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LEGISLATIVE DISQUALIFICATIONS AS BILLS OF ATTAINDER

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The separation of powers was first introduced into political discussion during the English Civil Wars of the seventeenth century by the political party known as Levellers.[1] The object was to insure that persons be judged by general and prospective rules. If the legislative authority should decide a particular case, it might be tempted through partiality or prejudice to improvise a special rule for the situation. So the separation of powers was intended to achieve that impartiality in government which Aristotle called "the rule of law."

The doctrine of checks and balances was also introduced into political discussion during the Civil Wars, and with the Stuart Restoration in 1660 it became the official description of the English constitution.[2] King, Lords and Commons were in a condition of equilibrium. "Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community."[3] By the time Blackstone wrote these words, the tripartite division of legislative power had already yielded to what we call today the cabinet system.

The separation of powers was an idea about law; checks and balances was an idea about legislation. The proposition that men should be judged by general and prospective rules implies nothing about the composition of political forces in the legislature. It does imply a division of function between the framing of rules on the one hand and the administration of rules on the other.

Most of the early American constitutions explicitly indorsed the separation of powers—those adopted by Virginia, Maryland and North Carolina in 1776, by Georgia in 1777, by Massachusetts in 1780, and by New Hampshire in 1784. The principle was incorporated in the distribution of powers in the new Federal Constitution as well as in all state constitutions adopted subsequently. Yet of the early state constitutions J. Allen Smith has said truly: "The English system of checks and balances was discarded for the more democratic one under which all the important powers of government were vested in the legislature."[4]

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1. See WORMUTH, THE ORIGINS OF MODERN CONSTITUTIONALISM c.8 (1949).
2. *Id.*, cc. 7, 18.
3. 1 BL. COMM. *155.
4. SMITH, THE SPIRIT OF AMERICAN GOVERNMENT 27 (1907).

Checks and balances, however, reappeared with a new object. Thomas Jefferson protested against the Virginia constitution that it left the executive and judiciary dependent upon the legislature. "If therefore the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual: because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches."[5] To prevent this, he believed that "the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others."[6] The same reasoning underlies some of the debates in the Constitutional Convention and the argument for checks and balances in the *Federalist,* where, indeed, Madison quotes Jefferson as an authority.[7] The Federal Constitution incorporated both the separation of powers and checks and balances; and this plan prevailed in the revision of state constitutions thereafter.

So the separation of powers was invented in order to insure generality and prospectivity in law. Checks and balances was originally a political doctrine, but with Jefferson it became a device to protect the separation of powers. It has never lost its political flavor; instead, it has imparted that flavor to the separation of powers, so that today both ideas are commonly thought to rest on the proposition that the division of power is a salutary political principle. This proposition has fallen on hard times, with the consequence that both the separation of powers and checks and balances are in considerable disrepute among political scientists.

Nevertheless it is true that the most characteristic mechanical features of our Constitution were not addressed to the problem of power but to an idea about law. Their purpose was further implemented by the prohibitions on bills of attainder and *ex post facto* laws, by the contract clause in the Federal Constitution, and by the prohibitions on special legislation in state constitutions. This idea about law is one of the most striking features in the Anglo-American constitutional tradition. The passages in which John Locke,[8] Blackstone[9] and Daniel Webster[10] indorsed it are well known. Webster's definition—"By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and

5. JEFFERSON, NOTES ON VIRGINIA, Query 13 (1784).
6. *Ibid.*
7. THE FEDERALIST, No. 48 (Madison). The following statement is, at the least, an enormous exaggeration: "It was mainly for the purpose of arresting the tendency toward political democracy that the system of checks and balances in the federal Constitution was devised." SMITH, THE GROWTH AND DECADENCE OF CONSTITUTIONAL GOVERNMENT 81 (1930).
8. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 142 (1690).
9. 1 BL. COMM. *44.
10. In his argument in Dartmouth College v. Woodward, 4 Wheat. 518, 579-82, 4 L. Ed. 629 (1819).

renders judgment only after trial"—epitomizes a whole epoch of constitutional law.[11]

The most familiar example of the evils of joining legislative with judicial power is the bill of attainder. Protest first arose against the use of this device in 1641.[12] It was with difficulty that the last bill of attainder in English history, that of Sir John Fenwick in 1696, was pushed through Parliament. In America bills of attainder were passed in colonial days and during the Confederacy, but informed opinion disapproved of the practice, and it was apparently without debate that the framers of the Federal Constitution forbade both the national government and the states to pass bills of attainder.

At the time of the adoption of the Constitution, the term bill of attainder had been given no precise legal definition. Only with the constitutional prohibitions on action of this sort did definition become necessary. There was, to be sure, a body of practice to which the term referred and which supplied guidance. Justice Story described the practice thus:

> "Bills of attainer, 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 court of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties. But in the sense of the Constitution, it seems that bills of attainder include bills of pains and penalties. . . . In such cases, the legislature assumes judicial magistracy, pronouncing on the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions."[13]

Bills of pains and penalties commonly imposed civil disabilities, such as ineligibility for public office. It is in this area that controversy has arisen. Clearly it is appropriate for the legislature to establish qualifications for officeholders and for the practitioners of a wide variety of professions and callings. Clearly it is inappropriate for the legislature to assume judicial magistracy, determining fault without trial, and by legislative act to exclude the persons thus condemned from office or a designated vocation. The problem is to distinguish these two situations.

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11. The early doctrine of vested rights rested on the ideas expressed by Webster. See Corwin, *A Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914). For a time it found support in the eminent domain and due process clauses, Wynehamer v. People, 13 N.Y. 378 (1856); but it perished in Mugler v. Kansas, 123 U.S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205 (1887), with the holding that eminent domain did not apply and the due process clause did not afford absolute protection to vested rights in property. The bill of attainder clause is of course absolute.

12. MACILWAIN, THE HIGH COURT OF PARLIAMENT 153 (1910).

13. 2 STORY, COMMENTARIES ON THE CONSTITUTION § 1344 (5th ed., Bigelow, 1891).

Two tests have been advanced, one by Justice Field and the other by Justice Frankfurter. It is not certain that Justice Field considered his test to be exhaustive; Justice Frankfurter believed his to be so. It appears that each correctly identified a particular use of the bill of attainder; but there are situations which are explained by neither test. The bill of attainder clause, like the *ex post facto* clause, can be violated in more than one way.

In *Cummings v. Missouri*,[14] Justice Field held that a provision in the Missouri constitution of 1865 which forbade persons to hold office or to follow certain callings unless they took an elaborate oath disclaiming participation in or sympathy with the rebellion was a bill of attainder. He relied heavily but not exclusively upon the assertion that many of the disclaimers required by the oath were irrelevant to many of the activities in question. This made them penalties rather than qualifications. In *Pierce v. Carskadon*,[15] in 1872, a West Virginia statute which conditioned access to the courts upon the taking of an oath that the applicant had not participated in the rebellion was held to be a bill of attainder. Here the disability clearly had no relevance to the privilege. Probably no one will quarrel with the holdings in these cases.[16]

On the other hand, relevant disqualifications have also been held to be penalties. In Ex parte *Garland*,[17] a companion case to *Cummings v. Missouri*, a federal statute which required attorneys to take an oath disavowing any part in the rebellion as a condition of admission to practice in the federal courts was declared to be a bill of attainder. It could not honestly be said that this requirement was irrelevant to the practice of law. Justice Field, who wrote the opinion, made no such claim, although he purported to rely on *Cummings v. Missouri*.[18] And in *United States v. Lovett*,[19] a provision of a Congressional appropriation act which barred three named individuals from public employment as subversive was held to be a bill of attainder, although subversiveness is clearly a valid disqualification for public employment.[20]

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14. 4 Wall. 277, 18 L. Ed. 356 (1867).

15. 16 Wall. 234, 21 L. Ed. 276 (1872).

16. See in accord, Davis v. Pierse, 7 Minn. 13, 82 Am. Dec. 65 (1862); Kyle v. Jenkins, 6 W. Va. 371 (1873).

17. 4 Wall. 333, 18 L. Ed. 366 (1867).

18. However, in Dent v. West Virginia, 129 U.S. 114, 128, 9 Sup. Ct. 231, 32 L. Ed. 623 (1889), Justice Field asserted of the *Cummings* and *Garland* cases: "The constitution of Missouri and the act of Congress in question in those cases were designed to deprive parties of their right to continue in their professions for past acts or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions."

19. 328 U.S. 303, 66 Sup. Ct. 1073, 90 L. Ed. 1252 (1946).

20. Even the suspicion of subversiveness will justify administrative removal. Friedman v. Schwellenbach, 159 F.2d 22 (D.C. Cir. 1946), *cert. denied*, 330 U.S. 838 (1947); Washington v. Clark, 84 F. Supp. 964 (D.D.C. 1949).

In his concurring opinion in the *Lovett* case Mr. Justice Frankfurter undertook to shift the problem. He argued that the disqualification of the three was not a bill of attainder because Congress had failed to announce that it was punishing a past offense. The bills of attainder with which the framers were familiar had always nakedly declared their purpose; consequently no Congressional act is a bill of attainder if Congress does not state a prohibited purpose. This viewpoint was rejected by the majority in the *Lovett* case, but it apparently contributed to the holding in *American Communications Association v. Douds*,[21] where Chief Justice Vinson upheld section 9(h) of the Labor Management Relations Act of 1947, the Taft-Hartley Act,[22] which denied the facilities of the National Labor Relations Board to unions whose officers did not file affidavits disavowing membership in the Communist party. The Chief Justice attempted to distinguish the *Cummings, Garland* and *Lovett* cases:

> "Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that § 9(h) is intended to prevent future action rather than to punish past action."[23]

This of course flies in the teeth of the *Garland* and *Lovett* cases, in both of which the alleged fault which gave rise to the disqualification was highly pertinent to future conduct. If there is a difference in the legislative intent, the Court can have discovered it only by intuition. But the premise as well as the application seems to be unsound. It means that a completely capricious measure must escape condemnation as a bill of attainder because it is grounded on no offense whatever. If the legislature is forbidden to punish a man for cause, surely it is forbidden to punish a man without cause. It has also been suggested that under some circumstances a measure penalizing a future act or omission may be a bill of attainder.[24]

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21. 339 U.S. 382, 70 Sup. Ct. 674, 94 L. Ed. 597 (1950).

22. 61 STAT. 143 (1947), 29 U.S.C.A. § 159 (Supp. 1950).

23. 339 U.S. at 413.

24. See Doe *ex dem.* Gaines v. Buford, 31 Ky. (1 Dana) 481, 510 (1833): "A bill of attainder is not necessarily an *ex post facto* law. A British act of parliament might declare that if certain individuals or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated, as convicted felons and traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury. . . ."

In the case of Proclamations, 12 Co. Rep. 74, 75, 77 Eng. Rep. 1352 (K.B. 1610), Chief Justice Coke said: "But 9 Hen. 4 an act of parliament was made, that all the Irish people should depart the realm, and go into Ireland before the Feast of the Nativity of the Blessed Lady, upon pain of death, which was absolutely *in terrorem*, and was

Mr. Justice Frankfurter justified his truncation of the bill of attainder clause by saying that "There are other provisions in the Constitution, specific and comprehensive, effectively designed to assure the liberties of our citizens."[25] Presumably he refers to the Bill of Rights and the due process clause of the Fourteenth Amendment; but these were not in existence when the Constitution was drafted. If Mr. Justice Frankfurter is right, the state legislatures, from 1789 to 1868, were in no way restrained by the Federal Constitution from putting a man to death by vote, if only his life had been so blameless that he escaped all reproach for past conduct. Probably the framers of the Constitution did not intend that.

Justice Field was right in saying that the imposition of a disability on a principle of discrimination which is irrelevant to the proscribed activity discloses a penal intent. Justice Frankfurter was right in saying that a measure avowedly intended to penalize past conduct discloses a penal intent. But these are not the only ways in which legislatures are capable of giving effect to penal intents, nor are they the only cases in which courts have uncovered such intent. *United States v. Lovett* presents a third type of case; Ex parte *Garland* presents a fourth. Both these cases involve what Freund called "censorial" judgment of individuals.[26] In the *Lovett* case the individuals were measured against a general standard; in *Garland,* the standard was defined in terms of the individuals.

"In such cases, the legislature assumes judicial magistracy, pronouncing on the guilt of the party without any of the common forms . . . of trial. . . ."[27] The bill of attainder clause forbade a process as well as an outcome. In many cases the outcome would not be a penalty without the use of the prohibited process. Administrative discharge of subversive employees is not a penalty, but legislative discharge is penal. By appropriate judicial proceedings an attorney may be disbarred, and this is not penal, although direct legislative proscription, as in Ex parte *Garland,* is penal. It appears that there are certain results which the legislature is forbidden to achieve directly; the legislative decision is a bill of attainder.

There is nothing objectionable about the legislative establishment of appropriate qualifications for an office or vocation. In establishing qualifications, the legislature spells out the affirmative qualities which are implied in

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utterly against the law." This was not an attainder in the British sense because there was no corruption of blood.

Under the view adopted in this article, a disqualification based upon a legislative judgment of faulty character is a bill of attainder, whether the legislature grounds its action on past conduct, on other evidence or on no evidence at all. It seems more improper to disqualify on conjecture than on past conduct.

25. United States v. Lovett, 328 U.S. 303, 326, 66 Sup. Ct. 1073, 90 L. Ed. 1252 (1946).

26. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 100 (1928).

27. 2 STORY, *loc. cit. supra* note 13.

the activity admission to which is restricted.[28] These qualifications do not exclude any designated person or class of persons; all are eligible to acquire the qualifications. The establishment of disabilities is another matter. Here the legislature does not confine itself to reciting the requisite virtues which serve as qualifications; it specifies a characteristic which it declares to constitute a disqualification. Even here, however, the legislative action is not necessarily censorial or penal. When the legislature declares that persons suffering from communicable disease shall not be teachers, or that epileptics shall not drive automobiles, it is not passing judgment on those excluded. Another example is afforded by the statutes which impose disabilities upon persons occupying a given position or status because admitting them to the activity in question would expose them to a temptation to which many people would succumb. Public servants have been excluded by law from business transactions related to their official positions,[29] and from political activities;[30] railroads are forbidden by the commodities clause to haul the products of their own mines or factories;[31] certain shippers are forbidden to act as freight forwarders;[32] elaborate restrictions hedge in officers and employees of banks[33] and investment companies,[34] the directors of other concerns,[35] trustees under trust indentures,[36] and some other persons who act in a fiduciary capacity. Although these disqualifications are established in terms of anticipated fault of character, there has been no legislative judgment of the particular persons. The legislature relies upon common knowledge, that temptation leads in some cases to misconduct. Its judgment is in terms of general psychology. It is discharging the proper legislative function

28. Requiring professional competence of physicians is not a bill of attainder. Dent v. West Virginia, 129 U.S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623 (1889). Increasing the qualifications for the practice of drugless healing is not a bill of attainder even as to persons presently licensed. Butcher v. Mayberry, 8 F.2d 155 (W.D. Wash. 1925). A statute forbidding the practice of naturopathy is not a bill of attainder even as to persons already licensed to practice. Davis v. Beeler, 185 Tenn. 638, 207 S.W.2d 343 (1947), 1 VAND. L. REV. 451 (1948), appeal dismissed, 333 U.S. 859 (1948).

29. The earlier statutes are collected in *Ex parte* Curtis, 106 U.S. 371, 1 Sup. Ct. 381, 27 L. Ed. 232 (1882). See also 62 STAT. 694 (1948), 18 U.S.C. § 216 (Supp. 1950); 62 STAT. 697, *as amended,* 18 U.S.S. §§ 281-84 (Supp. 1950); Exec. Order No. 359 (1905).

30. The First and Second Hatch Acts [53 STAT. 1148 (1939), *as amended,* 5 U.S.C. § 118i (1950), and 54 STAT. 767, *as amended,* 5 U.S.C. § 118k (1950)] were upheld in United Public Workers v. Mitchell, 330 U.S. 75, 67 Sup. Ct. 556, 91 L. Ed. 754 (1947); and Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 67 Sup. Ct. 544, 91 L. Ed. 794 (1947).

31. 24 STAT. 379 (1906), 49 U.S.C. § 1(8) (1946), upheld in Delaware, L. & W.R.R. v. United States, 231 U.S. 363, 34 Sup. Ct. 65, 58 L. Ed. 269 (1913).

32. 56 STAT. 293 (1942), 49 U.S.C. § 1011(b) (1946).

33. 48 STAT. 194 (1933), *as amended,* 12 U.S.C. § 78 (1946), upheld in Board of Governors v. Agnew, 329 U.S. 441, 67 Sup. Ct. 411, 91 L. Ed. 408 (1947); 62 STAT. 694 (1948), 18 U.S.C. § 217 (Supp. 1950); 62 STAT. 695 (1948), 18 U.S.C. § 220-21 (Supp. 1950).

34. 54 STAT. 806 (1940), 15 U.S.C. § 80a-10 (1946).

35. 38 STAT. 732 (1914), 15 U.S.C. § 19 (1946).

36. 53 STAT. 1157 (1939), 15 U.S.C. § 77jjj (1946).

of establishing general rules of conduct, not the judicial function of appraising the faults of individuals.

We have a very different situation when the legislature inquires into the character of the persons disqualified.[37] Here the disqualification results from a legislative judgment that the proscribed persons possess a characteristic not found in people in general. It rests, not upon general psychology, but upon evidence. It is a determination, judicial in nature, of culpability or blameworthiness. It is usual to assess such states of mind in awarding penalties—criminal penalties, civil penalties, exemplary damages. Blackstone said that crime involved a "vicious will."[38] In *Bailey v. Drexel Furniture Company*,[39] Chief Justice Taft found the child-labor tax a penalty rather than a tax because its incidence depended on a state of mind: "Scienter is associated with penalties not with taxes."[40] And in *United States v. Lovett* it was held that when Congress determined that certain named individuals were "subversive" and were unfit for public employment this was a bill of attainder.

There are, of course, cases in which character is evaluated in administrative and judicial proceedings and the outcome is not a penalty—in licensing and in awarding the custody of children, for example. In such proceedings the issue ordinarily cannot be raised by the tribunal which judges (although in revocation of licenses it may be); the test applied has already been established by a general law; the hearing observes appropriate procedural safeguards. In legislative disqualification, on the other hand, the legislature takes the initiative in raising the question; it enacts the standard which it applies; and it proceeds, as Story pointed out, "without any of the common forms . . . of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not."[41] Acting in this manner discloses a penal intent.

So viewed, the bill of attainder clause is a more specific implementation of the separation of powers. It represents the view universally held at the time of the framing of the Constitution: "It is the peculiar province of the legislature to prescribe general rules for the government of society; the ap-

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37. In his concurring opinion in the *American Communications* case, Mr. Justice Jackson confuses the two. He says: "I have sometimes wondered why I must file papers showing I did not steal my car before I can get a license for it." 339 U.S. at 435. The licensing of cars is a privilege confined to the owners of cars; documentary proof of ownership is affirmative proof of qualification. This is very different from an act which says: "Robert H. Jackson for want of qualification is hereby forbidden to own or operate an automobile."

38. 4 BL. COMM. *21.

39. 259 U.S. 20, 42 Sup. Ct. 449, 66 L. Ed. 817, 21 A.L.R. 1432 (1922).

40. 259 U.S. at 37.

41. 2 STORY, *loc. cit. supra* note 13.

plication of those rules to individuals in society would seem to be the duty of other departments."[42]

This problem has arisen rather seldom, because legislatures have seldom had the impertinence to attempt to appraise character. In upholding the Ohio law for the licensing of dealers in securities, Justice McKenna remarked: "it is certainly apparent that if the conditions are within the power of the State to impose, they can only be ascertained by an executive officer. Reputation and character are quite tangible attributes, but there can be no legislative definition of them that can automatically attach to or identify individuals possessing them, and necessarily the aid of some executive agency must be invoked."[43] And in *Bratton v. Chandler*,[44] the Court at least thought it possible that the due process clause requires that an applicant for a license as real estate broker or salesman be given a hearing and an opportunity to meet adverse evidence. It construed a Tennessee statute to authorize these, on the ground that any other interpretation would raise grave constitutional doubts.

If we assume that the bill of attainder clause forbids the legislature to inquire into character and to impose a disability as a result of its findings, *Hawker v. New York*[45] must be considered. In that case the Court upheld a New York statute which forbade persons who had previously been convicted of felony to practice medicine.

> "But if a state may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidences of that character. We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test. . . . Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the legislature as conclusive evidence thereof. It is not the province of the courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conducive to the desired result. These are questions for the legislature to determine.
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> "It is not open to doubt that the commission of crime, the violation of the penal laws of a State, has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the State shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule—one having no relation to the subject-matter, but is only appealing to a well recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the State? The conviction is, as between the State and the defendant, an adjudication of the fact. So if the legislature enacts that one who has been

42. Chief Justice Marshall in Fletcher v. Peck, 6 Cranch 87, 136, 3 L. Ed. 162 (1810). And see Merrill v. Sherburne, 1 N.H. 199, 8 Am. Dec. 52 (1818).
43. Hall v. Geiger-Jones Co., 242 U.S. 539, 553, 37 Sup. Ct. 217, 61 L. Ed. 480 (1917).
44. 260 U.S. 110, 43 Sup. Ct. 43, 67 L. Ed. 157 (1922).
45. 170 U.S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002 (1898).

convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of *res judicata* and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care."[46]

The difference between this and the *Lovett* case is readily apparent. Here, as in establishing disqualifications for persons of given status because of the temptation offered by the conjunction of the status and the proscribed activity, the legislature acts upon a "well recognized fact of human experience." It does not take evidence or inquire into the character of individuals; in fact, the individuals involved are unknown at the time the act is passed. This seems to be a legislative rather than a judicial act.

In conformity with *Hawker v. New York*, it has been held that conviction of felony may be made a disqualification for public office.[47] Other statutes have carried the policy further. New York has also disqualified dentists and veterinarians who have been convicted of felony.[48] The Secretary of the Treasury is instructed not to license any person to deal in liquor who has been convicted of felony within the past five years, or of a misdemeanor under any federal law relating to liquor within three years.[49] The Investment Company Act bars those convicted of crimes in securities transactions from any connection with investment companies.[50] Persons adjudged guilty of violating the antitrust laws by monopolizing or attempting to monopolize radio communication are not eligible for licenses to construct or operate radio stations.[51] The Packers and Stockyards Act appears to be unique in that it requires no judicial proceeding; the Secretary of Agriculture is authorized to refuse a license to deal in poultry if he finds that the applicant has engaged in any of the practices forbidden by the Act within two years prior to his application.[52]

All these statutes rest on the argument of *Hawker v. New York*. There is in each case a notorious connection between the disqualification and the activity barred. No legislative investigation of character occurs; the disability is testified to by "the experience of mankind."

But this was true also of the disqualification in Ex parte *Garland*. It cannot be argued that the disqualification in the *Garland* case was irrelevant to the activity in question. As Justice Miller pointed out in his

46. 170 U.S. at 195.
47. Washington v. State, 75 Ala. 582 (1884); Crampton v. O'Mara, 193 Ind. 551, 139 N.E. 360 (1923), *writ of error dismissed*, 267 U.S. 575 (1925).
48. N.Y. EDUC. LAW §§ 6613, 6702.
49. 49 STAT. 978 (1935), 27 U.S.C. § 204 (1946).
50. 54 STAT. 805 (1940), 15 U.S.C. § 80a-9 (1946).
51. 48 STAT. 1086 (1934), 47 U.S.C. § 311 (1946).
52. 49 STAT. 648 (1935), 7 U.S.C. § 218a, upheld in Handy Bros. Co. v. Wallace, 16 F. Supp. 662 (E.D. Pa. 1936).

dissent: "fidelity to the government . . . [is] among the most essential qualifications which should be required in a lawyer."[53] So it has been held that admission to the bar may be conditioned not only on loyalty but on willingness to bear arms.[54] Past acts of disloyalty are certainly evidence, as notorious as a judicial conviction of felony, of unfitness. Nor is there any difference in the reliability of the findings of fact. Inability to take the oath establishes the fact as surely as a judicial conviction would have done. Where, then, is the difference between the *Garland* and *Hawker* cases?

The difference is this. In the *Hawker* case, as we have seen, the legislature did not identify the persons disqualified. These were determined by an impersonal process outside the control of the legislature. In the *Garland* case the statute must be treated as though it enumerated all the persons affected and by name excluded them from the practice of law. Garland's position was exactly as though the statute read: "A. H. Garland, having served in the legislature of the Confederacy, is forbidden to practice law in any federal court." The device of the oath made it possible to pass a John Doe bill of attainder covering thousands and to put upon the individuals proscribed the duty, under pain of prosecution for perjury, of filling in their own names in the blanks. As Mr. Justice Frankfurter said of the *Garland* and *Cummings* cases: "That the persons legislatively punished were not named was a mere detail of identification. Congress and the Missouri legislature, respectively, had provided the most effective method for insuring identification."[55]

Certainly it is proper for the legislature to establish a general requirement of loyalty for attorneys. What is improper is for the legislature to disqualify specified individuals. The statute in Ex parte *Garland* both created and applied a disqualification. It is irrelevant that those proscribed actually came within the disqualification. It could not be otherwise, since the disqualification was tailored to the exact dimensions of the proscribed group. Congress acted simultaneously as legislature and judge. This is forbidden by the bill of attainder clause.

There is one point of difference between the *Garland* and the *Lovett* cases. In *Garland* those disqualified were undoubtedly justly accused of the fault, for the fault was defined in terms of them, and they in terms of the fault. In the *Lovett* case there is only a legislative finding, which on the merits appears to deserve no respect, that those accused were justly accused of a fault which others were capable of sharing. But in both cases the legislature undertook to impose a disqualification for fault of character; in

53. 4 Wall. at 385.
54. *In re* Summers, 325 U.S. 561, 66 Sup. Ct. 94, 90 L. Ed. 491 (1945).
55. United States v. Lovett, 328 U.S. 303, 327, 66 Sup. Ct. 1073, 90 L. Ed. 1252 (1946).

both cases this was held to be a bill of attainder, for the reason that Congress is forbidden to make these judgments about individuals.

In three of the five cases involving exculpatory oaths disclaiming a designated fault of character—in *Cummings v. Missouri,* Ex parte *Garland,* and *Pierce v. Carskadon*—the Supreme Court has held the requirement to be a bill of attainder. In the fourth, *Davis v. Beason,*[56] in which the Court upheld a territorial statute imposing a test oath for the disfranchising of Mormons, the attainder question was not discussed. In *American Communications Association v. Douds,*[57] the exaction of a disclaimer of membership in the Communist party was upheld. The Court merely remarked that the imposition of oaths is a common and necessary practice. This is certainly true. The requirement of an oath that the applicant possesses the necessary affirmative qualifications for an office or activity is not a legislative determination of fault. The requirement of an oath that one lacks a disqualification not turning on blameworthiness—a disclaimer of epilepsy by an applicant for a driver's license, for example—is not a legislative judgment of fault of character. But the requirement of an exculpatory oath is the legislative identification of persons upon whom the legislature has passed a blanket judgment of fault of character; it is an instrument in a bill of attainder.

To summarize, it is proper for the legislature to establish relevant disqualifications for an office or occupation so long as these are not grounded on a legislative determination of fault or culpability in the persons disqualified; but a legislative disqualification so grounded is a bill of attainder. So the *Lovett* case stands for the proposition that the legislature may not apply a valid standard of disqualification to individuals and itself determine their blameworthiness. According to Ex parte *Garland,* the legislature may not enact a blanket disqualification of a group of individuals who are identified

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56. 133 U.S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637 (1890). And see Murphy v. Ramsey, 114 U.S. 15, 5 Sup. Ct. 747, 29 L. Ed. 47 (1885).

The cases on exculpatory oaths in other jurisdictions, are in conflict. In accord with the *Cummings* and *Garland* cases are *In re* Baxter, 2 Fed. Cas. 1043 No. 1118 (E.D. Tenn. 1866); Commonwealth v. Jones, 73 Ky. (10 Bush) 725 (1874); Murphy and Glover Test Oath Cases, 41 Mo. 340 (1867); State v. Heighland, 41 Mo. 388 (1867); Green v. Shumway, 39 N.Y. 418 (1868); Kyle v. Jenkins, 6 W. Va. 371 (1873). *Contra:* Cohen v. Wright, 22 Cal. 293 (1863); Shepherd v. Grimmett, 2 Idaho 1123, 31 Pac. 793 (1892); Anderson v. Baker, 23 Md. 531 (1865); State v. Neal, 42 Mo. 119 (1868); State *ex rel.* Wingate v. Woodson, 41 Mo. 227 (1867); State v. Garesche, 36 Mo. 256 (1865); *Ex parte* Quarrier and Fitzhugh, 4 W. Va. 210 (1870); Randolph v. Good, 3 W. Va. 551 (1869); *Ex parte* Hunter, 2 W. Va. 122 (1867); *Ex parte* Stratton, 1 W. Va. 304 (1866).

Of course it is the legislative proscription and not the oath that makes the measure a bill of attainder. Agreeing with the leading cases in the absence of an oath are Baltimore v. State, 15 Md. 376 (1860); Davis v. Pierse, 7 Minn. 13, 82 Am. Dec. 65 (1862). *Contra:* Boyd v. Mills, 53 Kan. 594, 37 Pac. 16, 25 L.R.A. 486 (1894).

The same result as that in the *Cummings* and *Garland* cases may be reached under another prohibition. Communist Party v. Peek, 20 Cal.2d 536, 127 P.2d 889 (1942); *cf.* Thompson v. Wallin, 301 N.Y. 476, 95 N.E.2d 806 (1950).

57. 339 U.S. 382, 70 Sup. Ct. 674, 94 L. Ed. 597 (1950).

by the possession of a common characteristic, even when that characteristic would be a proper disqualification in an administrative or judicial adjudication of character. It is, however, proper for the legislature to disqualify a class of persons, not in terms of its own appraisal of their fault but in the light of "the experience of mankind," when the members of the class are ascertained by some other organ of the government than the legislature—in *Hawker v. New York,* by the judiciary through a conviction of felony.

As we have seen, the *American Communications Association* case conflicts with both the *Lovett* and *Garland* cases. It requires extended discussion. The majority opinion was written by Chief Justice Vinson and was subscribed to by Justices Burton and Reed. Justices Frankfurter and Jackson concurred in upholding the non-Communist affidavit. The Court applied to the legislative decision the substantial evidence rule, which is appropriate in reviewing the actions of administrative tribunals.

> "Substantial amounts of evidence were presented to various committees of Congress, including the committees immediately concerned with labor legislation, that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government. . . . At the committee hearings, the incident most fully developed was a strike at the Milwaukee plant of the Allis-Chalmers Manufacturing Company in 1941, when that plant was producing vital materials for the national defense program. . . . Congress heard testimony that the strike had been called solely in obedience to Party orders for the purpose of starting the 'snowballing of strikes' in defense plants."[58]

Under this decision, *ex parte* testimony from interested witnesses, consisting largely of hearsay, is enough to justify Congress in determining that designated persons possess a special character which warrants their exclusion from any activity under federal control. In his dissent Mr. Justice Black said:

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58. 339 U.S. at 388. Congress and the Court preferred to believe the testimony of Mr. Louis Budenz that Allis-Chalmers was engaged upon defense contracts of at least $30,000,000 [5 *Hearings Before House Committee of Labor on Bills to Amend and Repeal the National Labor Relations Act,* 80th Cong., 1st Sess. 3612 (1947)], rather than that of Mr. Harold W. Story, Vice-President of the Allis-Chalmers Manufacturing Co., which seems to indicate that Allis-Chalmers had no government contracts:

"Senator Murray: Well, I am talking about prior to the war—during the period of rearmament in this country.

"Didn't your company refuse to accept any contract from the United States Government for the preparation of this country; and wasn't the leadership of your organization engaged in backing America First; and didn't they making strong contributions to America First—heavy contributions to America First?

"Mr. Story: Well, as far as I know, there were no contributions to America First. . . .

"Senator Murray: But it accepted no contracts for war work?

"Mr. Story: It accepted all the contracts that it had an opportunity to accept, within the limit of its ability to produce, in accordance with the promised dates of shipment. . . .

"Senator Murray: Was your company at that time seeking or negotiating contracts with the Government for war production or for production of armaments for the country?

"Mr. Story: We have been negotiating with the Government for contracts long before that time, Senator." 2 *Hearings Before Senate Committee on Labor and Public Welfare, on S. 55 and S.J. Res. 22,* 80th Cong., 1st Sess. 837, 839, 841 (1947).

"Under today's opinion Congress could validly bar all members of these [minority] parties from officership in unions or industrial corporations; the only showing required would be testimony that some members in such positions had, by attempts to further their party's purposes, unjustifiably fostered industrial strife which hampered interstate commerce."[59]

This is not far-fetched. It may be said also that if persons should testify before Congressional committees as to the validity of the *Protocols of Zion,* this would, under the majority opinion, constitute substantial evidence on the basis of which Congress might legitimately exclude all Jews from positions in national banking associations. The Court was at pains to point out that "accidents of birth and ancestry under some circumstances justify an inference concerning future conduct. . . ."[60] To come closer to the question in hand, what is to prevent Congress from passing an act forbidding a union to be represented before the National Labor Relations Board by John L. Lewis? He has frequently interrupted interstate commerce, and "substantial evidence" of discreditable motives, if that be necessary, would be forthcoming from the appropriate sources.

The Chief Justice's opinion deals summarily with the attainder issue. He disposes of the *Cummings, Garland* and *Lovett* cases by saying that in those cases individuals were being punished for past actions; here the statute is grounded on apprehension over future conduct, although "the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be."[61] It would be hard to think of better evidence of disloyalty or a more ominous augury for future conduct than Garland's past career. It also seems odd to concede that Lovett, Watson and Dodd had been subversive because the House of Representatives had accumulated "substantial evidence" to that effect, and yet to say that the House was moved by the desire to punish past conduct rather than to guard against future harm in barring them from public employment.

But it cannot be said that the Chief Justice's opinion rests entirely on this distinction. He converts the disqualification into a qualification by pointing out that the act proscribes only present membership in the Communist party. "Here the intention is to forestall future dangerous acts; there is no one who may not, by a voluntary alteration of the loyalties which

59. 339 U.S. at 450. It is a matter of some interest that members of the Republican party were once proscribed by statute. In 1860 the Maryland legislature created a Board of Police for Baltimore by a statute which provided "that no Black Republican, or endorser or approver of the Helper [antislavery] Book" should be appointed to any office under the Board. The Court of Appeals said that the statute was unconstitutional "if we are to consider that class of persons as proscribed on account of their political or religious opinions. But we cannot understand, officially, who are meant to be affected by the proviso, and, therefore, cannot express a judicial opinion on the question." Baltimore v. State, 15 Md. 376, 468 (1860).

60. 339 U.S. at 391.

61. *Id.* at 413.

impel him to action, become eligible to sign the affidavit."[62] This statement does not seem to be a fair report of the facts. The non-Communist affidavit is not an affidavit of loyalty or an avowal of any principles which impel to action. It is merely a disclaimer of membership in an organization. Members of the organization have been proscribed by Congress because Congress has formed an adverse judgment on their character; nor are they allowed any opportunity to profess or demonstrate the loyalty or the virtuous principles which the Court seems to believe are implied in the non-Communist affidavit. This is clearly enough a disqualification. To be sure, the statute allows them to escape the disqualification by resigning from the organization; but this does not involve an abjuration of political strikes or the affirmative profession of any new loyalty. Assuming that a man is wedded to political strikes, coercion such as this will merely deepen his attachment. The escape from disqualification afforded by the statute does not convert the disqualification into a qualification; rather, it exhibits the statute as what it is—a measure which attaches a legislative penalty to membership in an organization, and serves no other purpose whatever.

Mr. Justice Frankfurter concurred, saying that "the judgment of Congress that trade unions which are guided by officers who are committed by ties of membership to the Communist Party must forego the advantages of the Labor Management Relations Act is reasonably related to the accomplishment of the purposes which Congress constitutionally had a right to pursue."[63] But the provision of the oath which required disavowal of belief in the overthrow of the government by illegal or unconstitutional methods appeared to him too vague to meet the requirements of due process.

Mr. Justice Jackson found his own reasons for concurring in the majority decision. "If the statute before us required labor union officers to forswear membership in the Republican Party, the Democratic Party, or the Socialist Party, I suppose all agree it would be unconstitutional. But why, if it is valid as to the Communist Party?"[64] Mr. Justice Jackson finds that: "From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political façade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system."[65] A footnote refers the reader to literature

62. *Id.* at 414.
63. *Id.* at 418. This quotation provides an interesting contrast to Justice Frankfurter's attitude toward legislative decisions affecting the property of public utilities. "Foreshadowed nearly sixty years ago, . . . it was decided more than fifty years ago that the final say under the Constitution lies with the judiciary and not the legislature." Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 625, 64 Sup. Ct. 281, 88 L. Ed. 393 (1944).
64. 339 U.S. at 422.
65. *Id.* at 424.

which "the Congress *may or could have considered*"[66] in arriving at the conclusion indorsed by Mr. Justice Jackson. The least trammelled of our Justices, he is not disturbed by the fact that Congress failed to reach this conclusion. In the *Herzog* case counsel for the NLRB, in defending the oath, conceded:

> "I agree there is a wide gap there and Congress did not find—I might as well make it clear now—it did not find and it did not purport to find, and it is our position that it did not need to and could not properly have found, that the Communist party advocates the doctrine of the violent overthrow of the Government by force or other unconstitutional means. That is just no part of this case."[67]

After a lengthy argument resting chiefly on his own views on political science, Mr. Justice Jackson asserts that Congress, by virtue of its rational conclusions about the nature of members of the Communist party, might properly protect interstate commerce from Communists. But he proceeds to argue with equal vehemence against the remainder of the oath, which requires a disclaimer of revolutionary opinions. It is proper to exclude from the ranks of union officials Communists who are willing to swear allegiance to the United States and to disavow a belief in "the overthrow of the United States Government by force or by any illegal or unconstitutional methods," but not to bar those who cannot swear such allegiance or disclaim such belief. It is a little hard to justify this. Justice Jackson finds the difference in the presence of an overt act, affiliation, in the case of Communists, and the absence of an overt act in the case of revolutionaries. The non-Communist oath is an inquiry into action, whereas the oath as to opinion unassociated with an overt act is "thought control." This objection raises some doubt as to the propriety of exacting an oath of allegiance from public officials and members of the armed forces.

Justices Douglas, Clark and Minton took no part in the decision. In *Osman v. Douds*,[68] however, a case involving the same issues, Justice Minton, who had already upheld the oath in its entirety on the Court of Appeals,[69] concurred in the Chief Justice's opinion. Justice Douglas concurred with Justices Frankfurter and Jackson in declaring the oath as to opinion void, and since he considered the statute not to be severable he did not pass on the requirement of the non-Communist affidavit. Justice Black dissented in both cases; in the *American Communications Association* case he wrote a brief but eloquent opinion in which he denounced the requirement of an affidavit as to membership or opinion as a bill of attainder and a violation

66. *Id.* at 424 n.2 (italics supplied).

67. Quoted in National Maritime Union v. Herzog, 78 F. Supp. 146, 181 (D.D.C. 1948), *aff'd mem.* 334 U.S. 854 (1948).

68. 339 U.S. 846, 70 Sup. Ct. 901, 94 L. Ed. 530 (1950).

69. Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948).

of the First Amendment. This was unavailing. The attitude of the majority of the Court was aptly stated by Mr. Justice Jackson. The Court must act, he said, "in the light of present-day actualities, not nostalgic idealizations valid for a simpler age."[70] The nostalgic idealization at state in the *American Communications* case was that stated by James Madison: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[71]

70. 339 U.S. at 435.
71. THE FEDERALIST, No. 47 (Madison).