the Supreme Court was working with when it decided *Cummings*. The court's decision to leave the religious liberty claims raised in *Cummings* unanswered was par for the contemporary course—without the Due Process Clause, it would have been extremely difficult for even the most sympathetic jurist to rule in favor of Father Cummings's bold assertion that the state of Missouri had no right to regulate his religious practice.

Conclusion

There is no doubt that *Cummings* is among the lesser-known court cases of the Civil War era. Other cases, such as *ex parte Merryman* (1861), *ex parte Milligan* (1866), and *Texas v. White* (1869), examined more high-profile constitutional questions and hold far more prominent places in the anthology of American legal history. Still, the historical and scholarly minimization of *Cummings* does a great injustice to the crucial role the case played in the development of the Supreme Court's interpretation of the U.S. Constitution's proscriptions of bills of attainder and *ex post facto* laws. Fundamentally, *Cummings* ought not to be

[39] Barron v. Mayor & City Council of Baltimore, 32 U.S. 243 (1833).

understood as a religious liberty case—it was a precedent-setting ruling that defined how the nation's courts would assess the constitutionality of retroactive laws and alleged bills of attainder in the future. As Justice Black approvingly remarked in his *Garner* dissent, the *Cummings* decision will be remembered in U.S. legal history as "one more of the Constitution's great guarantees of individual liberty."[40]

[40] Garner *et al*. v. Board of Public Works of the City of Los Angeles *et al.*, 341 U.S. 716, 730 (1951).

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