The Evolution of the Legal Concept of Citizenship

in the United States

Dissertation

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Introduction

The legal concept of American citizenship has not always been so well defined as it is today; nor has it always been reduced to accepted principles or doctrines. In fact, during much of the history of the United States, the thought of statesmen and jurists on citizenship was marked by confusion and contradiction. Yet this stage of confusion must not be overlooked, since it played an important part in the process by which present day doctrines have been determined. That process of development came about not by sudden change but by a gradual evolution which runs all the way through the nation's history from the Confederation period to near the present time. Thus the present concept of American citizenship is intimately related, in the evolutionary sense, to all the efforts to meet the problems of citizenship which were made in past times. Since present day concepts have this background, the present characteristics of citizenship and the doctrines associated with it should be briefly examined in order to get a general impression of the problems which confronted statesmen in the past and which therefore formed the framework of the evolutionary process.

The chief characteristic of American citizenship, although not the only important one, is its dual nature; that is, the fact that citizens of the states are also citizens of the United States. This dualism was not expressly established, however, until the Fourteenth Amendment was adopted with the provision that "all persons born or naturalized in the United States . . . are citizens
of the United States and of the States wherein they reside..."

In the case of both kinds of citizenship, there is a reciprocal relation between the individual who is regarded as a citizen and the body in which he holds citizenship which implies allegiance on the part of the individual and protection in privileges and immunities on the part of the political authority.

Equal in importance to the dual nature of citizenship is the correlated fact that there are two kinds of privileges and immunities of citizens, one group of rights which is associated with state citizenship, and another which is associated with United States citizenship. Since neither the original Constitution nor the Fourteenth Amendment states specifically the privileges and immunities of state and United States citizens, the doctrine of two kinds of privileges and immunities has been established almost entirely by judicial interpretation, rather than by constitutional provisions and court decisions.

A third characteristic of American citizenship is the relationship existing between the two kinds of citizenship which arises from the fact that both kinds are possessed by the same individual or individuals. Perhaps no problem in American citizenship has been so difficult as that presented by the relationship of state and national citizenship. The same individual looks to both state and federal governments for protection of his privileges and immunities, and since both authorities seek to protect the rights of their citizens by legislation, the problem arises as to what rights originate from the authority of the state and are to be under its control, and what rights arise from and are to be under the control of the
national government. In terms of the distribution of powers between the states and the United States, the problem is one of determining the division point between these two authorities in their power over American citizens. In other words how far may the United States government go in the protection of the rights of citizens before it encroaches upon the reserved powers of the states, and what are the limits of the powers of the states over citizens before the authority of the United States government is to be encroached upon.

The Fourteenth Amendment established a fourth principle of American citizenship to the effect that, with certain exceptions, birth in the United States confers United States citizenship and citizenship of the state in which the person lives. Citizenship in the United States today, therefore, comprehends both state and United States citizenship, carrying privileges and immunities which arise from the political authority which affords the protection of rights and which gives each government power over the same person. Moreover it is recognized that there exists between these two types of citizenship a close relationship, which is governed and controlled by certain accepted principles or doctrines.

The statesmen and jurists since 1776 who groped their way to these solutions of the problems of citizenship have not had an easy task. Several factors conspired against an easy and rapid solution. In the first place, Americans found European terms and concepts poorly suited to the new and different situation of a republic, as well as to a federal system of government where power was divided between two political authorities. Confusion and complications arose from the fact that under the federal system there were two
governments to claim the allegiance of an individual, and to which citizens might turn for protection of their rights. As a third factor, the presence of the free Negro greatly increased the difficulty. As will be shown by the later discussion, these facts, individually and collectively, contributed to make the search for a solution of the problems of citizenship extremely confusing and difficult. Statesmen and jurists faced practical problems from time to time which raised such questions as the following: Are all free inhabitants of a state citizens of the state? Whether they are or are not, are they citizens of the United States? Are free Negroes and Indians exceptions, with respect to both state and national citizenship, or are they citizens of the state but not of the nation, or vice versa? What are the privileges and immunities of state citizenship, of national citizenship? What are the rights of citizens of one state in another state? And since the same individual can be a citizen of the state as well as the nation, what rights are state in character and what of national character?

The importance of these questions to a study of the evolution of the concept of citizenship is in this fact: that it was as these questions were faced, and as the solutions to problems from which they arose were determined that the present day concept was evolved. For this reason they will serve as a guide for an examination and study of the many and varied events which have transpired since the beginning of American nationality in which the subject of citizenship has been dominant.
It has been the purpose of the discussion up to this point to characterize briefly the essential features of American citizenship as it exists today, to suggest the questions which faced those who participated in the working out of today's concept, and to point out the several factors which have made the process an extremely difficult task. This having been done, the next step is to proceed to an examination of the various occasions which illustrate the evolutionary process.
Chapter I

Early American Views on Citizenship

The beginnings of the process by which the present day concept of American citizenship has developed first appear in the Confederation period. At that time an important step was made in the recognition given to state citizenship in the Articles of Confederation. From this small beginning a further advance was made by the recognition of United States citizenship in the Constitution of 1787.

Although there was little similarity between the terms and practises associated with citizenship in America at the time of the formation of the Confederation and in the Roman Republic and in England, the legal terms and concepts of the two latter countries should be briefly examined for the background material they hold.

In Rome only two general classifications of inhabitants were known; there were citizens, or cives, and aliens, or peregrinae. Those of the latter group who were not citizens of a foreign state, yet who were permanent residents of the republic, were classified as subjects. It was not customary to regard as citizens, persons in conquered territory immediately upon conquest. Roman citizenship was acquired by descent, amission from slavery, privilege, and legislative grant. There were likewise four ways by which citizenship could be lost: reduction into slavery, capture in war, banishment, and voluntary expatriation. But in England the term "citizen" was used to describe only those individuals under the control of the town, while the term "subject" was used with respect

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to all inhabitants of the realm who owed allegiance to the king and claimed his protection.\(^2\)

Of the two terms, citizen and subject, which were available to early Americans, the former appears today as infinitely better suited to a republic. The English term "subject" was poorly suited to America because it implied that the inhabitants were bound to a monarch. In fact, the term "citizen" seems to have come into use in America, as it did in France, at the close of the Eighteenth century, as a result of the overthrow of the idea of subjection to a monarch and the substituting in its place the idea of a union of individuals in a republican state.

In grappling with the many problems of citizenship, American statesmen and jurists very often failed to make distinctions between the use of terms. Some of the first examples of this failure occurred during the Confederation period. As might be expected, among the first terms to be confused were "citizen" and "subject". In this connection two treaties entered into by the United States with European powers should be considered, although it should be said at the outset, that as used in these treaties the two terms are probably not to be understood as conveying the idea of interchangeable use. The alliance with France of 1778 spoke of "a treaty of amity and commerce for the reciprocal advantage of the subjects and citizens. . ."\(^3\) Article VIII of the peace agreement with Great Britain of 1782-1783 spoke of "a firm and perpetual

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\(^2\) Ibid., XVIII, 49 n.

\(^3\) Treaties and Conventions concluded between the United States of America and other Powers, 307.
peace between his Britannic Majesty and said States and between the subjects of the one and the citizens of the other... So far as internal evidence reveals, the use of the terms "citizens" and "subjects" should probably not be taken to indicate a distinction in the minds of American statesmen at the time the treaties were agreed to. Indeed, the term "subject" as here used may be taken to refer merely to the people of France and England and the term "citizen" to the people of America, and their use together is not to be taken to mean that the same classes who were "subjects" in the foreign countries were "citizens" in America. However, the use of the two terms may indicate the difference in the status of persons in a monarchy and a republic.

However, there are other examples to be found in the Confederation period which offer more conclusive proof of the interchangeable use of the two terms, "citizen" and "subject". In some of the state constitutions both the terms "citizen" and "subject" are to be found, while two state constitutions are without either term. Moreover, the terms "people" and "inhabitants" are also used. The Constitution of Maryland of 1776 had neither the term "subject" nor "citizen" in it, the common terms being "people", "inhabitants", and "freemen". No state constitution illustrated the confused use of the two terms quite so well as the Massachusetts Constitution. The preamble declared that "the body politic is formed by an association of individuals; it is a social compact by which the whole people covenants with each citizen

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4 Ibid., 374. Further use of the two terms in the same manner is to be found in Jay's treaty with Great Britain of 1794, Pinckney's treaty with Spain of 1795, and the treaty of Amity and Commerce with Prussia of 1785. Ibid., 374, 390, 899.

and each citizen with the whole people . . .6 In clauses referring to
religious liberty and schools, and recourse to the laws as a remedy for
injury done by one individual upon another, the term "subject" was used,
while in provisions covering trial by free and impartial judges the
term "citizen" was used.7 But in the provisions granting power to the
legislature to require school attendance and to possess the "sole and
exclusive right of government" the word "people" was used.8 In the Consti-
tution of South Carolina of 1778 the term "freeman" is to be found9
in clauses referring to the reciprocal obligation of individuals and
the government, but in the constitution of 1790 the term "citizen" re-
places the term "freeman" of the earlier document.9 The term "freeman".
originally meant a member of a corporation, and was evidently dropped
for the term "citizen" in the American Commonwealths. The Pennsylvania
Constitution of 1790 provided that the citizens have a right in a
peaceable manner to assemble together for the common good, "and that
the right of citizens to bear arms in defence of themselves and the
State shall not be questioned". It was also stated "that all power is
inherent in the people . . ."10 By the New York Constitution of 1777
the people vested authority in the legislature, and it was provided
that every male inhabitant meeting freehold and residence requirements
was permitted to vote.11 In the Constitution of Delaware of 1792 the
term "people" was used in the preamble, while in later sections both
the terms "citizens" and "inhabitants" were used.12

6 Ibid., 1639, et seq.
7 Ibid.
8 Ibid.
9 Ibid., II, 3258-3259.
10 Ibid., V, 3100-3101.
11 Ibid., 2630.
12 Ibid., 568, 569, 570-571.
It appears from both treaties and state constitutions that there was no definition either of state or United States citizenship or of what constituted the status of citizenship of either type. As Americans broke their relationship with the mother country preparatory to entering into an independent national existence, they partially discarded English terms and concepts, but they did not at once develop a set of terms and concepts appropriate to their new political situation. Nor had the framers of the Articles of Confederation and the Constitution as yet advanced far enough to perceive the necessity of these terms and concepts.

It is manifest that the best source of information on citizenship in America before the formation of the Constitution is contained in the Articles of Confederation. Article 4 is particularly important, and provided:

"The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any State, and shall enjoy there all the privileges of trade and commerce subject to the same duties and impositions and restrictions as the inhabitants thereof respectively. . ."13

Thus, with certain noted exceptions, it was recognized as a rule of state citizenship that all "free inhabitants" within a state were regarded as its citizens, since it is reasonable to infer that states would not grant "all privileges and immunities" possessed by their own

13 Thorpe, Charters, Constitutions, I, 10.
citizens to free inhabitants of other states if the latter class occupied a position any less privileged than their own citizens. In addition to the recognition of a rule of state citizenship, another important feature of Article 4 is that a rule is provided for the determining of the privileges and immunities which a citizen of a state was to enjoy in the other states. All states were to grant the same privileges and immunities to the citizens of other states as they granted to their own citizens. In order to avoid discrimination in commercial opportunity, it was specially provided that each state was to grant the same opportunities for trade and commerce to citizens of other states as it granted its own citizens.

The significance of Article 4 of the Confederation lay in the fact that in it is evidence of an appreciation of two questions that are inevitably raised concerning citizenship, and that answers had been found. In establishing a rule for state citizenship and for the determining of the privileges and immunities to be enjoyed within the states by citizens of other states, the American states had made a beginning in the difficult task of developing a concept of citizenship. It appears that citizenship of free Negroes is clearly implied.

However, one important omission in the Articles of Confederation should not be overlooked. Neither in Article 4 nor in other provisions is there a recognition of a national citizenship. It is important that Article 3 declared that "each State retains its sovereignty, freedom and independence..." With the Articles containing this provision, it is difficult to believe that a national sovereignty was at all comprehended. Not even so much as the phrase "people of the United States" can be found in the Articles of Con-
federation. In consequence of this it has been said that "there was no status of United States citizenship created or recognized...".

There were free inhabitants and citizens of the several states, but no United States citizens simply because a national government did not exist in any sovereign sense. Moreover, as the Confederation Congress could act only upon the states, but not upon individuals, it may be concluded that national citizenship did not exist before the formation of the Constitution in 1787. It can be said that the free inhabitants were citizens of the states wherein they resided, and that these citizens possessed privileges and immunities within other states equal to the citizens of those states, but it cannot be said that they were citizens of the United States as that term is regarded today.

Article 4 of the Confederation should be considered further because of the Article's important relation to the privileges and immunities clause of the Constitution, and on account of its bearing on the question of a rule of state citizenship as this question arose in later years, particularly with reference to the citizenship of the free Negro. Since the fourth Article of Confederation was carried over to the Constitution to become with some changes Article IV, section 2, it was apparently intended that the same rule was to apply to the rights of citizens of the states when in other states under the Constitution as had applied under the Articles of Confederation.


15 The Constitution of 1787 contains two provisions which give further evidence of the absence of national citizenship under the Confederation. Article III, section 3, provides for the punishment of treason against the United States and Article I, section 8 provides for naturalization by Congress. Since these clauses pertain to matters important to national citizenship the absence of similar provisions in the Articles appears significant.

16 "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States".
Moreover, the same rule of state citizenship was to apply under the new Constitution as had applied under the Articles. At a later time opponents of the granting of state citizenship to free Negroes denied that all free inhabitants of a state were its citizens, and they also denied that the privileges and immunities clause of the Constitution gave rights in other states equal to the rights of their own citizens, to citizens of any of the other states. But because of the plain wording of the privileges and immunities clause of the Articles and the Constitution, it does not appear that the opponents of free Negro citizenship were justified in the claims. As later discussion will show, the presence of the free Negro was to complicate greatly the problem of state and national citizenship.

In the constitutional convention of 1787 only slight and indirect attention was given in the debates to the problems of citizenship. But in the Constitution framed by the convention there was continued the recognition of state citizenship which had been made in the Articles of Confederation, while there was added a recognition of United States citizenship. In this latter respect the Constitution represented an advance over the Articles.

Both the advocates and the opponents of the plan of union known as the Virginia plan frankly acknowledged that the vital question was the location of sovereignty, and it was agreed that under the Confederation the states were sovereign. In discussing the forces necessary for the support of a national government, Hamilton declared that a habitual attachment of the people was necessary. He said that "the whole force of this tie is on the side of the State Govt."
sovereignty is immediately before the eyes of the people; its protection is immediately enjoyed by them. Mad... and the States legislatures to levy money directly upon the people themselves..." Earlier in the debates Madison showed a comprehension of a national citizenship. "The people would not be less free," he said, "as members of one great republic than as members of thirteen smaller ones. A citizen of Delaware was not more free than a citizen of Virginia, nor would either be more free than a citizen of America."21

It was only in this indirect manner that the framers of the Constitution touched upon the problem of citizenship. They came to the convention with more pressing problems, and they therefore gave the subject of citizenship only passing attention in the debates. Citizenship was not a problem, which in the minds of the framers, demanded a full solution, but if it had suddenly arisen in the convention there is reason to doubt whether it could have been properly solved. The members of the convention possessed only the meager knowledge of their predecessors when they drafted the state constitutions and the Articles of Confederation. Thus, if debate had been started upon the subject of citizenship, it is probable that no solution would have been reached.

It is true that the members of the convention possessed the knowledge of citizenship as represented in the Articles of Confederation, and that the Constitution which the convention drafted dealt with both state and United States citizenship. But if later controversies produced by the

20 Ibid., 251.
21 Ibid.
presence of the free Negro and the question of the relationship of state and national citizenship are any criteria, the convention would have been thrown into a hopeless confusion, if debate had been started on the subject of citizenship. Whether they realized it or not, the men of the convention of 1787 created a national sovereignty which acted upon the people directly and claimed their allegiance. The relationship resulting produced a national citizenship. The framers of the Constitution undoubtedly felt that the creation of a union with power to act directly upon individuals involved national citizenship. The complications of state and national citizenship were not foreseen, but were made apparent by later experience. The failure of the convention to foresee the problems of citizenship later made evident by experience was reflected in the constitution produced by that body. The Constitution contained no definition of privileges and immunities of citizens of the United States. In the entire constitution mention was made of citizens in only five different places. In Article II, section 1, it was provided that "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President. . ." Article I, section 2, required that a Representative to Congress should have been for seven years a citizen of the United States, when elected, while nine years of United States citizenship was the requirement made for Senators.\footnote{Article I, section 2.} The judicial power of the federal courts was extended to cases "between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming land under grants of different
States, and between a State or a citizen thereof and foreign States, citizens, or subjects. 23 By Article IV, section 2, it was provided that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States". In empowering Congress "to establish an uniform rule of naturalization" the Constitution apparently provided for a class of citizens of the United States without respect to state citizenship. 24 Again, in the section defining treason against the United States, there was a recognition of a citizenship of the United States. 25 Thus the Constitution contains references to both national and state citizenship and the above passages may be regarded as a recognition of dual citizenship. In this respect an advance was made over the Articles, in which dualism was not recognized.

In both the vague and general provisions in the Constitution and in the omission of necessary defining clauses it is again demonstrated that the statesmen of that era had little appreciation of the problem of citizenship. There was perhaps, no question of equal importance to which so little time or thought was given. As a consequence of this, under the new government about to be established, in the courts of the states and the nation, in the state and national legislative bodies, those who faced the problem of citizenship were without any profitable experience from the past by which they might be guided. Added to this, the presence of the free Negro very soon made the formation of a satisfactory concept almost impossible, or hopeless.

23 Article III, section 2.
24 Article II, section 8.
25 Article III, section 3.
Chapter II

The Naturalization Act of 1790

The confusion and uncertainty concerning citizenship marking American political thought at the time of the establishment of the new government, on the whole continued down to the decision of Chief Justice Taney in the Dred Scott case in 1857. The problem arose in Congress, in state and federal courts, and was the subject of opinions by executive departments, but there was no agreement. The national period differed in at least one respect from the Confederation period. While the earlier period was free from problems of citizenship, the national period was so replete with such questions that controversy often resulted. These controversies usually arose because the efforts to determine a rule of citizenship were complicated by the presence of the free Negro, and throughout the period to the Civil War this class of "inferior" people made it practically impossible for a definition of citizenship to be formulated.

Consideration of the Naturalization Act of 1790 was the first occasion for congressional attention to the problem of citizenship. Although two years after the enactment of this measure the Supreme Court of the United States ruled that the states had concurrent power of naturalization,1 Congress was later declared to possess exclusive control.2 Based on Article I, section 3 of the Constitution of the United States, which empowers Congress "to establish an uniform rule of naturalization . . .", the bill as introduced in the House on February 3, 1790 provided that:

1 Collet v. Collet (1792), 2 Dallas, 294.
2 Chirac v. Chirac (1817), 2 Wheaton, 259.
"all free white persons, who have, or who shall migrate into the United States, and shall give satisfactory proof, before a magistrate, by oath, that they intend to reside therein, shall take an oath of allegiance, and shall have resided in the United States for one whole year, shall be entitled to all rights of citizenship, except being capable of holding office under State or General Government, which capacity they are to acquire after a residence of two years more." 3

There are parts of this bill which are extremely important to a study of the manner in which the problem of citizenship has been met from time to time in American history. One of the first things which arouses attention is the provision that citizenship by naturalization was restricted to members of the white race. It might be said that this is to be taken as evidence of a consensus of opinion in Congress that members of the Negro race then in the United States were not citizens, but this provision aroused no discussion, and it does not seem that such a conclusion is inevitable. It is true, of course, that on several later occasions it was asserted that since Congress limited citizenship by naturalization to members of the white race, it was to be inferred that it was carrying out an already established rule. But apparently all that may be said now is that there was unanimity of opinion that only members of the white race should be naturalized. It seems probable, in view of the lack of understanding of the problems of citizenship and of any definite rules, that it is assuming too much to say that Congress followed any established principle in phrasing this part of the bill. It is more likely that they were meeting the situation as they saw it, without the guidance of any set principles, and that the limiting of naturalization to

3 Ann. of Cong., 1 Cong., 2 Sess., 1109.
whites is to be interpreted as nothing more than a desire that citizens created by naturalization be of the white race only.

A second provision of this measure that deserves special attention is the clause which gave to naturalized citizens "all the rights of citizenship, except being capable of holding office under State or General Government, which capacity they are to acquire after a residence of two years more". It is to be noted that in two ways this part of the measure could restrict the power of the states over their own citizens. This provision would seem to prevent a state from making officers of naturalized citizens who had not been in residence for at least two years after the oath of allegiance had been taken. As a second effect, the provision apparently required the states to regard all naturalized citizens as eligible for state office upon fulfilling the two-years residence requirement. This setting up of requirements for state office by the national government nationalized an important phase of state citizenship and could have led to further encroachments by the national government upon the states.

Giving naturalized citizens the right of holding office in the states, it appears, made them citizens of the states. The clause extending to naturalized citizens "all rights of citizenship" is significant further because it raises the question whether or not Congress regarded itself as empowered to legislate on all the privileges and immunities of citizenship including those which have come to be regarded as coming under the power of the states. Opponents of the measure as it was first presented to the House charged that it would nationalize the privileges of citizenship springing from the states. Representative Sury of Maryland regarded the bill as equivalent to
Congress fixing qualifications for state legislatures. The power of Congress, he said was limited to prescribing the rule by which it could be determined who were and who were not citizens. Congress did not have the power to say that naturalized citizens "shall be entitled to privileges in the different States, which native citizens are not entitled to, until they have performed the conditions annexed thereto". Representative White denied that Congress had the power to fix the rights and privileges to be enjoyed within the states. "All the House has to do", he argued, "is to confine themselves to a uniform rule of naturalization and not to a general definition of what constitutes the rights of citizenship in the several states." Representative Stone, too, saw in the measure a move to dictate to the states the effect that the creation of citizens was to have on them. Congress could only fix a uniform rule of naturalization. When it attempted to say what the effect on the states was to be, it was usurping authority. Congress could not say that foreigners naturalized under a general law were entitled to privileges which the states withheld from native citizens. Although there is no expressed recognition by opponents of the bill of duality of citizenship or of privileges and immunities, yet they apparently saw that certain privileges arise from state citizenship. This implies that they were not far from perceiving that other rights might arise from national citizenship.

In the face of this opposition the measure was voted back to the committee for reconsideration. The new bill still carried the provision admitting only whites to citizenship, since that part had aroused no

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4 Ibid., 1122-1123.
5 Ibid.
6 Ibid., 1112-1113.
7 Ibid., 1118.
opposition. The residence requirement of one year, as in the first bill, for making declaration and swearing allegiance, was changed to two years. The provision of the first bill which had provided that naturalized citizens were entitled to "all rights of citizenship, except being capable of holding office under State or General Government, which capacity they are to acquire after a residence of two years more" was eliminated from the final bill, while there was added the provision that "no person heretofore proscribed by any State shall be admitted a citizen aforesaid, except by an act of the Legislature of the State in which such person was proscribed". The bill as enacted also provided "that any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States may be admitted to become a citizen thereof. . . ." But no alien person was to be adjudged a citizen of the United States until he had taken an oath before a court of a state of which he had been a resident for one year to support the Constitution of the United States.8

In examining the position of the Naturalization Act of 1790 in the evolution of the concept of American citizenship, it should be recalled that the Constitution recognized both state and national citizenship. But the Constitution did not define the privileges and immunities of the citizens of the state and the United States, which presented a problem to the framers of a law of Naturalization in the-

8 Ibid., appendix 2205-2206. The Senate accepted without debate the measure as it was passed by the House. Ibid., 956. There is no deliberation on the subject reported during the time the House had it under consideration. The bill was received from the House on March 4, and ordered read the first time on that day; it was read a second time on March 13, and read a third time and passed March 19. Ibid., 952-956.
first Congress. Some doubt may be raised that the members of the House saw the duality of citizenship, for certainly the bill as enacted made no clear distinction between citizens of the state and of the United States. From the House debates it appears that even the most advanced members were disturbed by the fact that the character of both state and United States citizenship resided in the same individual. Since there existed only the vaguest kind of idea of a distinction between state and national citizenship, there of course could be no satisfactory determination of the problem of distinguishing between the privileges and immunities of state and of national citizens. Although a few members apparently recognized that naturalized persons became both United States and state citizens, even those whose thought was the most advanced, did not attempt to suggest any principle for distinguishing between the rights of the two classes of citizens.

The confusion of thought relative to the privileges and immunities of state and United States citizens can be seen best from the speeches of two House members against the first bill. It is to be noted that the opposition to the clause granting all rights of citizenship was based on the plea that the United States should not fix the privileges and immunities of state citizenship, but not upon the claim that citizens of the United States were not citizens of the states. In fact, it seems to have been tacitly admitted that citizens of the United States were state citizens. For instance, Suray objected that Congress by the bill assumed the power to prescribe the privileges and immunities of citizens in the states which native citizens were not entitled to until they had met the necessary requirements of state citizenship. 9 This is significant, for it implies that citizens of

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the United States were citizens of the states but as such would enjoy their privileges and immunities by grant of the states and not of the national government. The objection was that privileges and immunities of state citizenship were to be fixed under the bill by the United States, and not by the states.

Representative Stone held a position similar to Sureau's, inasmuch as he was concerned because Congress would have power under the original bill to establish the privileges and immunities of state citizenship, and as, like Sureau, he did not seem disturbed because citizens of the United States were to become state citizens. His words on the subject were important: "Congress can not say that foreigners... shall be entitled to privileges which the states withhold from native citizens."¹⁰

In addition to the evidence in the views of Sureau and Stone, the wording of the final bill indicates that the House considered citizens of the United States to be citizens of the states. The provision that "no naturalized citizen heretofore proscribed by any State shall be admitted a citizen aforesaid, except by an act of the Legislature of the State in which the person was proscribed", seems to mean that, with the exception of those persons proscribed by the states before the law went into effect, citizens of the United States were considered citizens of the states.

The Naturalization Act of 1790 was the occasion of the raising of one of the most important questions associated with the subject of citizenship, namely, the relationship of state and United States citizenship. For this problem not even the most advanced thinkers in Congress could offer a solution. It was at this point that the lack of a definition of the privileges and immunities of state and United States citizenship was important. Congress evaded the problem of

¹⁰ Ibid., 1118.
distinguishing between state and United States citizenship by enacting a measure from which was omitted all mention of the privileges and immunities of citizenship. Yet it was admitted that naturalized persons became state citizens as well as United States citizens. It is evident that the few members who spoke against the first bill did not see fully the problem involved. Yet there is a vague suggestion of the distinction between the privileges and immunities of state and United States citizenship, which was to be made by the Supreme Court in 1873. But since even the most thoughtful members of the House were not accustomed to thinking of the rights of citizens in terms of dual citizenship, the question of the relationship of state and United States citizenship was raised, but not answered.
Chapter III
Privileges and Immunities of Citizenship

One of the most important aspects of citizenship is the privileges and immunities enjoyed by citizens of the states and the United States, and no little part of the evolution of the concept of citizenship in the United States has centered around the question of those rights. Before the adoption of the Fourteenth Amendment the Constitution of the United States contained but one reference to privileges and immunities: "Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."¹ Since the Constitution lacked an enumeration of rights, the recognized privileges and immunities have been the result of successive judicial opinions on this single provision.

One of the first cases in a state court involving this clause was decided in the General Court and the Court of Appeals of Maryland in 1797.² The question before the courts was the legality of a statute of Maryland of 1795 which exempted the property of a citizen of another state from attachment for debt by a citizen of the state, unless he actually ran away or fled from justice.³ Morris, a citizen of Pennsylvania, held property in Frederick, which Campbell, a citizen of Maryland, sought to attach in order to force Morris' appearance in court.⁴

The law also provided that the property of a citizen of Maryland was exempt from attachment by a citizen of the state or of another

¹ Article IV, section 2.
² Campbell v. Morris, 3 Harris and McHenry, 535.
³ Ibid., 535.
⁴ Ibid., 538.
state unless he ran away or fled from justice. Thus the privileges and immunities clause of the United States was clearly involved. The arguments in the General Court and the Court of Appeals for both the plaintiff and the defendant were significant of the current interpretation of privileges and immunities. In argument before the general court, Key for the defendant declared that the privileges and immunities clause of the United States constitution granted the right of holding property in every state by the citizens of any other states, and having the protection of their property and persons in the same manner as citizens of the state. This extension of rights across state lines would not have been possible if the government of the United States had emanated from the states. If the government of each state had retained its independence and sovereignty, the citizens of each state, in relation to the citizens of other states, would have been aliens. It seems that Key did not appreciate the fact that although the states were sovereign under the Confederation, Article 4 exempted the free inhabitants of each state from the disabilities of alienage when in other states. In argument before the General Court for the defendant, Attorney General Martin declared that the equal privileges clause of the national constitution was intended to make all people citizens in every state. The property of citizens of another state was entitled to protection in every state in the same manner as that of citizens of the state. Another privilege secured to the citizens by this clause was the right to go into a different state without

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6 Ibid., 3 Harris and McHenry, 537.
7 Supra., 11
being under the necessity of taking an oath of allegiance. 8

The argument, of Schaeffer before the General Court, for the plaintiff distinguished between privileges and immunities which were general in nature and those local in origin. He said that the Constitution never meant to give to citizens of other states of the union all the advantages of citizens of any particular state. Privileges given by the local institutions in a state were not meant to be given to citizens of the other states. The Constitution only meant that citizens of each state should have the right to become citizens in every state. 9

The decision of the General Court was in favor of the defendant Harris. In the opinion by Justice Chase, an attempt was made to interpret the privileges and immunities clause of the national constitution. The terms privileges and immunities were nearly synonymous. "Privileges signify a peculiar advantage, exemption; immunity signifies exemption, privilege. . ." 10 But it was necessary to limit the meaning of the clause, for it was agreed that it did not mean the right of voting or holding office. The clause gave the right to acquire property, and it was the opinion of the court that "such property shall be secured by the laws of the state in the same manner as the property of the citizens of the state is protected", and "such property shall not be liable to any taxes or burdens which the property of the citizens is now subject". 11

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8 3 Harris and McHenry, 543.
9 Ibid., 542.
10 Ibid., 553.
11 Ibid., 554.
The case was appealed by Campbell to the Court of Appeals. The great difference of opinion held at that time on the privileges and immunities clause of the United States Constitution is illustrated well by the argument of Schaeff for the plaintiff, whose ideas differed greatly from Justice Chase's opinion for the General Court. In his opinion the question was not whether the law of the state discriminated between citizens of the states, but whether it denied any of the civil rights of citizenship. It was the intent of the privileges and immunities clause of the United States Constitution to protect civil rights in all the states, but it could not be said that to subject the property of Norris to attachment deprived him of any rights.\textsuperscript{12} To set up a special procedure for the recovery of debt from citizens of other states was not a denial of the privileges of citizenship, as guaranteed by the Constitution of the United States.\textsuperscript{13}

The Court of Appeals reversed the decision of the General Court and gave a judgment for the condemnation of the property of Norris.\textsuperscript{14} But the records do not contain the reasoning on which the decision was based. It is sufficient to point out here that the reversal denied by implication the views of Justice Chase and that the case illustrates well the great difference of opinion on the subject of privileges and immunities.

In 1812 Chancellor Kent of the New York Court of Errors gave an interpretation of the privileges and immunities clause of the United States Constitution in a decision in the case of Livingston v. Ingen.\textsuperscript{15}

\textsuperscript{12} Ibid., 565.
\textsuperscript{13} Ibid., 567.
\textsuperscript{14} Ibid., 575.
\textsuperscript{15} 9 Johnston, 507.
"This clause", he said, "means only that citizens of other states shall have equal rights with our own citizens and not that they shall have different or greater rights".16 In a manner similar to Justice Chase's emphasis on property rights, Kent declared that "persons and property, must, in all respects be equally subject to our own laws".17 Since the definition was not carried beyond this point, it is difficult to make any satisfactory comparison with the opinion of Justice Chase in the Maryland case.

Another decision which bore on the comity clause of the United States Constitution was made in the case of Abbott v. Bayley by the Supreme Judicial Court of Massachusetts.18 In this decision made in 1827 Justice Parker declared that the right guaranteed by this provision "can be applied only in case of removal from one state into another". By this removal, citizenship of the adopted state was adopted without naturalization, with the limitation that persons "cannot enjoy the right of suffrage or eligibility to office without such tenure of residence as shall be prescribed by the constitution and the laws of the State into which they shall remove".19 Stressing the right to take and hold property as a privilege within the scope of the constitutional provision, the court declared that "it cannot be pretended that a citizen of Rhode Island, coming into this State (Massachusetts) to live, is ipso facto entitled to the full privileges of a citizen, if any term of residence is preliminary to the exercise of a political or

16 Ibid., 577. Cf. opinion of Justice Miller in Slaughter House cases, 16 Wallace, 77. Infra., 159.
17 Ibid.
18 9 Pickering, 89.
19 Ibid., 92.
municipal right". 20

The case usually considered the most important before the Civil War bearing on privileges and immunities was Corfield v. Coryell. 21 The decision in this notable case was made by Justice Bushrod Washington for the Eastern District of Pennsylvania in 1832. The privileges and immunities of "citizens in the several states" were those which by nature were "fundamental, which belong of right to citizens of all free government, and which have at all times, been enjoyed by the citizens of the several states . . .". 22 Although an enumeration of the privileges and immunities was a tedious task, Justice Washington would not admit that it was an impossible task. They were, he believed, to be comprehended under the following classes:

"Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property. . . and to pursue and obtain happiness and safety. . . The right of a citizen of one state to pass through or to reside in any other state, for the purpose of trade, agriculture, professional pursuits or otherwise; to claim the benefit of a writ of habeas corpus, to institute and maintain action of any kind in the courts of the state; to take, hold and dispose of property. . .; and the exemption from higher taxes or impositions than are paid by the other citizens of the state. . . to which may be added the elective franchise, as regulated and established by the laws or constitutions of the state in which it is to be exercised. 23

Justice Washington then turned to the question whether a citizen of any state might enjoy privileges and immunities in another state. On this point he said that the court "can not accede to the proposition . . . that the citizens of the several states are permitted to participate in all the rights which belong exclusively to

20 Ibid.
21 4 Wash. C.C., 371.
22 Ibid., 351.
23 Ibid., 551-552.
the citizens of any particular state. . ." He further said that in the regulation of property of the state, the legislature was not bound "to extend to the citizens of all the other states the same advantages as are secured to their own citizens."

There were two important cases which came before the United States Supreme Court during the Middle Period relating to the infringement by the states of the privileges and immunities guaranteed by the Constitution of the United States. In a decision for the court in the case of Barron v. Baltimore, Chief Justice Marshall considered the question of the application of the first eight amendments to the national constitution to the police power of the states. In dealing specifically with the Fifth Amendment, the opinion declared that the Bill of Rights must be understood as "restraining the power of the general government, not as applicable to the States." The court considered that this, as well as the other amendments, were limitations upon Congress in the same manner as was the limitation in the constitution on the enactment of bills of attainder. It was therefore the opinion of the Chief Justice that a law of the State of Maryland restricting the use of streams by citizens of other states was not a violation of the Fifth Amendment to the Constitution of the United States.

Any conclusion which may be drawn from the judicial opinions during the Middle Period on the privileges and immunities of citizenship should look, first, to an evaluation of the opinions as a

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24 Ibid., 552.
25 (1833) 7 Peters, 243.
26 Article of Amendment V: "No person shall be . . . deprived of life, liberty or property without due process of law . . . ."
27 (1833) 7 Peters, 249. Marshall's view was reaffirmed in 1846 in the decision in the case of Fox v. Ohio, 5 Howard, 410.
statement of principles for the period, and second, to an examination of their place in the process by which present-day doctrines have evolved. One of the most important things to be said of the opinion during the Middle Period on the privileges and immunities of citizenship is that there existed a rather remarkable agreement in the interpretation which was placed upon Article IV, section 2 of the Constitution of the United States. In the opinion given by the various courts there was seemingly a studied effort to place a narrow interpretation upon that provision of the national constitution. For instance, in Maryland the Court of Appeals permitted special conditions to be set up by law for the recovery of a debt due from a citizen of another state to a citizen of Maryland. In Massachusetts the opinion was held that not all the privileges and immunities enjoyed by citizens of that state might be claimed by citizens of other states. This tendency to give a restricted interpretation to the comity clause was continued in the case of Corfield v. Coryell. Only the fundamental rights of citizenship were to be enjoyed by virtue of Article IV, section 2, and among those rights not fundamental were the advantages to be derived from the use of the property owned by the state.

Of the opinions on the privileges and immunities of citizenship before the Fourteenth Amendment, which were of later significance, the most important was Justice Washington's in the case of Corfield v. Coryell. So important was this decision to later cases that its significance can scarcely be overemphasized, for it was later quoted in several important decisions as accepted doctrine. 28

In this connection a minor difference which exists between the views of Justices Washington and Miller, should be mentioned. Although Justice Washington's opinion is quoted as accepted doctrine on the privileges and immunities of state citizenship, there is some difference between his views and the views of Justice Miller on whether a state must grant all the rights to citizens of other states it gives to its own. Justice Washington, in referring to Article IV, section 2, was emphatic in denying that "the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state merely upon the ground they are enjoyed by those citizens..." In contrast to this, Justice Miller, with the privileges and immunities clause of the Fourteenth Amendment in mind, declared that "whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction".

It is to be noticed that, in the opinions bearing on privileges and immunities during the Middle Period, there was neither a discussion of privileges and immunities of United States citizens, nor of the relation of the privileges and immunities of the two classes. In this respect the views of the state and federal judiciary reflected the common tendency to emphasize state rather than United States citizenship. Due to the fact that the emphasis was on state rather than on

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29 4 Wash. C.C. 552.
30 16 Wallace, 77. *Infra.*, 159
national citizenship, no attention was given in the period before the
Fourteenth Amendment to the matter of distinguishing between the
privileges and immunities of state and national citizens. Citizens of
the states were regarded as citizens of the United States, but no
consideration was given to the question of privileges and immunities
of United States citizens as distinguished from the privileges and
immunities of state citizens. Yet it should be pointed out that Justice
Miller in the majority opinion in the Slaughter House cases considered
Justice Washington's enumeration of "fundamental" rights to mean rights
of United States citizens. That Justice Washington did not consider
those rights exclusively pertaining to United States citizens has been
already shown.

The judicial opinion of the Middle Period offers little in the
way of anticipation of the present-day doctrine of two groups of privi-
leges and immunities of citizens. Although state and national citi-
zenship was recognized before the adoption of Fourteenth Amendment,
it took the force of constitutional amendment to set forth in bold
relief the corollary principle that for separate and distinct citizen-
ship, there must of necessity exist separate and distinct classes of
privileges and immunities. But as will be shown in a subsequent chap-
ter, the framers of the Fourteenth Amendment did not recognize any
distinction between the privileges and immunities of state and United
States citizens. The decision in the Slaughter House cases in 1873 was
necessary to bring out the distinction which the amendment implicitly
carry.
Chapter IV

The Missouri Question and Citizenship

In that event of great significance in the history of the United States known as the Missouri Compromise, chief interest in the past has usually centered around the political struggle between the slave and the free states and the constitutional questions of congressional exclusion of slavery from the territories and the right of new states to have control over their domestic institutions. As a result of this emphasis the importance of the Missouri question to the subject of American citizenship has not received the attention it deserves.

Spirited controversy did not subside with the voting of the famous compromise measure, for almost immediately action on the part of the constitutional convention in Missouri caused a renewal of sectional strife among members of Congress. By the new constitution it was made imperative upon the legislature of the state to enact laws preventing free Negroes from migrating into the state and making their residence there. The significance of this provision depended upon the question whether free Negroes were citizens of the states. If free Negroes were citizens of the states, to admit Missouri into the union with this provision in her constitution would constitute a violation of Article IV, section 2 of the Constitution of the United States. Thus the stage was set in Congress once again as in the preceding session, for a struggle between the representatives of the free and slave sections.

In the Senate on December 7, 1820, John H. Eaton of Tennessee offered the following resolution:
That nothing herein contained shall be so construed as to give the assent of Congress to any provision in the constitution of Missouri, if any such there be which contravenes that clause of the Constitution of the United States, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." 1

Five days later the Eaton resolution was voted down by the Senate by a vote of 21 to 24,2 but on December 9 it was agreed to.3

With the passage of this resolution the challenge was thrown down to the slavery forces and debate on the question of the citizenship of the free Negro began. Of chief interest in this debate are the remarks of Burrill of Maine, Morrill of New Hampshire and Otis of Massachusetts, who argued that free Negroes were citizens, and the speeches of Smith of South Carolina and Holmes of Maine who denied the citizenship of the "inferior" class. Of the three senators who claimed that the free Negro was a citizen only Otis of Massachusetts considered the question in any detail. Burrill saw no difficulty in defining the term "citizen". If a person were neither a slave nor a foreigner, but native-born and free he would have the same right to go into Missouri as if he had been born there.4 Senator Morrill declared that "color does not come into consideration and it has no share in characterizing an inhabitant or a citizen".5 In New Hampshire men who were neither slaves nor aliens were citizens. Free Negroes were citizens and would be denied privileges and immunities of citizenship by the proposed Missouri Constitution.6

1 Annals, 16 Cong., 2 Sess., 42.
2 Ibid., 45.
3 Ibid., 102.
5 Ibid., 105.
6 Ibid., 112
As Morrill spoke from a knowledge of conditions in New Hampshire, so Otis examined the situation in Massachusetts and found that free Negroes were considered citizens there. He did not stop with such a simple analysis, but examined the relation of the state and its citizen. This he found to consist of protection on the part of the state and allegiance on the part of the citizen. Protection by the state implied the right of the citizen to live within the jurisdiction of the state and be secure in life, liberty and property. Allegiance of the citizen implied service on the part of the citizen in time of public danger and war. If the citizen was injured by a foreign power, he was entitled to redress. Irrespective of color, if the person possessed these rights and stood in these relations to the state, he was a citizen.

Otis next turned to the claim that free Negroes were not citizens on account of the various disabilities under which they lived. Both women and children, he said, were subject to many abilities. The heart of citizenship lay "in the right of protection in life, liberty and property, of residence, and inheritable blood, of taking and transmitting by descent land and chattels . . ." As long as these rights remained unimpaired it was not possible to say that a man or woman ceased to be a citizen. Citizenship was of such a character that "if a State . . . restrained its citizens from bearing arms or killing game, or discharging certain political or civil functions, laws made pursuant to such authority would not operate an extinguishment of the rights of citizens." Otis believed restrictions of the political

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7 Ibid. 93.
8 Ibid.
9 Ibid. 94.
10 Ibid.
rights of citizens were irrelevant unless it could be shown that these restrictions had not "merely been confined to a limitation of their political or civil privileges, but had entirely annulled all that portion of them which were essential to constitute the relation of citizens."  

Senator Smith of South Carolina led the attack against the claim that free Negroes were citizens. Following a line of argument which anticipated Chief Justice Taney's reasoning in the celebrated Dred Scott case, Smith declared that neither the constitution nor the laws of the states showed that free Negroes had ever been considered as a part of the body politic. Not a state had admitted them to the militia, and the Naturalization Law of 1790 represented a studied effort to naturalize only members of the white race. The constitutions of Kentucky, Ohio, and Louisiana excluded free Negroes from voting, and Indiana prohibited free Negroes from being witnesses.  

Senator Holmes of Maine declared that the creation of citizens by the United States was limited to naturalization. It was a mistake to conclude that free Negroes were citizens by assuming a broad and comprehensive definition of citizenship from the scattered references to citizenship in the Constitution of the United States. To him the best definition of citizenship appeared to be "a native or an inhabitant of a city (or country) vested with freedom and liberties".

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11 Ibid., 95.
13 Annals, 16 Cong., 1 Sess., 59-60.
14 Ibid., 34.
15 Ibid.
The latter consisted in the right to be elected to office and bear arms in his defense. If a person was denied these privileges he was divest of his citizenship. 16 He had other essential rights such as those of property and personal security, but he had these in common with foreigners and in some respects with slaves. Unless a person had a part in the formation or administration of the laws, he could not be said to be entitled to the privileges of an American citizen. Exclusion from this participation deprived him of the essential attributes of a citizen. 17

In the House a special committee was named to study the Missouri Constitution. In part the committee reported that: "the committee are not unaware that a part of the twenty-sixth section of the third article of the Constitution of Missouri has been construed to apply to such of that class [Negroes] as are citizens of the United States and that their exclusion has been deemed repugnant to the Federal Constitution". 18

A representative view of the House at the time of the consideration of the Missouri Constitution can be gathered from remarks of three or four members on each side of the controversy, for the citizenship of the free Negro aroused extended speeches from a relatively few members.

Of those who contended that free Negroes were citizens, the speeches of Strong of Virginia, Hemphill of Pennsylvania and Mallory of Vermont stand out. Strong's definition of a citizen was in terms of his privileges and immunities. "Some peculiar and distinctive

16 Ibid., 36.
17 Ibid., 86-87.
18 Ibid., 453.
characteristics of a citizen of a State... are the right of passing freely and unmolested from town to town and place to place within the State, and the right of residing at pleasure in any part of the same...

These rights he considered to be common to all free persons of every age, sex, and color except aliens, lunatics, vagabonds and criminals. The greater portion of citizens of the states had no other external mark of their citizenship. Females and minors could not be elected to office, nor could they vote, sit on juries, or be made subject to taxation as a general rule. Nevertheless, these persons enjoyed the privileges of citizenship "as completely as the man who has in addition the qualification of voter or jurymen."

Representative Hemphill of Pennsylvania, too, denied that discrimination against the free Negro was sufficient evidence that he was not a citizen. If they were not citizens because they were denied the right of franchise, then the non-voters among the whites were likewise not to be considered citizens. As further support of the contention Hemphill advanced the doctrine of citizenship by birth. "If", he said, "being a native and free born, and of parents belonging to no other nation or tribe does not constitute a citizen... I am at loss to know in what manner citizenship is acquired..." "Citizenship", he said, "is of the nature of a compact, it is a political thing, and the mutual obligations are contribution and protection..." If free Negroes did not have this political connection, how could they

19 Ibid., 570.
20 Ibid., 571.
21 Ibid., 576.
22 Ibid., 599.
23 Ibid.
be given any protection at all, as for instance they were sure to re-
ceive if imprisoned in a foreign country? And as a concluding argu-
ment Hemphill declared that it was strange that free Negroes, once sub-
jects of the English sovereign, were no longer connected with any
political society.

The remarks of Representative Mallory dealt chiefly with dis-
crimination against free Negroes, and with great pains he sought to
show that although they were subject to discriminatory laws, they were
citizens. It was impossible, he said, to find all persons living under
the same circumstances. Yet it seemed agreed "that when one finds
a person, who enjoys all the rights and privileges which others enjoy
under similar circumstances, he is a citizen." For instance, a
freeholder was usually considered a citizen, yet the person who was
not a freeholder but who possessed all the civil rights and privileges
under the same circumstances would still be a citizen. Other classes
were made by minority or advanced age, yet if these possessed equal
rights with their several classes, they were citizens. If rights and
privileges varied with property or age, why not with color, without
denial of citizenship? Color might be a circumstance which
would designate a portion of a population, and might be used con-
stitutionally, as age or property, to restrict political privileges.
"If it be so", he said, "it is a clear conclusion... that every
colored person who is entitled to all the rights enjoyed by whites
under the same circumstances must be a citizen".

24 Ibid.
25 Ibid.
26 Ibid., 633.
27 Ibid.
28 Ibid.
Just as there was a strong similarity in the views of the members of the House and Senate who advocated the claim that free Negroes were citizens, so there was a close agreement among the members in the two houses who denied the citizenship of that degraded class. Of the speeches contending against Negro citizenship the most important were made by Representatives Storrs of New York, Barbour and Smythe of Virginia, and McLane of Delaware.

Brief consideration of the speech by Storrs will be sufficient, for his remarks dealt with the single point of the right of Congress to say whether a particular person or class possessed the privileges of state citizenship. The power granted to Congress to create citizens by naturalization Storrs recognized as the sole and exclusive basis of the right of the national government to create a class of persons possessing privileges and immunities of state citizenship. With this single exception, he said, "the original power, inherent in every Government of determining the extent of the rights of citizenship remains unimpaired in the States." Therefore Congress had no right to define citizenship of the State of Missouri.

Philip F. Barbour of Virginia who was later, from 1835-1841, an associate justice of the United States Supreme Court differed from some who attacked the view that the free Negro was a citizen in that he stressed civil, rather than political rights, as the necessary attributes of citizenship. A person was not to be called a citizen unless he possessed all at least of the civil rights if not the political rights of every other person in the community, under the circumstances, of which he is not deprived for some cause personal.

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29 Ibid., 536-537.
to himself. In Virginia no white man in similar circumstances, for instance, every white freeholder had the right to vote. In no state were rights enjoyed by some citizens which were forbidden to others in similar circumstances. Free Negroes were not to be regarded as citizens because they were deprived, as a class, of certain civil rights, by discriminatory laws directed especially at them. The circumstances of color caused them not to be considered citizens.

The burden of the remarks of Representative Smythe of Virginia was that since free Negroes had been denied political privileges they were not citizens. To him a citizen was a person who "is entitled to all the freedom and privileges of the body politic and has a share in its Government..." Smythe would probably have denied that women were disqualified from citizenship on account of not possessing political privilege. Yet his definition of citizenship apparently would exclude them. Citizenship implied a political membership in a society. Citizens of the United States were entitled to "every personal right of a civil and political nature common to all the great body of the political community". The distinguishing characteristic of a citizen might be found in those rights acquired by the alien through naturalization. "1st a capacity to take a frehold, 2d to vote at elections, 3d to be elected having the requisite qualifications of age, residence and property..." The free Negro had not been entitled to any of these rights in the states that had adopted the constitution. He was therefore in 1820 not a citizen; his position was

30 Ibid., 545.
31 Ibid.
32 Ibid., 546.
33 Ibid., 546.
34 Ibid., 556.
that of a denizen, who was admitted "to some portion of the rights and privileges of citizens, but not all those rights and privileges." 35 In the opinion of Representative McLane of Delaware the rights of citizens were independent of the political power and were inalienable. These rights might be modified but could not be destroyed by the political power of society. A State, he said "may regulate the right of suffrage, and extend it to such only of its members as possess a freehold, but it cannot extend it to one freeholder and not to another. . . ."36 One of the inalienable rights of a citizen was to acquire a freehold, for it was the inherent right of every citizen "to extend his mental and physical powers in the pursuit of happiness."37 Only those persons were citizens who were able to claim such advantages as a matter of right, all others and those whose privileges depended upon the grace or favor of the local authority came under the classification of inhabitants or aliens.38 This argument was based on the natural rights doctrine which had been made prominent by the French Resolution and the Declaration of Independence. As it has been shown, it appeared later in the judicial opinions of Justice Washington of the United States Circuit Court in the case of Corfield v. Coryell.39 It was also to appear in the opinion of Justice Miller in the decision in the Slaughter House Cases.40

Two other matters involving citizenship were discussed briefly in the Missouri debates. The provision in the Missouri Constitution requiring the legislature to exclude free Negroes raised the question

35 Ibid., 557.
36 Ibid., 615.
37 Ibid.
38 Ibid.
39 Supra, 30 et passim.
40 Infra, 154-155.
of the rights of citizens of other states to migrate to Missouri. This question involved whites as well as Negroes, and if the latter were citizens in any of the states, they apparently could not be excluded without violating Article IV, section 2. Moreover, if Congress admitted Missouri to the union with the exclusion clause in her constitution, tacit consent would be given to a violation of the comity clause. As has been shown, the right of migration of citizens of the states to other states was declared a cardinal principle of American citizenship by Justice Washington in the case of Corfield v. Coryell.

Another matter considered was the question of the relation of the exclusion of free Negroes and the police power of the states. State exclusion laws were common before the Civil War, as will be shown, and were directed against free Negroes, as well as paupers, criminals, and the diseased. In relation to the Missouri Constitution the question was whether the state could constitutionally exclude free Negroes without violating Article IV, section 2.

In general the ideas expressed by members of Congress on these matters fit their opinions on free Negro citizenship. That is, those who argued that free Negroes were not citizens declared that the exclusion of free Negroes did not constitute a violation of the privileges and immunities clause of the United States Constitution, and that exclusion was well within the state's police power. Storrs of New York had not considered the question of free Negro citizenship, but he held strong views on the rights of citizens of the states to migrate to other states. Article IV, section 2 was "capable of no construction

41 Supra., 30.
42 Infra., 61-64
which does not plainly denote the universality of its application and its uniform application to individual rights to every portion of the nation.43 A citizen of New York was at liberty to go into Ohio or to sue in the courts of Virginia. Strong of Virginia, who had urged Negro citizenship,44 described Article IV, section 2 as conferring "the same privileges and immunities upon the citizen of Maryland, for instance, in reference to the United States, as the citizens of Maryland possess in reference to that State.46 A citizen of a state may move freely in another state, but he did not have the privilege of voting there.45 A similar interpretation was placed upon the comity clause by Sergeant of Pennsylvania46 and Morrill of New Hampshire.47

The member of Congress just quoted apparently held views on the privileges and immunities clause of the United States Constitution similar to the view expressed by Justice Washington in the case of 48 Corfield v. Coryell. However, those who had opposed free Negro citizenship interpreted the provision in a manner with which Justice Washington would surely not have agreed. Senator Holmes of Maine declared that free Negroes who went into the state of Missouri from another state "takes all the privileges and immunities, and is subject to all the restraints and disabilities as to residence, property, age, and color of the people of the State where he goes.49 Representative McLane declared that if the right of migration was not determined by the states entered, free Negroes could enter Virginia and claim city-

43 *Annals*., 16 Congress, 2 Sess., 546.
44 Supra., 40.
45 *Annals*., 16 Cong., 2 Sess., 571.
46 *Ibid*., 529.
48 Supra., 39.
49 *Annals*., 16 Cong., 2 Sess., 82.
zenship there. Archer of Virginia discussed in the House the relation of Article IV, section 2 and the exclusion clause at greater length than some other members. Free Negroes were not citizens and were liable to exclusion under the reserved power of the states. But with respect to those who were citizens the aim of Article IV, section 2 was said not "to inhibit the States nor to restrain the power of regulation, as respecting the condition of the enjoyment and exercise of the privileges of citizenship... but to inhibit any power of the legislature on the subject to be directed exclusively against citizens removing from other States..." The power was left to the states "to adopt regulations affecting indigenous [persons] or those removed from other States, providing these regulations were not rendered restrictive and peculiar in their relation to this last description of inhabitants." 51

In discussing the relation of the exclusion laws to the police powers of the state members from the South urged strongly the states' rights point of view, while members from the North denied that a state could exclude free Negroes. However, many of those who had declared that the free Negro was a citizen admitted that it was within the reserved power of the states to enact laws for the purpose of excluding criminals, paupers, vagabonds, and the diseased. Barbour of Virginia argued that a state could exclude free Negroes as a measure of safety just as it would pass other laws to exclude undesirable persons. 52 Holmes of Maine argued that if "a State can fix a name of disgrace or

50 Ibid., 621-623.
51 Ibid., 582.
52 Ibid., 549.
demerit on any population, and exclude them, the point is yielded that free blacks may be excluded." Smythe of Virginia argued in the House that exclusion laws were legal under the reserved powers of the states. He said that "the States retain all powers not delegated to the United States. They have not delegated power on this subject." Strong of New York, who had declared that free Negroes were citizens, admitted the right of states to exclude paupers, convicts, and lepers, but denied that they might bar free Negroes through an exercise of the police power. Strong agreed that Negro convicts might be excluded, but declared that there would be no limit to the abuse of the police power if free Negroes were excluded. Archer expounded his view of the police power as follows: "The power of the States would . . . extend . . . to the capacity of prohibiting the ingress of citizens of other States, provided the exclusion were for causes affecting the individual merely, and not the class; that is to say, provided the exclusion operated for causes accidental in their access and liable to removal". He admitted that the principle implied a violation of Article IV, section 2, but declared that it was necessary for the preservation of the reserved power of the states.

It should be clear from the foregoing description of the debates on the exclusion clause of the Missouri Constitution that there were few issues, but that these were well drawn and strongly contested, and that for the most part they were fundamental to the problem of citizenship. It is to be remembered, however, that the chief concern of
the members of Congress was either to prove or disprove the free Negro a citizen, and not to examine dispassionately the subject of citizenship in an academic or legal manner. Since the controversy was part of a larger fight over slavery, it is to be wondered that there were as few extraneous remarks as were actually made. It should, however, be kept in mind that whatever ideas came forth from the struggle, were incidental to a heated political combat.

It should be noted that the opponents of free Negro citizenship were not always in agreement on what characteristics constituted citizenship of a state. The majority based their denial of the free Negro's incapacity for citizenship on political grounds; yet Barbour presented very strong reasoning in basing his argument on the fact of the free Negro's civil disabilities, while McLane based his denial on natural rights arguments. This variety of opinion is to be expected, since no definition of citizenship had up to that time been developed to the point of receiving universal acceptance, and since the presence of the free Negro naturally encouraged the ingenuity of members of Congress.

The debates on the Missouri Constitution are important in several ways in relation to the development of the concept of American citizenship. In the first place it is made clear that any previous rule implying that all free inhabitants were citizens of the states, as in the Articles of Confederation, was both unrecognized and unacceptable when put to the test by the disturbing factor of the free Negro. The seriousness of the dispute is not to be interpreted as meaning that there was less clarity of thought than had previously prevailed. The Negro question added to the existing confusion and
made a logical definition impossible because of race prejudice. The Missouri debate brought out difficulties hitherto unperceived and in that sense represents an advance over earlier periods in which definition was limited to indefinite and brief provisions of only theoretic value in the Articles of Confederation and the Constitution. In affirming or denying that tests of citizenship depended upon political, civil and social positions of individuals, members of Congress raised questions which had to be decided — and which were decided — before a satisfactory rule of citizenship was finally evolved. Only a few of the views expressed in the heat of the controversy stood the test of time. It is the attempt made at definition, not the definitions announced, that is important.

However, the later significance of some points in the debates should be considered briefly. A point which should be emphasized is, that in them are to be found views which anticipate the ideas on citizenship of Chief Justice Taney and Justice Curtis in the famous Dred Scott decision. For over forty years after the debates in Congress on the exclusion clause of the Missouri constitution the arguments made at that time were repeated in the state courts and finally in the famous decision of Chief Justice Taney in the case of Dred Scott in 1857.57 For instance, as already noted, Senator Smith's view that neither the Constitution of the United States nor the laws of the states showed that Negroes had been considered citizens, was strongly reiterated in the opinion of Taney. In both the views of the South Carolina senator and the decision of the chief justice the position

57 infra., 92-94
was taken that free Negroes historically had not been regarded as part of the body politic. There was also a similarity in the views of the chief justice and of Representative Smythe that the measure of citizenship was the political privilege an individual enjoyed. Moreover, in the arguments of Otis and others that citizenship consisted in the right to protection of life and property of the individual, there is a concept similar to that of Justice Curtis in his dissenting opinion in the Dred Scott case. In urging that the test of citizenship was not the political rights an individual enjoyed, but the civil privileges he was permitted, Curtis reiterates to a great degree the arguments made in the Missouri debates.

Another feature of the debates on the Missouri Constitution which had later significance is that the idea that citizenship depended upon social and civil, rather than political rights. This anticipated the Fourteenth Amendment and the decision of the Supreme Court in the Slaughter House cases. In this respect the members of Congress who declared that free Negroes were citizens had the development of history on their side, if not contemporary evidence. In placing the attributes of citizenship on other than a political basis the proponents of Negro citizenship were expressing a modern idea. A comparison between the opinions of Otis in the Senate and Strong, Hemphill and Mallory in the House and the views of the United States Supreme Court beginning with the decision in the

58 Infra., 102–103.

59 See the later decision in the case of Minor v. Happersett (1874) 21 Wallace, 162, for an opinion of the United States Supreme Court that political privilege is not an attribute of citizenship. Infra., 171.
Slaughter House cases in 1873, 60 can be carried too far because members of Congress failed to recognize a distinction between state and national citizenship. 61 But Otis in speaking of the right to protection of life and property as the fundamental characteristic of citizenship was pointing the way to opinions which since the Civil War have become well established. Another idea which was later to become established doctrine was held by Senator Burrill and Representative Hemphill, who declared that birth in the country made citizens of all born within its borders. 62

It is important that there was no greater agreement in the Missouri debates on the question of privileges and immunities of "citizens in the several States" than on the question of the citizenship of the free Negro. The difference of opinion on the status of the free Negro was equaled by disagreement over the scope of the privileges and immunities clause of the United States Constitution, both with respect to the rights of citizens in other states and the limits imposed by the provision on the authority of the states to exclude free Negroes through an exercise of the police power. One group in Congress interpreted Article IV, section 2 as implying that citizens of other states have the same rights within a state as citizens of that state. In this view they anticipated Justice Miller in the decision in the Slaughter House cases. 63 Another group of equally able and sincere men regarded the privileges and immunities clause of the United States Constitution as guaranteeing only such

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60 16 Wallace, 36.  Infra., 151 et seq.
61 It is obvious that there was no sentiment in the Congress of 1820-1831 for the nationalization of all privileges and immunities of citizenship as there was in the Congress which drafted the Fourteenth Amendment and the enforcement legislation. See Cong. Globe, 39 Cong. 1 Sess., 570 seq.
63 Infra., 159.
rights to citizens of the state when in other states as those states see fit to grant them. And on the question of the scope of the police power of the states as it affected rights of citizenship there was equal difference of opinion. So great was the effect of the free Negro that this great difference of opinion was almost inevitable.
Chapter V
What are the Tests of Citizenship?

In addition to the attention the problem of citizenship received in Congress at the time of the discussion of the Missouri Constitution, there were numerous state and federal court cases during the Middle Period in which the problem was involved. First there were a few cases touching the question of citizenship as it was related to the jurisdiction of the federal courts. In the second place, there were a few cases in which the relation of state and national citizenship was involved. Many of the cases more important to the study of citizenship arose from the claim of free Negroes to citizenship; some dealt with the privileges and immunities of citizenship; others arose out of the question of expatriation, and still others dealt with the question of citizenship by birth.

In the period 1789-1856 there were a few cases indicating judicial opinion on citizenship as it related to jurisdiction of the courts of the states and of the United States. In 1819 in the case of Cooper v. Galbraith Justice Washington for the United States Circuit Court declared that "citizenship, when spoken of in reference to the jurisdiction of the courts of the United States means nothing more than residence". ¹ In 1831 the Kentucky Court of Appeals was of the opinion that a person might be a citizen of a state though not a resident. ² A similar view was given by the United States Circuit Court for Michigan in 1849, the court saying that a citizen may reside in one state and be a citizen of another. Change of citizen-

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¹ Fed. Case No. 3193.
² Harris v. Johns, 29 Ky., 237, 238.
ship was shown by the act of the party. If he refrained from exercising the rights of citizenship where he resided and claimed to be a citizen of the state he had left, he did not lose in the court's opinion, his citizenship in such state. 3

A case of a different nature, in which an unnaturalized alien, who was a debtor, was involved, was decided by the Maryland Court of Appeals in 1854. 4 In this decision the court was of the opinion that although an unnaturalized person was not a citizen in the usual sense, he was to be considered a citizen in the commercial sense. "A party might not be a citizen for political purposes, and yet be a citizen for commercial purposes", the court said.

Perhaps no aspect of the problem of citizenship caused greater difficulty than the question of the relation of state and national citizenship. It has already been seen that this was one of the difficulties Congress had faced in the enactment of the Naturalization Act of 1790. A present-day authority has said that "it was not so much the existence of dual citizenship that occasioned dispute as it was the relationship between the two". 5 It will be recalled that the difficulty in 1790 was to work out in a satisfactory manner the rights and privileges of a naturalized citizen within the states, and that Congress faced this problem at a time when a distinction between the privileges and immunities of citizens of the state and the United States had not yet been made. In the debate over the Missouri Constitution much attention was given to the question as

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to who were citizens, but there seemed to be no interest in or comprehension of the problem of the relationship between state and national citizenship.

It has been said that "it seems to have been the generally accepted view before the adoption of the Fourteenth Amendment that, except in cases of naturalized citizens, United States citizenship was derived from state citizenship". Yet as early as 1795 the Supreme Court of the United States declared that the loss of state citizenship did not affect citizenship of the United States. It appears that provision had been made for remission of the individual's allegiance to the state. While the Supreme Court recognized this as it applied to state citizenship, it held that allegiance to the national government was in no way affected. In another case the court ruled that an individual could renounce allegiance to the state by removal from it, without in any way affecting his national citizenship. A decision of the United States Supreme Court given in 1832 involved the relation of national and state citizenship in its connection with the jurisdiction of the federal courts. In the opinion for the court Chief Justice Marshall said that "a citizen of the United States, residing in any state of the Union is a citizen of that State". In Maryland one Shriver was denied a hearing in the United States District Court because he was unable

6 Charles K. Burdick, The Law of the American Constitution
..... 322.
7 Talbott v. Janson, 3 Dallas, 133.
8 Ibid.
11 Ibid., 763.
to show citizenship of Maryland or of some other state. 12 But the court took the opportunity to state that a person could be a citizen of the United States although not a citizen of any state. 13 In the above mentioned cases the opinions of the courts lose much of their value, for they show little appreciation of the extent of the problem involved in the question of the relation of state and national citizenship.

During the period, 1789-1856 the state courts were called upon on many occasions to decide on the citizenship of the free Negro. In general it may be said that the grouping of the decisions falls along lines of geographic division of the slave and free states. There are, however, two exception to in declaration of an otherwise "solid South" that the free Negro was not a citizen. In Kentucky Judge Mills for the Court of Appeals declared that "although free persons of color have not every benefit or privilege which the constitution secures, yet they have many secured by it ..." 14 In this decision it is evident the court was not sure of the Negro position; but a decision from North Carolina was emphatic in the declaration that this class of persons was entitled to the privileges of citizenship. 15 A free Negro had challenged the constitutionality of a state law levying special fines on members of his class. In a fairly exhaustive decision the opinion asserted with a great deal of emphasis that free Negroes were citizens and were not to be subject to discriminatory legislation. 16 Persons who were not slaves were either aliens or

13 Ibid., 497.
14 Ely v. Thompson (1830) 10 Ky., 981, 985.
15 State v. Manuel (1833) 3 Dev. and Bat., 144.
16 Ibid., 152.
citizens. Naturalization was the removal of alienage, emancipation removed the incapacity caused by the status of slavery.\textsuperscript{17} The court was aware that the claim was often made that since free Negroes were without political rights, they were not citizens. On this point the court said: "the possession of political rights is not essential to constitute a citizen."\textsuperscript{18} If political rights were necessary to citizenship, then neither women, nor minors, nor persons not paying public taxes were citizens. In North Carolina men who did not hold freeholds of fifty acres could vote for one branch of the legislature but not for the other. If political rights were the measure of citizenship, then this class would be "in an indetermined state, a sort of a hybrid between citizen and non-citizen."\textsuperscript{19} The court seemed extremely anxious to show that political rights possessed by an individual were not the tests of his citizenship. On this point the decision further stated: "the term citizen as understood in our law is precisely analogous to the term subject in the common law, and the change of phrase has entirely resulted from the change in government... he who was subject of the king is now a citizen of the United States."\textsuperscript{20}

Two other instances should be examined in which the free Negroes

\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid. The status of the free Negroes in the states with respect to the right of franchise was up to the adoption of the Fourteenth Amendment as follows: states never excluding: Maine, New Hampshire, New York, Rhode Island and Vermont; states which changed constitutions to exclude them: Delaware, 1792; Kentucky, 1798; Maryland, 1809; Connecticut, 1818; New Jersey, 1820; and Pennsylvania, 1838; states excluding them by law: eleven southern states and fifteen other states in the union. Kirk Porter, \textit{A History of Suffrage in the United States}, 90.
were declared citizens. In 1845 the General Assembly of Connecticut asked the State Supreme Court "whether a negro is not a citizen of the United States within the meaning of that phrase [citizen of the United States] as used in the amendment to the constitution of the state..." Without comment the court declared that free Negroes were citizens.

In the same year that the United States Supreme Court delivered its opinion in the Dred Scott case a decision was delivered in Maine that free Negroes were citizens. In an anonymous case the Supreme Court declared that members of that class of people were citizens of the United States.

Thus two state courts in the North and two in the South declared that free Negroes were citizens. It is to be noted that the problem of dual citizenship was not raised. In the North Carolina case the issue concerned state citizenship only; it appears, yet the court concluded its opinion by declaring that "a subject of the king is now a citizen of the United States". Since the plea against discrimination was not based specifically on the claim of privileges of either state or national citizenship, or on both, it can not be clearly determined what the court had in mind. In all probability the court saw no distinction between state and national citizenship, and was using the term citizen of the United States loosely. Certainly it gave no thought to the question whether the rights of state and national citizenship existed separate and distinct from each other and arose from separate sources.

21 Opinion of the Judges, 32 Conn., 565.
22 Ibid.
23 44 Maine, 506.
24 Dev. and Bat., 152.
As may be expected sentiment against free Negro citizenship was more widespread, as well as more positive, than the opinions asserting the opposite view. One of the strongest of such opinions was given in the decision in the case of Amy v. Smith by the Court of Appeals of Kentucky. The opinion began with a declaration that citizenship could not be claimed on the ground of birth as in England, because the English term subject did not comprehend as much as the term citizen. The court said that "even a villain or slave... is according to the principle of the common law a subject... But neither a slave nor a villain can be declared a citizen, for a subject and a citizen are evidently words of different import, and it indisputably requires something more to make a citizen than it does a subject." More birth in the country was not sufficient to make an individual a citizen, "but the rights and privileges he enjoys". The court then proceeded to show how the term citizen, as a derivative of the Latin term *civis*, signified one who was vested with the freedom and privileges of the community. And in words that were strikingly similar to Taney's in the Dred Scott decision the court declared that as members of a degraded race free Negroes were not of the citizen class who enjoyed all the privileges and immunities.

A dissenting opinion in this case should be examined because it illustrates the difference in opinion which was so characteristic of the period, especially when the presence of the free Negro made itself felt. The dissenting opinion was written by Judge Mills, who it

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25 (1822) 11 Ky., 326.
26 Ibid., 333.
27 Ibid., 334.
28 Ibid.
will be recalled had in an earlier case expressed the opinion for the court that the free Negro possessed at least some of the characteristics of citizenship.\(^\text{29}\) Political rights, in Mill's opinion, were not necessary to citizenship. A state might deny all her political rights to an individual, and yet he might be a citizen. A citizen was one who owed allegiance, services and money, in the form of taxes, and to whom the government guaranteed liberty of person, conscience, and the rights of acquiring and possessing property, of marriage and social relations, of bringing suit and making defence, and of security of personal estate and reputation.\(^\text{30}\)

These opinions of judges in the highest court of the State of Kentucky in 1822 show that there was no agreement as to who were citizens. The case is typical of the difference of opinion that was so widespread throughout the land during the Middle Period.

During the period before the Civil War many laws were enacted in both northern and southern states designed to control or prevent the migration of free Negroes across their boundaries. In 1835 Illinois followed an example of Ohio in enacting a law requiring a certificate of freedom of all free Negroes coming into the state. Three years later bond as security for good behavior was required.\(^\text{31}\)

Another northern state which curbed free Negroes was Connecticut. Through a law of 1833 it was provided that free Negroes might be ejected if they have no permanent residence and a license was required for the operation of a school for Negroes.\(^\text{32}\) These two pro-

\(^{29}\) Supra., 57.

\(^{30}\) 11 Ky., 342.


\(^{32}\) Ibid., 130.
visions of the law were repealed in 1838, but a third provision remained as law. That gave local communities authority to require individual Negroes to return to the states from which they had come, if they attempted to establish legal residence. 33

Laws against the migration of free Negroes into the southern states were numerous. Since 1820 South Carolina had enforced a law excluding free Negroes from her ports, disregarding entirely the fact that it had been declared unconstitutional by the United States Supreme Court in 1823. 34 North Carolina had prohibited the migration of free Negroes into the state in 1826, 35 while in the same year the territory of Florida took an identical step. 36 Other states which followed with exclusion laws were: Louisiana, 1830; Tennessee, 1831; Alabama, 1832; and Missouri and Arkansas, 1843. 37 Louisiana had enacted a law in 1842 similar to the law of South Carolina against the entry of free Negroes into the ports of the state. 38 In 1845 the territory of Florida, seeking admission as a state, embodied in its constitution express power to the legislature to enact laws for the exclusion of free Negroes. 39

These laws were defended on the ground that they were legitimate exercise of the police power of the states, while opponents had contended that they violated the clause giving control over commerce to

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33 Ibid.
35 Hurd, Law., II, 86.
36 Ibid., 191.
37 Ibid., 181, 91, 151, 170, 173.
38 Warren, Supreme Court, II, 445.
39 Ibid.
the federal government and the privileges and immunities clause of the United States Constitution. The South had upheld these laws as necessary to the public safety, as quarantine laws and other legislation designed to prevent the migration into the states of paupers, criminals and the immoral. 40 It has been seen in the Missouri debates that those who declared against free Negro citizenship claimed that the privileges and immunities clause in the United States Constitution guaranteed only such rights as the states saw fit to grant, to the citizens of other states and that it did not prevent the states from passing such legislation as was necessary for their safety. 41 This was the basis for the exclusion laws, and was a denial of the view which was to be advanced by both Justice Washington in the case of Corfield v. Coryell 42 and Justice Miller in the Slaughter House decision. 43

A decision in a case involving the right of a free Negro to migrate from one state to another was handed down in 1838 by the Supreme Court of Tennessee. 44 Claiborne, a free Negro who had been born in Kentucky, was indicted for migrating into Tennessee. 45 Therefore, he claimed the protection as a citizen of Kentucky of Article IV, section 2 of the Constitution of the United States.

In arguing the case for the state the attorney-general declared that Indians and free Negroes were sojourners, and, therefore, only sub-

40 Ibid.
41 Supra., 46-48.
42 Supra., 30.
43 Infra., 144-148.
44 State v. Claiborne, 1 Meigs, 330.
45 Ibid.
jects of the country. Since they had not been granted political
rights, they were not citizens. In the opinion for the court Judge
Green stressed the view that as a degraded class free Negroes could
not be regarded as belonging to the citizen class. Public opinion
had never permitted the white population to associate on terms of
equality with them, and they had never enjoyed equal rights or the
immunities of free white citizens. 47 They were not, therefore, citi-
zens in the sense of Article IV, section 2 of the Constitution of
the United States. On the other hand the court said, "the humblest
white citizen is entitled to all the privileges and immunities which
the most exalted enjoy. . ." "But the free Negro, who was required
by the laws of Tennessee to leave the state was entitled to no privi-
leges within the state." 48

In 1846 the Supreme Court of Arkansas decided a case which in-
volved facts similar to those in the Claiborne case. 49 John Pendle-
ton, a free Negro, had been indicted under an act of 1843 for migra-
ting into the state. In a decision denying that Pendleton was a citi-
zen, the court cited the opinion of the Kentucky court in the cases
of Ely v. Thompson 50 and Amy v. Smith. 51 If the free Negro was a
citizen, the court asked, why was he not permitted to participate in
the formation of the Constitution of the United States? The de-
cision continued with reasoning similar to that made famous by Taney

46 Ibid., 333.
47 Ibid.
48 Ibid., 335.
49 Pendleton v. The State, 6 Ark., 509.
50 Supra., 57.
51 Supra., 60.
in the Dred Scott case: the Constitution was the work of the white race; the government for which it provided and which is fundamental law is in their hands and under their control, and it could not have been intended "to place a different race of people in all things upon terms of equality with themselves."\textsuperscript{52}

Two decisions by the Supreme Court of Georgia made in 1848 and 1853 respectively should be considered together. In the case of Cooper and Wortham \textsuperscript{y}. The Mayor and Alderman of Savannah the Court declared that "free Negroes have always been considered in a state of pupilage and been regarded as our wards..." Some privileges denied them were "the right to bear arms, vote for members of the legislature, or to hold any civil office". They had no political rights, but they had personal rights, one of which was personal liberty.\textsuperscript{53} The decision made in 1853 in the case of Bryan \textsuperscript{y}, Walton\textsuperscript{54} followed the reasoning of the court in the Cooper case. This case involved the right of a free Negro to dispose of slaves, the suit being brought by Walton, who was the administrator for Joseph Nunez, for the recovery of slaves held by Bryant.\textsuperscript{55} It was the opinion of the court that the Negro, whether slave or free, occupied such a position in society, that any social, civil, or political right he enjoyed came as the result of legislative grant only. He could neither contract nor be contracted with, and could act only through a guardian. He was in "a state of perpetual privilege or wardship, and that condi-

\textsuperscript{52} 6 Ark., 512.
\textsuperscript{53} 4 Ga., 68.
\textsuperscript{54} 14 Ga., 185.
\textsuperscript{55} Ibid., 193.
tion he can never change by his own volition". This could be done only by statute the court said.

The court next considered whether manumission made the Negro a citizen. On this point the decision was clear and emphatic.

"Manumission confers no rights, but freedom from the master. Only the legislature can set aside the social and civil degradation of blood". Yet the court desired to make it clear that although the state might extend privileges to the free Negro, in so doing it did not make him a citizen. "He resides among us", the court said, "and yet is a stranger, a native even, and yet not a citizen. Though not a slave yet he is not free. Protected by the law, yet enjoying none of the immunities of freedom"

It is obvious that the nature of the cases which have just been examined practically precluded any agreement on the question of citizenship. With the problem complicated by the presence of the free Negro, only great difference of opinion could have possibly resulted. On later occasions the federal system of government made the determination of a rule of citizenship quite difficult, but, as in the case of the Missouri Constitution, the presence of the free Negro greatly enhanced the difficulty. Just how much the courts were affected by the slavery issue in national politics can not be determined, but it is certainly true that the presence of the free Negro had a great influence on the opinions of the courts, while the influence was undoubtedly of an equal effect on the state legislatures which

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56 Ibid., 193.
57 Ibid.
58 Ibid.
passed the exclusion laws. The states desired to control the ingress of outsiders, and it was not to be thought of that they would recognize free Negroes as citizens endowed with all rights to go from state to state. The concern of both northern and southern states was not so much the matter of their own free blacks as it was those of other states which might migrate.

In spite of the free Negro, courts in Kentucky and North Carolina made an effort to decide the question of citizenship aside from the question of the advisability of admitting members of the colored race to the privileges of citizenship. For the most part the courts felt able to confine their attentions to the question of state citizenship, and apparently appreciated no difficulty with the problems of national citizenship. Yet this problem might have been examined more closely, had the judiciary appreciated it more deeply. For instance, the Connecticut Supreme Court declared that free Negroes were citizens of the United States, without giving any attention to the relationship between state and national citizenship. 59 The Constitution of Maine provided that only citizens of the United States could vote in state elections. Free Negroes were declared by the Supreme Court to be entitled to vote under that provision, but there was no explanation of national citizenship or definition of the privileges and immunities of citizens of the United States. 60 It was significant of the partial thinking on the part of the Maine court that there was no explanation of the implication that the right to vote in a state was made dependent upon national citizenship.

59 Supra. 59.
60 Supra. 59.
In the North Carolina case the plea against discrimination was apparently based on state citizenship, yet as in most decisions there was no distinction made between the privileges of citizens of the state and of the United States. Yet the court did make vague references to national citizenship in referring to the analogy between the terms citizen and subject. But no attention was given to the fact that if the term subject was national in scope then the term citizen must have been as well. There really seems no answer as to what was in the mind of the court when it stated that "he who was a subject of the king is now a citizen of the United States".

Since the decision of the United States Supreme Court in the Slaughter House cases, it has been considered fundamental to a discussion of the privileges and immunities of citizenship to distinguish between state and national citizens. In the Kentucky case the Court declared that free Negroes did not possess all the privileges and immunities of citizens. Although the court stated that privileges and immunities were the heart of citizenship, no effort was made to say whether these rights came entirely from state or national citizenship, or what division existed between them, if some came from one and some from the other political authority. Nor was the dissenting opinion of Judge Mills in this case any clearer on the relation of state and national citizenship, for he simply stated what he believed to be the privileges and immunities of citizenship, but he showed no appreciation of the problem of the possible distinction between the citizens of the state and of the United States.

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61 3 Dev. and Bat., 152.  Supra, 58.
62 Ibid. Supra, 58.
63 Infra, 151 et seq.
64 Supra, 60.
65 Supra, 60-6.
Another class of persons within the United States usually regarded as "inferior", were the Indians living in either the states or territories, and as individuals within the tribes or separated from them. In order to make complete the description of the legal position of the "inferior" people in the United States prior to the Civil War, the position occupied by the Indians should be considered briefly.

As in the case of the Negroes the Constitution of the United States was of no assistance in answering the question whether or not they were citizens. There are two references to Indians in the Constitution: Article I, section 2, in providing for the distribution of Representatives and direct taxes, excludes "Indians not taxed", and Article I, section 8, provides that Congress shall have power to regulate commerce "with the Indian tribes". The power of Congress over Indians outside the limits of the states arises from the constitutional provision "to dispose of and make all needful rules and regulations respecting the territories and other property belonging to the United States. . .".

The question of the position of the Indians came before the United States Supreme Court for the first time in the outstanding case of The Cherokee Nation v. Georgia. The issue to be determined was whether or not the Cherokee Nation was a foreign power in the sense in which that term is used in the Constitution. Article III, section 2, providing that the judicial power of the federal

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66 Article IV, section 3.
67 (1831) 5 Peters, 1.
courts shall extend to controversies between a state and a foreign state. In the opinion for the court Chief Justice Marshall denied that Indians occupied a position in relation to the United States comparable to the relationship of foreign countries. Their relation, he said, was "unlike that of any other two people in existence". This relation was "marked by peculiar and cardinal distinctions which exist no where else". The territory which the Indians occupied formed a part of the United States, and the Indians acknowledged themselves to be under the protection of the United States, and that the government of the United States had the power to regulate the trade with them and to manage their affairs as it deemed proper. Tribes within the boundary of the United States could not be called foreign nations, nor their members allies. They were rather domestic, dependent nations, and enjoyed only such privileges as the United States government gave them. Moreover, the government acted as a guardian over them.

Although the question of citizenship was not directly raised by this case, it is evident from Marshall's decision that people of "domestic, dependent nations", who were "in a state of privilege" and under the guardianship of the United States, were not regarded as citizens either of the states or of the United States. And since they were not members of a foreign state, they were not in a position to become citizens by naturalization.

68 Ibid., 15.
69 Ibid., 17.
70 Indians, however, have sometimes been placed in a position to become citizens of the United States through annexation of territory, as by the treaty of February 2, 1848, with Mexico. U. S. Stat. at Large, IX, 923-943.
The few decisions bearing on Indians which came from the state courts gave considerably more attention to the question of citizenship than Marshall did in the Cherokee Nation case. Comparatively few cases arose which may be taken as indicative of the position Indians were considered to occupy with reference to the states, yet so positive were these decisions in tone, that it is quite plain that they were not regarded as state citizens. A decision of the New York Supreme Court of Judicature in 1823 held that Indians were citizens on grounds of the common law doctrine of citizenship by birth.\(^71\) But this decision was reversed by the higher Court of Errors.\(^72\) The reasoning in this decision closely resembled the argument by which citizenship of the free Negro was denied by judicial and legislative bodies. "Do our laws even at this day allow these Indians to participate equally with us in our civil and political privileges," the chancellor asked.\(^73\) Continuing his inquiry he asked if Indians had voted, had been represented in the legislature, served on juries, paid taxes, or served in the militia? Since the answers to all of these questions were in the negative, the court concluded that Indians "have never been regarded as citizens or members of the body politic . . . ."\(^74\) A decision by the Court of Appeals of South Carolina\(^75\) placed the Indian in much the same position as the decision in this New York case. Marsh, an Indian who had been a soldier in the Revolution, was denied the right to vote by the election officials of the district of York. In sustaining this denial Justice Colcock

\(^{71}\) Jackson \textit{ex dem} Smith v. Goodell, 20 Johnson, 187.

\(^{72}\) Goodell \textit{v.} Jackson, (1823) 20 Johnson, 690.

\(^{73}\) \textit{Ibid.}, 710

\(^{74}\) \textit{Ibid.}

\(^{75}\) Marsh \textit{v.} Managers of Elections (1829) 1 Daily, 215.
declared that Marsh "belongs to a race of people who have always been considered a separate and distinct race... In no case are they considered as citizens". 76

The decision of the Tennessee Supreme Court in the Ross case was likewise based on the view that the Indian occupied a degraded position. 77 In an opinion for the court, Chief Justice Catron, later of the United States Supreme Court, said that since Ross was a Cherokee, he had all the disabilities of that tribe and was not a citizen. The opinion clearly set up political privileges as the rule of citizenship for Indians in the following words: "The Cherokee has no vote in our elections, nor right to a representative in our legislature because he is no citizen..." 78

It is evident that the legal status of the Indians in the United States before the Civil War was not unlike that of the free Negroes. Not only was the position of these "inferior" peoples similar in the denial of their citizenship, but there was a similarity in the arguments advanced to place them in a degraded position, for against each race the fact that its members did not possess political privileges was urged as proof that they were not citizens. In one respect, however, the position of tribal Indians such as the Cherokee differed from that of the free Negro. As a member of a tribe the Indian was subject to tribal rather than state or federal law. He was not a citizen because of this, while no such reason could be urged against the Negro.

76 Ibid., 216.
77 The State v. Ross (1834) 7 Yerger, 74.
78 Ibid., 78.
In addition to the tests of citizenship made in the state courts concerning free Negroes and Indians, and the state exclusion laws, the question of corporations caused further consideration of the privileges and immunities clause of the United States Constitution. In the absence of any constitutional provision, the question arose whether corporations came under the protection of the comity clause. Since the claim of the corporations to immunity against discriminatory legislation by the states was equivalent to a claim of citizenship, the courts were presented with a problem on which the Constitution furnished little aid.

One of the earliest decisions made by the United States Supreme Court was in the case of Bank of Augusta v. Earle. In this case the court was called upon to decide whether a bank, incorporated in Georgia, could claim the right to buy bills of exchange in Alabama on an equality with citizens of the latter state. In the opinion for the court Chief Justice Taney expressed the opinion that the only rights a corporation could claim were the rights given in the charter, and not those rights belonging to its members as citizens of a state.

It was a common state practice to levy special taxes, or to place other special conditions on out of state corporations. Naturally the corporations tried to secure redress in the state and federal courts. In New Jersey a special tax of $1000 was levied on out of state insurance companies. In 1852 the legality of the measure was sustained by the state Supreme Court in the decision

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79 (1839) 13 Peters, 519.
80 Ibid., 539.
in the case of Tantem v. Wright. It was the opinion of the court that corporations were not citizens within the meaning of Article IV, section 2 of the national Constitution. In a separate and concurring opinion Judge Elmer cited Corfield v. Coryell in support of the view that only natural persons came under the constitutional provision. As artificial persons, corporations were not to be regarded as entitled to its protection.

The outstanding decision in a case dealing with corporations was made by the United States Supreme Court in 1963. The case involved the legality of a Virginia statute requiring out of state insurance companies to deposit bond before they received licenses to carry on business. In the decision for the court Justice Field declared that the term citizen, in Article IV, section 2, "applies only to natural persons, members of the body politic owing allegiance to the State, not artificial persons created by the legislature, and possessing only the attributes which the legislature has proscribed."

It was the belief of the court that "in no case . . . either in the State or Federal courts has a corporation been considered a citizen within the meaning of that provision of the Constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several States."

81 23 Law Reporter, 429.
82 Ibid., 442-443.
83 Ibid., 446. See also Wheeden v. Camdem and Amberry R.R. Co. (1856) (Pa.) 1 Grant, 430; Slaughter v. Commonwealth (1856) (Pa.) 13 Grattan, 767.
84 Paul v. Va. 8 Wallace, 168.
85 Ibid., 177.
86 Ibid., 178.
A grant of corporate existence was to be considered a special privilege; thus corporations were the creations of local law and had no existence beyond the limits of the state where they had been created. 87

Although the courts consistently refused to acknowledge that corporations were citizens within the meaning of the comity clause of the United States Constitution, they made the concession of allowing them to sue and to be sued in the federal courts. In the decision in the case of The Louisville, Cincinnati and Charleston Railroad Company v. Letson, 88 the Supreme Court of the United States held that a corporation created and doing business in a state was to be considered an inhabitant of the state, and capable of being treated as a citizen for the purposes of suing and being sued. But this decision did not establish the doctrine that corporations were citizens within the meaning of Article IV, section 2. Moreover in 1875 the court held that a corporation had no protection under the Fourteenth Amendment which guarantees the privileges and immunities of citizens of the United States against adverse state action. 89


88 (1844) 2 Howard, 497.

Chapter VI

Citizenship by Birth; Expatriation

It has already been made evident that the presence of the free Negro in a situation already confused by our dual system of govern-
ment caused difficulty in arriving at a definition of citizenship.
Yet despite the lack of a definition in the national constitution
and the controversies over the distribution of powers between the
state and federal governments, agreement might have been reached
concerning citizenship, if the free Negro had not complicated the
matter. It is conceivable and even probable that the common-law
rule would have received universal approval if a socially undesir-
able class would not have been thereby automatically admitted to
the privileges of citizenship.

Two more or less rival doctrines of nationality were current
in the world at the time of the formation of the United States Con-
stitution. The principle of jus sanguinis conferred nationality by
descent, the principle of jus soli, nationality by locality of birth.
The latter doctrine prevailed in England, for it had been established
since the fourteenth century "that any person ... who was born
within the ligeance of the kind of England was a natural born British
subject ... " ¹ Nationality of the individual depended upon the
country in which he was born, and not upon race or descent. ² This
has remained the fundamental law of England to the present time with
the modification that children of alien enemies in hostile occupation

appendix, 846. "Ligeance" meant the duty of a subject to give permanent
obedience to the king and claim in return the latter's protection.
Ibid., 847.
² Ibid., append., 847.
of the land, and of foreign consuls, ministers and ambassadors and children of tourists are not regarded as natural-born citizens. 3

The outstanding decision in English legal history based on jus soli or common-law doctrine of citizenship was given in the case of Calvin in 1608. The issue before the court was whether Robert Calvin, who had been born in Scotland after the accession of James I to the throne of England, was an alien and was thus disabled from bringing action for "any land within the realm of England". The question was what constituted a subject of the king, rather than subjectivity to the nation. In declaring Calvin one of the King's subjects Lord Coke 4 stated that whether or not he was a subject was to be determined solely by the feudal law relative to ownership of land. The importance of this decision for American legal history will be subsequently seen.

The doctrine of jus sanguinis or nationality by descent 5 is expressed by Vattel as follows: "the natives or natural-born citizens, are those born in a country of parents, who are citizens". Society says nations can only perpetuate themselves by children of citizens. In order to be counted as a citizen it is necessary to be born a citizen, for if he is born there of a foreigner, it will be only the place of his birth and not his country". 6 Another authority has written that "it is now more and more widely recognized that the place of birth, which is determined by pure accident shall have nothing to say in determining nationality, but that question may

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3 Ibid., append., 851. Cf. U.S. v. Wong Kim Ark (1898)
4 7 Coke Reports, 1.
5 Ibid., 575-575.
6 Law of Nations, (Chitty ed.) Ex., I. Ch. XIX, paragraph 212.
be made to depend on descent".7

It has been noted that the Naturalization Act of 1790 disregarded the English common-law principle that allegiance to the English crown was perpetual and inviolable. Furthermore the decisions of the courts, opinions expressed in Congress and by the attorneys-general of the United States, all reveal that the common-law doctrine of citizenship was far from being universally accepted in the United States.

Yet such was the difference of American judicial opinion that contemporaneous with incidents in which the common-law doctrine as applied to nationality was disregarded and violated, there were cases in which decisions were based on the English doctrine. American courts have, on the whole, taken the position that white persons born in the United States were natural-born citizens. One of the earliest cases decided by the United States Supreme Court was that of The Charming Betsy,8 in which the court assumed that individuals born within the United States were its citizens. The decision in this case was made in 1804, and the next year Judge Sewall was to declare for the Supreme Judicial Court of Massachusetts: "I take it, ... to be established with few exceptions, ... that a man born within the jurisdiction of the common law, is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance which is claimed and enforced by the sovereign of his native land ..."9

7 Ludwig Bar, The Theory and Practice of International Law, (2d ed., 1892) 126
8 2 Cranch, 68, l30.
Another decision of the United States Supreme Court in which the common-law principle of citizenship was asserted was made in 1830. This case involved the question of descent of a person born in the English colony of New York before July 4, 1776. If such a person remained in New York during the Revolution, he became a citizen of the United States by virtue of his birth in the country. In an opinion for the majority of the court it was declared by Justice Thompson that "it is universally admitted... that all persons born within the colonies of North America... were natural-born British subjects and it must necessarily follow that the character was changed by the separation of the colonies from the parent state and the acknowledgement of their independence." In a separate but concurring opinion, Justice Story cited Calvin's case and from Blackstone, and declared that "allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign." There were the following exceptions to this rule: "Children born on the ocean are subjects of the sovereign to whom the parents then owe allegiance; children of ambassadors are subjects of sovereigns whom the latter represent; and finally children born of alien enemies are still aliens."

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11 Ibid., 121
12 Ibid.
13 Ibid., 155.
14 Ibid., 156. Two other decisions written by Story in which the common law doctrine of citizenship was asserted were made in the cases of McCreery v. Sonerville (1834) 9 Wheaton, 354, and Levy v. McCartee (1832) 6 Peters, 102.
A decision which has often been quoted in support of the common-law doctrine of citizenship was made in 1844 by the New York Court of Chancery in the case of Lynch v. Clark. The defendant in error contended that Julia Lynch was ineligible to inherit because of her birth in the United States to parents who were only temporary residents of the country. In denying this contention, the court asserted that "every person within the dominion and allegiance of the United States, whatever was the situation of his parents, is a natural-born citizen".

When these decisions are placed alongside the denials of the application of the common-law principle to the free Negro there is revealed one of the greatest inconsistencies in American legal history. No better evidence exists of the powerful force of the presence of the free Negro as a complicating factor in the work of arriving at a solution to the problem of citizenship. The situation warrants the conclusion that if it had not been for the free Negro the common-law rule of acquiring citizenship would have been universally accepted, and that this doctrine would have in a large measure met the need of a constitutional definition of citizenship. This would not, however, have settled the problem of the distribution of the privileges and immunities of citizenship between the state and federal governments.

It is important that such prominent American jurists as James Kent and Joseph Story supported the doctrine of the acquisition of citizenship by birth in a country. Story in his *Conflict of Laws* said that "persons born in a country are generally deemed to be citizens and subjects of that country." "Exceptions", he said,

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15 Sansford Chancery Reports, 583.
16 Ibid., 563.
17 (5th ed.) 59.
"should be made of children of parents who were in itinerers or were
abiding there for temporary purposes, as for health or curiosity or
occasional business". 18 There was no mention of the free Negro by
story, but Kent believed him to be a citizen because of his birth
in the country. "Subject and citizens", he said, "are, in a degree,
convertible terms applied to natives... Citizens under our Con-
stitution and laws means free inhabitants born within the United
States or naturalized under the laws of Congress. Freed slaves or
native-born free blacks are citizens, but under such disabilities
as states place upon them". 19

One other aspect of these decisions should be considered briefly.
It is to be noted that in all cases, citizenship was spoken of in a
national sense. No attention was given to the citizenship of a state,
but so far as whites were concerned citizenship of the United States
was declared to be an inevitable and logical result of birth on
American soil. The decision in the case of Lynch v. Clark illustrates
this tendency well. "The right of citizenship, as distinguished from
alienage, is a national right or condition and does not pertain to in-
dividual states." "Citizenship... is a political right which stands
not upon the municipal law of any state, but upon the more general
principle of national law." 20

The insistent denial of the right of expatriation in English
common law has received popular expression in the saying "once an
Englishman always an Englishman", and the differences arising from the

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18 Ibid.
19 Commentaries on American Law II, 254 n. 13th ed. edited by
Oliver W. Holmes, Jr.
20 1 Sandford Chancery Reports, 641, 644.
impressment of American seamen by Great Britain during the Napoleonic Wars will recall the importance of this doctrine in Anglo-American relations. Blackstone had put the view which has prevailed in England in the following statement:

"It is a principle of universal law that the natural-born subject of one prince cannot by an act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic and primitive, and antecedent to the other and can not be divested without the common act of the prince to whom it was first due."\(^{21}\)

This doctrine was popular in the United States during its early history because of the natural desire to acquire rather than lose inhabitants. Necessity demanded that the already sparse population be not reduced in size. It should not be a matter of surprise, therefore, that the English doctrine on the right of expatriation found acceptance in the state and federal courts in the United States.

One of the earliest decisions made by a Federal court in which expatriation was involved was in the case of Williams.\(^ {22}\) Chief Justice Ellsworth in an opinion for the court was emphatic in denying that citizens might divest themselves of their citizenship. "All members of a civil community are bound to each other by a compact. . . One of the parties of this compact cannot dissolve it by his own acts". The reason given for the holding of such a doctrine was that a sparse inhabitation demanded that the nation restrict emigration. Furthermore, the decision stated that naturalization implied no consent of the government that citizens of the United States might expatriate.


\(^{22}\) (1795) Fed. Case No. 17,707.
They themselves.

The decision made in the case of The Venus by the United States Supreme Court indicated what the court believed constituted expatriation. The act of the person who removed from the United States was to be taken as evidence of intention. In an opinion based on English precedent it was declared that for a citizen of the United States to enter another country and to engage in trade there, was to be regarded as proof of intention to expatriate himself. The court did not recognize the right of expatriation in thus announcing a rule by which intention was to be judged. Justice Washington, who gave the opinion, dealt with a similar problem in the case of U. S. v. Gillies, which was decided by the Supreme Court in 1815. The question before the court was whether domicile for commercial purposes were sufficient, without the government's consent, to legally expatriate an individual. The heart of the opinion was in the following words which were strongly similar to Blackstone: "No citizen of the United States can throw off his allegiance to his country, without some law authorizing him to do so."27

The words of Justice Story in a decision written by him in 1830 may be taken as an accurate statement of the opinion existing in the federal judiciary during the first half of the Nineteenth Century. In this he said that "the general doctrine is that no persons can by any acts of their own, without the consent of the

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23 Ibid., p. 1331.
24 (1811) 8 Cranch, 253.
25 Ibid.
26 Fed. Case No. 15, 206.
27 Ibid., p. 1321.
government, put off their allegiance, and become aliens".

Decisions in the courts of the state were marked by less unanimity of opinion against the doctrine of expatriation than was shown in the federal courts. A decision of the Pennsylvania Supreme Court which was made in 1811 is illustrative of this difference in view. Another decision in which disagreement was expressed with the view so common in the federal courts, was made in the case of Almsberry v. Hawkins in 1839 by the Massachusetts Supreme Court of Judicature. In this decision it was declared by Chief Justice Robinson that allegiance in the United States was "conventional and may be repudiated by the native as well as adopted citizens, with the presumed concurrence of the government without its formal sanction. Expatriation may be considered a practical and fundamental doctrine of America." Another decision affirming the right of the citizen to expatriate himself was made by Justice Crandall of the Alabama Supreme Court in the case of Beavers v. Smith. In this decision it was said that:

"It would follow necessarily from our own naturalization laws, that our people can migrate and transfer their allegiance at their pleasure to a foreign government. . . . This was true since our laws do not require the consent of the former sovereign to the expatriation of a foreigner as a condition of his becoming a citizen of the United States".

29 Ibid., 246.
30 Jackson v. Burns, 3 Binney, 75.
31 9 Deza, 177.
32 Ibid., 179.
33 (1847) 11 Ala., 20.
34 Ibid., 31.
The state courts were not unanimous in upholding the doctrine of expatriation, however. For instance, Chief Justice Parsons declared for the Supreme Judicial Court of Massachusetts that allegiance was a perpetual relationship between a citizen and his native land. 35

In conclusion it should be said that the differences of opinion between the state and federal courts were not as important as they might seem to be. Since expatriation was and is more of a national than a state matter, the failure of the state courts to hold views coinciding with opinion in the federal judiciary actually detracted little from the force of the doctrine as accepted by the United States courts. In fact, the opinion that there existed no right of expatriation without the mutual consent of the citizen and his government prevailed in the United States down to the recognition of the right by Congress in 1868. 36

36 U. S. at Large, XV, ch. 248, p. 223.
Chapter VII
The Dred Scott Decision: the Opinions of Taney and Curtis

In this study our interest in the case of Scott v. Sanford is not in its importance to the political struggle which culminated in the Civil War or to the constitutional question of the power of Congress to restrict slavery in the territories, however important to the history of the fifties both of these matters have been. It is rather the rival interpretations of the term "citizen of the United States" of Chief Justice Taney and Justice Curtis which makes the case of great significance.

Its importance to the question of citizenship has been as great as its significance in the political struggle of the late fifties and the sixties; in fact, although the political questions raised by the decision were settled at Appomattox, the constitutional problems of citizenship with which Taney and Curtis dealt so cogently, were not settled for some time after the close of hostilities. Moreover, both justices contributed something to the solution of the problem in later times.

So far as citizenship was involved, Taney stated that the issue in the case of Dred Scott was whether he was a citizen of the state of Missouri "in the sense in which the word citizen is used in the constitution of the United States". In other words, was Scott entitled to the right to sue in the federal courts as guaranteed to citizens by the Constitution? Although the matter will be considered more fully at a later point, it should be stated here that,

\[1\] (1857) 19 Howard, 393.
\[2\] Ibid., 403.
\[3\] Infra., 95, 97.
Curtis interpreted the privileges and immunities clause as well as the clause defining the jurisdiction of the federal courts as referring to citizens of the United States. Taney sought to determine whether Scott was a citizen of the United States, rather than to inquire whether he was a citizen of the state of Missouri. He said that free Negroes had not been regarded as part of the "people of the United States" and were not intended to be included under the word "citizen" in the Constitution and can, therefore, claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. Curtis accepts Taney's position that any rights Scott may have in other states or the right to sue in the courts of the United States was dependent on United States and not state citizenship. Referring to Marshall's decision in Cassie v. Ballon, that citizens of the United States were regarded for purposes of jurisdiction as citizens of the state in which they resided, Curtis turned the argument around and said it must follow that since Scott was a resident of Missouri, he was a citizen of the United States. Thus both Taney and Curtis seek to determine Scott's right to sue in the federal courts in terms of

4 Article IV, section 2, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."
5 Article III, section 2. "The judicial Power shall extend to all cases, . . . between Citizens of different States . . . ."
6 19 Howard, 404.
7 Supra, 56
8 19 Howard, 571.
United States citizenship. For both, the question is one of determining who were citizens of the United States.

Both Taney and Curtis were of the opinion that in order to reach a solution of the question of who were "citizens of the United States" they must begin by determining who were citizens at the time of the formation of the national government. Yet, as will be shown presently, more fundamentally their reasoning resolved into the question of national versus state origin of citizenship. However, the problem as stated by them should be considered first, since it leads into the more fundamental issue of the origin of citizenship. Taney stated the problem in the following words:

"Can a negro whose ancestors were imported into this country and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States and as such become entitled to all the rights and privileges, and immunities guaranteed by that instrument to citizens?" 9

Curtis put the problem in a briefer and more direct manner by saying "the question is, whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States". In Taney's opinion the terms "people of the United States" and "citizens" were to be regarded as synonymous. He said:

"They both describe the political body who... formed the sovereignty and who hold the power and conduct the government through their representatives... The question before us is whether the class of persons described in the plea in abatement compose a portion of this people and are constituent members of this sovereignty?" 11

9 Ibid., 403.
10 Ibid., 571.
11 Ibid., 404.
Since Taney believed that Scott's right to sue in the United States depended upon United States rather than state citizenship, he proceeded to inquire into the relationship of state and national citizenship. The rights pertaining to the two types of citizenship were not to be confused, he said. Simply because a person had all the rights of state citizenship, it did not follow that he must be a citizen of the United States. "He may have all the rights and privileges of the citizens of a State and yet not be entitled to all the rights and privileges of a citizen of any other State," he declared. Before the adoption of the Constitution every state had the right to confer state citizenship on whomever it chose. But these rights and privileges had been confined to the boundaries of the state which had conferred the privilege, and those persons thus made citizens had "no rights or privileges in other States beyond those secured by the laws of nations and the comity of States."\(^{12}\) This right of the states had not been surrendered with their entry into the union, but the persons upon whom the rights and privileges had been conferred were not citizens "in the sense in which that word is used in the Constitution of the United States, nor entitled to sue in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them."\(^{13}\) States were without the power to create citizens of the United States, and proof of this was to be found in the provision in the national constitution for the naturalization of aliens by the national govern-

\(^{12}\) Ibid., 405.

\(^{13}\) Ibid., 406.
ment alone. 14

Since citizenship of the United States was found not to have been produced by action of the states, Taney considered that it was "necessary . . . to determine who were citizens in the several states when the Constitution was adopted. . . ." 15 At the time of the adoption of the Constitution every person, and every class and description of persons who were recognized as "citizens in the several states" (in the national sense) became citizens of the United States. But only those with rights and privileges were counted within the membership of the new political union. That union had been composed only of

"those who were at that time members of the distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside the State, which he did not before possess, and placed him in every other State upon perfect equality with its own citizens . . . it made him a citizen of the United States." 16

By the expression "citizens in the several states" is apparently meant United States citizens residing in the several states, and is in direct distinction to the expression "citizens of a State", which is used to describe inhabitants within a state whose rights arise from the authority of the state and may be exercised only within the limits of the state. The distinction is brought out clearly by the tests of state and United States citizenship which Taney establishes. The states had the right to confer state citizenship on whomever they

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14 Ibid.
15 Ibid., 406-407.
16 Ibid., 406-407.
chose, but those rights were confined to the boundaries of the state
conferring them, and the persons granted the rights of citizenship
had no rights in other states beyond those secured by international
law and the comity ordinarily existing among states. On the other
hand, the test of United States citizenship was a matter of privileges
and immunities which arose from national authority and which indi-
viduals living in the several states enjoyed in all states. In con-
trast to the citizens of the states whose rights in other states
were confined to those granted by international law and state comity,
United States citizens had rights in all the states which arose from
national authority.

Taney apparently did not comprehend a national citizenship ex-
isting before the Constitution was formed. He therefore must have
meant to ask who were made citizens of the United States by the for-
mation of the new government in asking: "who were citizens in the
several States when the Constitution was adopted. . ." This con-
clusion appears evident from his statement that each citizen of the
United States was given "rights and privileges outside the State,
which he did not before possess. . ." by the Constitution. In order
to determine what individuals "possessed rights and privileges" in
the several states at the time of the formation of the Constitution,
it was necessary to "go back to the governments and institutions of
the thirteen colonies when they separated from Great Britain, and
formed new sovereignties in the family of independent nations".

17 Ibid., 405.
This inquiry was of course directed to the specific question of the position of the free Negro in the body politic at the time of the formation of the Constitution of the United States. Had he been regarded as a "citizen in the several states" in the sense that he enjoyed privileges beyond the confines of his own state, and had he become by virtue of these rights, a member of the national political union formed in 1787? All the evidence, in the opinion of the chief justice, pointed to a negative answer to this question. For more than a century before the formation of the Constitution members of the colored race had been regarded "as beings of an inferior order and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect. . ." 18

Taney continued to give evidence of the free Negro's degraded position. Citing the discriminating legislation which had been enacted in Massachusetts and Maryland in 1705 and 1707 respectively, he declared that these laws "were in force when the revolution began and are a faithful index of the state of feeling toward the class of persons of whom they speak and the position they occupied through-

18 It is quite evident that Taney's partisan critics perverted his statement by making it appear that the declaration that the free Negro "had no rights which the white man was bound to respect. . ." was his personal opinion of the status of members of the colored race and not, as was actually the case, the statement of an historical fact. Historically the position of the free Negro was as Taney described it, although Curtis was correct in saying that Negroes were citizens of some of the states.
out the thirteen colonies... They showed clearly that it was intended for a perpetual barrier to be thrown up between the white race and "the one they had reduced to slavery... and which they had looked upon as so far below them in the scale of created beings....

Tanjy was cognizant of the claim that such ideas were said to be at variance with the Declaration of Independence. But it was to be pointed out that the framers of the Declaration "perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the Negro race..." For the free Negro had by common consent been excluded from civilized government, and no one had understood the meaning of the Declaration of Independence to include them. If they were conceived of as being within the scope of the Declaration "the conduct of the men who framed it would have been inconsistent with the principles they asserted, and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation".

Tanjy believed that there was further proof of the free Negro's degraded position in the provisions in the United States Constitution on the importation of slaves and the rendition of fugitive slaves. These provisions he believed showed conclusively that neither slaves nor their descendants even if the latter were free, were included in

19 Ibid., 409.
20 Ibid.
21 Ibid., 410.
22 Ibid.
23 Article I, section 9.
24 Article IV, section 2.
the scope of any other provisions of the Constitution, for they cer-
tainly showed that it had not been intended to confer on Negroes the
liberties or personal rights provided for citizens in other provisions
of the Constitution. 25

In addition, the free Negro suffered from the stigma of belonging
to a race, some of those members were enslaved. "They were identified
in the public mind with the race to which they belonged and regarded
as part of the slave population rather than the free. . ." 26 The dis-
criminating legislation which the states had enacted since the forma-
tion of the Constitution was regarded as additional evidence of the
degraded position which the free Negro occupied. 27 Of the New Hamp-
shire law excluding free Negroes from the militia Taney said: "nothing
could more strongly mark the entire reprobation of the African race.
The alien is excluded because he was born in a foreign country. . .
But why are the African race, born in the State, not permitted to
share in one of the highest duties of citizenship?" 28

In many respects Taney's discussion of American citizenship con-
stituted the outstanding contribution, on the subject, which had been
made up to that time. Yet in spite of the high position it occupies
in the literature on citizenship in the United States, there are cer-

25 19 Howard, 411.
26 Ibid.
27 Ibid., 415-416. Among these states were the following as
cited by Taney: Mass., (1786 and 1836) laws against miscegenation;
Conn., (1874) law restricting migration of free Negroes and mulattoes,
also (1836) law prohibiting the education of free Negroes; New Hampshire,
(1815) law admitting only whites to the militia; and Rhode Island (1822)
law against miscegenation.
28 Ibid., 415.
tain inconsistencies and weaknesses in his argument which should be considered. It has already been made evident that in deciding on Scott's right to sue in the federal courts, Taney interprets the clause in the Constitution which defines the jurisdiction of the federal courts, as granting the privileges of the courts to citizens of the United States but not state citizens. That such a conclusion implies a rejection of the plain wording of the jurisdiction clause is evident, for by no reasonable interpretation may it be said that the terms "citizens of different States" means United States citizens residing in the different states. It appears that in order to decide upon the question of Scott's right to sue it was necessary only to decide whether he was a citizen of Missouri, then Taney needlessly raised the question of United States citizenship, unless his purpose was to prevent a free Negro from having the privileges of the courts of the United States. Curtis accepts Taney's view, although it is difficult to see what he gains by it, aside from the gratification of a desire to refute the Chief Justice. In fact, it is difficult to see that Curtis gains an advantage by arguing that United States citizenship originates from the state, since the real question was whether Scott was a citizen of the State of Missouri.

Another unsound position taken by Taney is that United States citizens are referred to in the privileges and immunities clause of the United States Constitution. It has already been shown that this clause originated in the privileges and immunities clause of the Articles of Confederation and that the comity privileges of the Articles were preserved by their transfer to the Constitution. Although Taney does
not mention the privileges and immunities clause of the Articles, he refers to rights of state citizens under the Confederation "secured by the laws of nations and the comity of States". Apparently he did not appreciate the true meaning of the privileges and immunities clause of the Constitution. That this clause was regarded in the judicial opinion of the middle period as comprehending the rights of state citizens within other states, has already been shown. A recent critic has said: "Taney translates the 'citizens of each State' clause of the Constitution as 'citizens of the United States', but the derivation of this clause from the Articles forbids any such notion". Since the wording is "citizens of each State" rather than "citizens of the United States" the clearest implication is that citizens of any state are protected in privileges and immunities in other states.

Although Taney apparently conceived of United States citizenship as a creation of national authority, it should be noted that he shows a tendency to speak of the rights of United States citizenship in terms commonly used to describe the rights of state citizens when in other states as guaranteed by the privileges and immunities clause of the Constitution. At times he seems to speak of the rights of United States citizenship as a higher level of state citizenship, and to fail to make a clear cut distinction between the privileges of national and state citizens. In this connection it is important that Taney begins his inquiry of Scott's status by asking whether he is a citi-

30 19 Howard, 405.
31 Supra., 25 et seq.
zen of the State of Missouri "within the meaning of the constitution of the United States", but that he soon substitutes the question whether he is a citizen of the United States. It appears that this change in the approach to the question of Scott's citizenship may possibly be explained by the fact that Taney at times shows a tendency to think of United States citizenship in terms of rights which actually pertain to state citizens. In speaking of the rights of United States and state citizens he states that an individual may "have all the rights and privileges of citizens of a State and yet not be entitled to all the rights and privileges of a citizen of any other State". 33 Thus Taney's concept of United States and state citizenship does not show the proper distinction between the rights of the two classes of citizens. This is due perhaps, to his failure to regard the rights of national citizenship as being entirely free from state citizenship. In speaking of the rights of state citizens under the Confederation he states that these were confined to the limits of the state granting them, but that those who were thus made citizens had "no rights or privileges in other States beyond those secured by the laws of nations and the comity of States". Such citizens, he said, had not been entitled "to the privileges and immunities". Yet at the same time he is apparently basing the rights of United States citizens on this same clause which was no more than a guarantee of the comity privileges of state citizens. He thus completely ignores the express provision of Article IV, section 2.

33 19 Howard, 405.
Taney's failure to perceive clearly a body of rights of United States citizens which were entirely distinct from those pertaining to state citizenship may possibly explain his error in interpreting the privileges and immunities clause of the Constitution and the clause defining the jurisdiction of the federal courts. It is now quite evident that the doctrine of national citizenship cannot be maintained by holding that these clauses refer to citizens of the United States. The most logical basis for a doctrine of the origin of national citizenship rests on the fact that with the formation of the government in 1787 there was created a relationship of citizenship between that government and the individuals upon whom the authority of the United States acted. Taney suggests this but apparently permitted his reasoning to become confused by the fact that the free Negro was the origin of the issue.

Earlier in this chapter it was stated that in spite of the differences of opinion between Chief Justice Taney and Justice Curtis over the question of the citizenship of the free Negro at the time of the formation of the Constitution of the United States, the fundamental difference between them concerned the origin of national citizenship. The question was: were citizens of the United States created by state or national action? In fact, as will be shown presently, this difference is greatly more important to the study of the problem of citizenship in the United States than the question whether free Negroes were citizens at the time of the formation of the Constitution of the United States. 34 Although Taney does not stress the point that

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34 This significant fact has been brilliantly pointed out by E. S. Corwin in his article: "The Dred Scott Decision in the Light of Contemporary Legal Doctrine", Am. Hist. R. XVII, 52-69.
citizens of the United States were to be regarded as the creation of the national authority, it is apparently from the foregoing excerpts from his decision that he regarded this as an important matter, and that he proceeded on the assumption that in order to determine the status of the free Negro, it was necessary to first determine the manner in which citizens of the United States had been created in the beginning, irrespective of race or color. 35

The fundamental points of view of Taney and Curtis and which were the fundamental differences between them, can perhaps be seen best by placing the decision of Justice Curtis alongside Taney's for comparison and contrast. As the problem was stated by Curtis in the beginning of his opinion, it seems that he was not concerned with the origin of citizenship, but with the question whether the free Negro was a citizen at the time of the formation of the national government. "The question", he said "is whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States. It has already been shown that neither Taney nor Curtis was required to go into the question of Scott's possible United States citizenship. But since Taney claimed that only United States citizens could sue in United States courts, Curtis naturally tried to show that a free Negro might be a United States citizen. He, therefore, went into the question of the origin of citizenship in order to arrive at a solution of the problem of the free Negro.

35 A detailed analysis of the matter of the origin of United States citizenship will be given as part of a concluding estimate of the opinions of both Taney and Curtis, both from the point of view of origins, and the larger question of the evolution of the concept of citizenship in the United States.
In order that this more general question might be answered, Curtis believed that it was necessary to answer the question: "Who were citizens of the United States at the time of the adoption of the Constitution?"

In this question Curtis was thus approaching the problem of the free Negro's citizenship in the same historical manner as Taney, who asked: "Can a negro whose ancestors were imported into this country and sold as slaves, become members of the political community formed and brought into existence by the Constitution of the United States...?" But it should be recalled that Taney had not viewed United States citizenship as existing under the Confederation, but as coming into existence by the Constitution. In Curtis' opinion citizens of the United States in 1787 were none other "than citizens of the United States under the Confederation..." Citizenship of the United States, as it was comprehended at the time of the adoption of the Constitution and as it was mentioned in the Constitution, "must necessarily refer to citizenship under the government which existed prior to and at the time of such adoption..."

Turning to the question whether free Negroes had been citizens of the states before and after the ratification of the Constitution, Curtis showed that in at least five states they had been considered

36 Ibid., 572.
37 Ibid., 403.
38 In contrast to Taney who evidently intended the expression "several States" to convey a meaning of national authority, Curtis used the term "United States" to mean simply a loose collection of the individual states.
39 19 Howard, 572. In this connection it has been stated by Pomeroy, Const. Law of U.S. 46, that "the whole matter was left to stand upon the action of the several States and to the natural consequences of such action, that citizens of each State should be citizens of... The United States of America".
citizens. 40 In these states free Negroes had voted for the ratification of the Constitution. 41 The importance of this was that "as free colored persons were then citizens of at least five States, and in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established." 42 Curtis readily admitted that not all free Negroes were citizens of the United States. Referring to an act of Congress of March 3, 1813, 43 he said that the measure certainly implied that "there may be persons of color, natives of the United States who were not citizens of the United States. . . ." 44 Such an implication was in accordance with the facts "for not only slaves, but free persons of color born in some States are not citizens", he said. 45 From these words it is clear beyond any possible doubt that Curtis considered that free Negroes were citizens of the United States only in the comparatively few states where they were deemed citizens of the state. It is also clear that he believed that with the exception of naturalized citizens, national citizenship was a creation of state authority.

It was also urged by Justice Curtis as further proof that national citizenship sprang from state authority that the national Constitution carried no provision for a national electorate. He

40 Ibid., 573-574. N.H., Mass., N.Y., N.J., and N.C.
41 Ibid., 582.
42 Ibid.
43 Ibid.
44 This act made it unlawful after the close of the war with England to employ on public or private vessels of the United States "any person or persons except citizens of the United States or persons of colour. . . ." U.S. Stat. at Large, II Ch. XLII, p. 809.
45 19 Howard, 583.
46 Ibid.
considered it significant that there was no mention of a class, independent of state action by whom the President and members of the lower House of Congress were chosen. Instead "the electors of President are to be appointed in such a manner as the legislatures of each State may direct, and the qualifications of electors of members of the House of Representatives shall be the same as for electors of the most numerous branch of the State legislature". 46

It was Curtis' opinion that the fourth Article of Confederation 47 conferred privileges and immunities of national Citizenship upon those persons regarded by the individual states as their citizens. If free Negroes were citizens of the states in which they resided, they became citizens of the United States by virtue of their state citizenship. That the fourth Article was intended to have this effect was a fact known to the framers of the Articles. It was even more decisive that Congress under the Confederation had refused to insert the word white before "inhabitants" in order to give privileges and immunities to whites only. 48

In taking cognizance of the view which prevailed in wide circles that the free Negroes were not citizens because they were without the political and other rights held by whites, Curtis said that "citizenship under the constitution of the United States is not dependent on any particular political or civil right, and any attempt so to define it must lead to error". 49 One state might confine the right of

46 Ibid., 581.
47 "The better to secure and perpetuate mutual friendship and intercourse among the people of the States of this Union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States. . . ." 19 Howard, 575.
48 Ibid., 583.
suffrage to white male citizens, while another might confer it upon colored persons and women. A state might permit all persons above a prescribed age to transact business and convey property. Regardless of whether a person was under any or all these restrictions, he was a citizen of the United States. 50 Those persons who were entitled to protection of life, liberty and property were citizens of the state in which they resided and in consequence of state citizenship were United States citizens. In order to see the full significance of Curtis' opinion on the origin of United States citizenship, it will be necessary to recall Taney's view of this matter. The latter said that a person "may have all the rights and privileges of the citizens of a State and yet not be entitled to all the rights and privileges of any other State." 51 And in referring to the new political authority formed by the Constitution, he said that the new government had been made up of those whose power "was to extend over the whole territory of the United States and gave to each citizen rights and privileges outside the State which he did not before possess and placed him in every other State upon perfect equality with its own citizens...; it made him a citizen of the United States." 52

Curtis on the other hand could find no grounds for a distinction between state and national citizenship. In fact, he believed that there was proof to the contrary. The clause in the Constitution providing for the jurisdiction of the federal courts 53 made no

50 Ibid.
51 Ibid., 405.
52 Ibid., 406.
53 Article III, section 2.
distinction, for "in selecting those who are to enjoy these national rights of citizenship... they are described as citizens of each State...." 54 Curtis regarded this failure to imply national citizenship as proof that there was no conception of a class of citizens originating from the authority of the United States. "It would seem", he said, "that if it had been intended to constitute a class of native-born persons within the State, who should derive their citizenship of the United States from the action of the federal government, this was an occasion for referring to them". 55

In Curtis' opinion there was only one way in which citizens of the United States might be created by the national authority. This was by the process of naturalization. It was the sole means by which Congress could create citizens of the United States, for the power had been left to the states of determining what native-born persons should and should not be citizens. The states had exclusive power of determining "what persons born within their respective limits, shall acquire by birth, citizenship of the United States", but no power had been left to them "to prescribe any rule for the removal of the disability of alienage. This power is exclusively in Congress." 56

After Curtis had established the principle that the states alone were empowered to create citizens of the United States of the

54 19 Howard, 580.
55 Ibid.
56 Ibid., 582. Curtis contended that the application of the Naturalization Law of 1790 to whites only showed that Congress did not consider it expedient to apply the rule of naturalization to colored aliens. He believed that was a power to make colored citizens, as had been done by treaties in the cases of the Choctaw, Cherokee, and other Indians.
inhabitants born within their boundaries, he felt it necessary to consider the question of the rule by which states might make the selection of those upon whom they conferred citizenship. There were four possible rules by which the states might be guided in making the selection. The first two were: "First. That the constitution itself has described what native-born persons shall or shall not be citizens of the United States, or, Second. That it had empowered Congress to do so."

These two alternatives he dismissed as being inconsistent with the major premise of the state origin of national citizenship. The third alternative was "that all free persons born within the several States, are citizens of the United States". This he rejected because it violated the principle that states were to exercise the power of selection. The fourth and most logical alternative was "that it was left to each State to determine what free persons, born within its limits, shall be citizens of such States, and thereby be citizens of the United States". This idea may be called a modified form of the doctrine of citizenship by locality of birth. The Constitution, he said, "recognizes the great principle of public law, that allegiance and citizenship spring from the place of birth. . . ." But the application of this principle was reserved to the states.

A concluding estimate of the opinions of Taney and Curtis should accomplish a three-fold purpose. First, there should be a

57 Ibid., 577.
58 Ibid.
59 Ibid.
60 Ibid., 586.
consideration of the decisions as being representative of the differences of opinion in legal thought on the question of citizenship which existed up to the time of the adoption of the Fourteenth Amendment. Second, attention should be given to any new ideas that the decisions may have contained, and third, the two decisions should be analyzed from the point of view of their place in the evolution of the concept of citizenship as it exists today. The problem of analysis may be put in the following question form: how did the opinions reflect the past, to what extent did they shed new light on the problem of citizenship in the middle of the nineteenth century, and finally, how did they anticipate the ideas of the future? But it is not advisable to examine each of the problems separately, since the two opinions rather defy a breaking down into parts corresponding to the three problems. Instead it seems best to place the opinions of Taney and Curtis side by side for comparison, and to point out the relationship of specific ideas to the above points as they arise in the opinions.

Both Taney and Curtis reflect the past inasmuch as the views of both on the citizenship of the free Negro sum up arguments that had been repeatedly expressed earlier. Taney's view that historically the free Negro was not a citizen had been expressed in similar language by Senator Smith of South Carolina during the debates on the Missouri question. Likewise Taney's opinion that political privilege was the test of citizenship had been anticipated by Smythe of Virginia in the House debates on the Missouri question. On the other hand, the arguments of Curtis that citizenship consisted in the right to

61 Supra., 38
62 Supra., 43.
protection of life and property had been expressed earlier by Otis and others during the Missouri debates. 63

It has already been seen that the fundamental difference between the opinions of Taney and Curtis arose over the origin of citizenship and not the question of whether Negroes were citizens in 1787. No greater contrast existed between the opinions of the two jurists than the contentions on the one hand, that national citizenship came from national authority, and on the other hand that it sprang from the authority and action of the state.

Two factors, the federal system and the presence of the free Negro, had continually perplexed all statesmen and jurists who had attempted to define citizenship before 1857. Before the opinions of Taney and Curtis were written there had not been any considerable effort expended to determine the relationship of these factors. Never before had it been so plainly seen that the first of the factors bore such a close relationship to the second, and had such efforts been made to seek a solution of the problem of relationship. In addition to this feature of the opinions, it seems that both Taney and Curtis saw the need of establishing on a legal basis the relationship between state and national citizenship. Although neither Taney nor Curtis satisfactorily settled the issue, their efforts were significant in pointing the way to later treatments of the subject. In perceiving the close relationship between the free Negro and the federal system, as factors affecting citizenship, and in seeking a solution to the problems of the relationship of

63 Supra, 37-38
state and United States citizenship, Taney and Curtis represent an advance over other jurists and statesmen of their day. In these two achievements there are distinct contributions to the development of the concept of citizenship.

In failing to recognize that United States citizenship arose independently of state authority, Curtis represents a continuation of a point of view which had been so characteristic of his predecessors. As a consequence of this, time was to prove his doctrine wrong, if compared with the Fourteenth Amendment and the Slaughter House decision. 64 Taney, on the other hand, as it will be shown presently, more nearly anticipated the future. Yet Curtis' doctrine represented more accurately than Taney's the view commonly held before 1857, and in fact until some time after that date. Before that date, the opinion generally held seems to have been that every citizen of a state was a citizen of the United States. 65 But it was not recognized that, excepting naturalization, national citizens might be created by the national government. Curtis resembles his predecessors in that he failed to adjust citizenship to the dual system of government. It seems that Curtis and his predecessors did not perceive that neither state nor United States citizenship results from the other. Curtis held that when the Union was formed those who were citizens of the states became, in consequence of state citizenship, United States citizens. In contrast to this view, was that of Taney which held that state and United States citizenship originated from the authority of the state and national governments, respectively.

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64 Infra: 138 et seq., 151 et seq.
65 Willoughby, Const. Law, I 260.
In making a distinction between the sources of the two types of citizenship, Taney represents an advance over Curtis, and anticipates the present-day view.

Although the majority of opinion in Congress and the state courts had been in agreement with Curtis' view it should be recalled at this point that there had been a minority opinion in support of the doctrine that United States citizenship existed independently of citizenship of the state. 66 Taney thus had some precedent for his contention on the origin of national citizenship; and although this view in its day was that of the minority, it was to be made the universal view by the adoption of the Fourteenth Amendment.

It has been seen that Curtis believed that Article IV of the Confederation conferred national citizenship upon citizens of the states. 67 Taney, on the other hand, apparently believed that national citizenship was not created until the new government was formed in 1787. He believed that the Constitution created in all the states a class who were citizens in the national sense and who became citizens of the United States. It is clear that Taney did not mean to say that all persons deemed citizens by the states after 1787 were citizens of the United States; and, it is important that he considered that those who were national citizens were such by national and not state authority. In stating that the union formed in 1787 was of "members of distinct and separate communities" he meant that the union consisted only of those in the states who by some process of national selection, were made citizens of the United States. After 1787 the states had the

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66 Talbott v. Jansen (1795) 3 Dallas, 133; Cassie v. Ballou (1832) 6 Peters, 761; and Prentiss v. Brennan, (1851), Fed. Case No. 11,333. Supra. 56
67 Supra. 102.
power to select their own citizens, but this "distinct and separate political union" possessed the exclusive right to select its citizens.

From the standpoint of a legal basis or definition it is obvious that Taney's doctrine broke down at this point, for he could offer no legal rule by which those born in the United States became United States citizens. Naturalization of foreigners by congressional act was provided for in the Constitution, but it was only by historical process that a rule could be determined for those born in the United States. According to the view which the Chief Justice meant to convey citizens of the United States were those who in the national sense were deemed worthy of receiving the privileges of national citizenship. And in 1857 the precedent was that free Negroes were not among those considered worthy of being regarded as citizens of the United States, regardless of the position they might have occupied in relation to some of the states.

It is evident that Taney's doctrine was far too intangible and extra-legal to meet adequately the need of a constitutional definition of citizenship. It clearly demonstrated a truth that had again and again been brought out since the formation of the national government, that so long as there was no definition of citizenship in the Constitution, no amount of defining by legislative debate, executive ruling or judicial interpretation would provide a solution. Yet it was to Taney's eternal credit that he was pursuing an idea which was later to be confirmed by the Fourteenth Amendment and by the Supreme Court in its decisions in the Slaughter House and other cases. Justice Miller's clear distinction between state and national citizenship, as well as the privileges and immunities of state and national citi
citizenship, clearly revealed Taney to be on the path which led towards present-day views. And it was just such a force as the national will, which Taney conceived of as selecting national citizens, which later caused to be put in the form of the Fourteenth Amendment a legal definition which made citizenship of the United States a creation of national authority and independent of state action.

A second great difference which existed between Taney and Curtis was in their views on the privileges and immunities of citizenship. In holding there was a distinction between the privileges a person enjoyed as a citizen of the state and as a citizen of the United States, Taney was again expressing a doctrine that was anticipatory of later views. In this respect, as in the case of his doctrine that national citizenship originated from the authority of the United States, he anticipated Justice Miller's decision. Curtis, on the other hand, naturally found no place for such a distinction in the privileges and immunities clause. Unlike Taney he saw no need for a recognition of both state and national authority in terms of citizenship.

For years before the decision was made in the Dred Scott case a phase of the problem of citizenship had been the question of the scope of the privileges and immunities of citizens. In general those who had denied that the free Negro was a citizen had pointed to the practice of denying him many of the privileges which whites enjoyed. That this was to be repudiated in more recent times, later consideration will show. On this point Curtis advocated a doctrine more nearly like present-day principles than did Taney. He denied that citizenship was to be measured in terms of the maximum of
privilege, and stated the modern doctrine that the franchise and the
privilege of office-holding were not attributes of national citizen-
ship. He declared "that citizenship under the Constitution of the
United States is not dependent on any political or civil right and
any attempt so to define it must lead to error". If these words
are given general application and are taken as a rule of citizenship,
their strong resemblance to present-day principles makes them signi-
ficant. With citizenship today dependent upon birth in the United
States or naturalization, Curtis' statement is modern in character.

Neither Taney nor Curtis held views acceptable today on the
question of citizenship by place of birth. Taney was clearly wrong
in the light of the present doctrine that birth in the United States,
with certain exceptions, confers citizenship. There is today no
room for the selection of citizens of the United States from among
those born here by an exercise of the national will. Curtis' doc-
trine of United States citizenship by virtue of birth in a state
is just as unacceptable as is Taney's, for by the Fourteenth Amendment
it was provided that "all persons born or naturalized in the United
States and subject to the jurisdiction thereof, are citizens of the
United States and of the States wherein they reside". By this pro-
vision United States citizenship is made completely independent of
any action by a state and is made to rest entirely upon the accident
of birth. Moreover, by the clause "subject to the jurisdiction
thereof" United States citizenship may result from birth in a
territory.

68 See Minor v. Happersett (1874) 21 Wallace, 162; Infra., 171.
Bradwell v. Ill. (1875) 16 Wallace, 130, Infra., 170.
69 19 Howard, 583. He said: "the truth is that citizenship
under the constitution is not dependent on any political or civil
right."
One other feature of Taney's opinion will serve to complete this analysis. Although Taney's position on the free Negro was to be repudiated by later legislative and judicial action, at least a portion of his doctrine on "inferior" peoples survives today in the policy of the United States towards the natives of colonial possessions. It appears that the courts have accepted, so far as the natives of our insular possessions are concerned, the doctrine that the peoples of these possessions are not citizens of the United States. The courts have used the term "national" to describe a position somewhat the same as Taney believed the free Negro occupied.

Chapter VIII

A Period of Transition: Continuation of Taney's Doctrine, the Thirteenth Amendment, and the Civil Rights Bill of 1866

The period from the Dred Scott decision to the enactment of the Fourteenth Amendment resembles closely in confusion of thought and lack of agreement the years before 1857. However, if these years are considered in relation to both the preceding period and the one following, they represent a period of transition and take on a new and greater significance than if related to the earlier period alone. It is from this point of view that the leading legal and constitutional events of the years, 1857-1866 should be examined.

For a few years immediately following Taney's decision, his doctrines respecting the position of the free Negro were followed by the courts with strict fidelity. But with the coming of the civil struggle he was almost immediately repudiated.1 There followed in quick succession, action by the executive and legislative departments of the national government designed to set aside the Dred Scott decision for all time, and to place the free Negro in a position of being a citizen. First, there was the ruling of Attorney General Bates in 1862; second, the Thirteenth Amendment; and finally, the Civil Rights Bill of 1866, all being to the effect that free Negroes were citizens of the United States.

Four decisions in southern states, all made in 1859, represent the continuation of the views of Taney.2 Opinions in all of these

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1 Story, Commentaries, II, 553.
cases cited Taney in support of the doctrine that free Negroes were not citizens; and the opinion in the Dred Scott case was really so closely followed that it will be necessary to discuss them only briefly. The case of Mitchell v. Wells, however, is of special interest because it is the only one in which recognition was given to Taney's views on the origin of national citizenship. The case involved a claim to citizenship in Mississippi on the ground that the defendant a [Negro] had been a citizen of Ohio. Justice Harris in the opinion for the Court of Errors and Appeals cited Taney's opinion that the states could not create citizens of the United States. He said that "comity forbids that a sister State of this confederacy should seek to introduce into the family of States, a class of United States citizens] as equals or associates, a caste of different color, and acknowledged inferiority. . . ."

It is scarcely necessary to comment on Justice Harris' illogical position of borrowing Taney's doctrine of the origin of national citizenship through federal authority and at the same time referring to the union as "this confederacy". This is another excellent illustration of the common effect of the federal system on attempts to define citizenship.

By far the most significant statement on the subject of citizenship which was made in the early years of the Civil War was a ruling of Attorney General Edwin Bates in 1862. The Attorney General had been asked by Secretary of Navy Welles whether or not free Negroes were citizens of the United States. Bates began his

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4 37 Miss., 261.
5 Ops. Atty Gen., X. 382 et seq.
discussion of the question with the observation that the subject of citizenship "is as little understood in its details and elements, the question as open to argument and speculative criticism, as it was at the beginning of the Government". However, he proceeded to rule on the citizenship of the free Negro without any considerable attention to the proposition that the subject was, even up to that time, in an unsettled state. An earlier ruling by the Attorney General was repudiated with the statement that no satisfactory definition of citizenship was to be found in the courts or in a continuous policy of the administrative branch of the government.

Bates evidently had Taney in mind as one who had established gradations in citizenship. After referring to "citizenship of higher and lower degree in point of legal virtue and efficiency" as it had been conceived by some, he used the following significant words which were evidently directed at Taney's distinction between state and national citizenship: "one grade in the sense of the Constitution, and another inferior grade made by a State, and not recognized by the Constitution".

There was no satisfactory definition of citizenship in the constitution, he said, for it did not "declare who are and who are not citizens, nor does it attempt to describe the constituent elements of citizenship". But in words with which Justice Curtis would be in agreement, Bates indicated that he was inclined to the view that the Constitution left the determination of citizenship

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6 Ibid., 383.
7 Ibid.
8 Ibid., 388.
9 Ibid., 385-386.
"where it found it, resting upon the fact of birth, and upon the laws of the several States". Proof of
this he found in such expressions in the Constitution as "by the
people of the several states" and "elected of the several States". 10

Bates next sought to show that citizenship did not depend
upon political privileges, such as the right to vote and hold office.
He declared that "no person in the United States ever exercised the
right of suffrage in virtue of the naked unassisted fact of citizen-
ship". In every instance the right depends upon some additional
fact and cumulative qualification, which may as perfectly exist with-
out, as with citizenship. 11 Since voting and holding office were not
essential to citizenship, the deprivation of these privileges did not
amount to a deprivation of citizenship. The term citizen had been
placed in the Constitution only "to express the political quality of
the individual in his relation to the nation, to declare that he is
a member of the body politic..." 12 This relationship implied the
reciprocal obligation of allegiance on the part of the citizen and
protection on the part of the government. This was the sum-total
of citizenship, and he knew of no other "political citizenship,
higher or lower, state or national... The phrase a citizen of the
United States, without additional qualifications, means neither more
or less than a member of a nation..." 13

Although the point is not stressed, Bates declared that "every
citizen of a State is necessarily a citizen of the United States, and
... it is equally clear that every citizen of the United States

10 Ibid.
11 Ibid., 387.
12 Ibid.
13 Ibid.
is a citizen of the particular State in which he is domiciled". But it seems that this statement should not be taken as a view on the origin of citizenship, but rather as an expression of the opinion of the application to all persons of the dual character of citizenship. That it was not meant as an expression of doctrine on the origin of citizenship seems apparent when it is noted that, if it were, the states would be in a position to create citizens of the United States and that at the same time citizens of the United States were considered citizens of the states in which they resided. It may be concluded that Bates was not interested in the origin of national citizenship. His chief interest and contention, it seems, was that all persons in the United States who, were not aliens or visitors, were citizens of both state and nation.

Considerable stress was put in the ruling by Bates upon the inviolable character of national citizenship as it was related to state action. "Every citizen of the United States is a component member of the nation with rights and duties, under the Constitution and laws of the United States which can not be destroyed or abridged by the laws by any particular State". In this statement there was a recognition of the doctrine that accompanying citizenship of the United States there was a set of privileges and immunities which were beyond state control. There was not, however, any suggestion of a view that the entire body of privileges and immunities may be divided between the state and the nation, and that

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14 Ibid.
15 Ibid., 400.
the latter is not the protector of the rights arising from state citizenship. 16

Bates recognized completely the great influence that the free Negro had on the determination of a rule of citizenship in the United States. The subject had been "embarrassed and obscured by the fact that it is beset with artificial difficulties extrinsic to its nature. . . These artificial difficulties were caused by the presence of a large class of people whose physical qualities visibly distinguishes them from the mass of people and makes a different race, and who for the most part are held in bondage. 17 Negroes had been excluded from citizenship because of their degraded position. But why had not whites lost their citizenship when in the past they were subject to such humiliating punishment as the lash, the pillory and the cropping of ears? 18 In reality, it was the opinion of the Attorney General that there had been entirely too much confusion between citizenship and privileges of citizenship. Citizenship of the United States should be interpreted to mean "the simple expression of the political status of a person in connection with the nation that he is a member of the body politic. 19 The Constitution did not "specify his rights and duties as a citizen. . . . If there are grades and classes of citizens. . . it would seem that there must be something to distinguish the grades, some difference in their rights, privileges and immunities of the different classes. 20

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15 As in the decision in the Slaughter House cases (1873)
16 Wallace, 36. Infra, 153 et seq.
17 Oss. Attys. Gen., 390-391
18 Ibid., 398.
19 Ibid., 401.
20 Ibid.
Having decided that citizenship did not depend upon any specified privileges and immunities, the Attorney General then proceeded to assert that the simplest rule of determining who were citizens was the common-law principle of citizenship by birth in the United States. There was no better claim than that based on "accident of birth".

"The Constitution in speaking of natural-born citizens used no affirmative language to make them such, but only recognizes and reaffirms the universal principle... that the people born in a country do constitute the nation..."[21]

For several reasons this ruling by Bates has seemed of sufficient significance to be quoted and to be discussed at length. In the first place, he had the insight to see that the free Negro had been a mighty factor in surrounding any discussion of citizenship with confusion and lack of understanding. Closely associated with this, was the manner in which he dealt with the problem of the relationship of citizens and their privileges and immunities. The predecessors of Bates had allowed their discussions to bog down with unsuccessful attempts to enumerate and define the privileges and immunities upon which they had made citizenship depend. Instead of this complicated system, citizenship of the United States was defined by Bates as "the simple expression of the political status of a person in connection with the nation..."[22] It was Bates' view that the political status of an individual born in the United States was established simply by his being native-born.

[21] Ibid., 395.
[22] Ibid., 401.
There is great danger, of course, in declaring as he did that too much attention may be paid to the privileges and immunities of citizenship. This is now particularly true since a rule of citizenship has been established by a constitutional provision. Bates' day must of the confusion resulted from the attempt to arrive at a definition of citizenship from an indeterminate number of undefined privileges and immunities. Confusion was the result. The significance of the ruling of Bates was that he would take the simplest rule of citizenship known to men, rather than try to arrive at a definition of citizenship from ill-defined privileges and immunities. It is this that seems to be the contribution of Edwin Bates to the search for a solution to the problems of citizenship.

One other view of Bates should be looked at from the standpoint of its place in the general description of the search for a rule of citizenship. There was considerable of the present-day view in his opinion that citizens of the United States possessed privileges which the states can not disturb or deny.

In conclusion it may be said that Attorney-General Edwin Bates saw better than his predecessors the need of reducing the rule of citizenship to its simplest terms; he anticipated recent opinion also in the view that United States citizens were immune from abridgement of their privileges and immunities by the states, and in the view that citizenship existed independent of a maximum of privileges and immunities.

In view of the opinion of Attorney General Bates that free Negroes were citizens of the United States the Thirteenth Amendment appears important as greatly increasing the number of poten-
tial citizens. But it added little of importance toward a definition of citizenship and gave practically no assistance in the development of the present-day concept of citizenship. Yet it did show the tendency of Republican thought. In spite of Bates' view it does not appear that the free Negro was regarded at first as being made a citizen by the amendment, for if he had been so regarded beyond any question, the Civil Rights Bill of 1866 and the Fourteenth Amendment would not have been necessary. The position of the free Negro after the adoption of the Thirteenth Amendment may be gathered from the following opinion of Judge Lindsay given in 1874 for the Supreme Court of Kentucky: "the thirteenth amendment abolished slavery and prohibited involuntary servitude, except for punishment for crime, but it left the negro under all his former disabilities and with no political rights except as various states might see proper to permit him." It is to be noted that the opinion shows Nancy's influence in making citizenship dependent upon political privileges and freedom from social disabilities.

There was little in the discussions in the Congress which drafted the Thirteenth Amendment that would indicate that the members intended at one stroke to emancipate and to endow Negroes with citizenship. Neither the radicals who urged emancipation of all Negroes, nor the conservatives who attacked the amendment as an unconstitutional denial of the police power of the state.

24 For discussion in the Senate see Cong. Globe, 38 Cong. 1 Sess., 1324 passim; for the House, see ibid., 686 et passim. Cong. Globe, 39 Cong., 2 Sess., 53 et passim.
gave any serious attention to the question of the political and social position of the new freedmen. It is probable that the knowledge of the effect of the free Negro on the problem of citizenship in the past, explains the reluctance in Congress to discuss the subject of the new freedmen's position in society. It is certain too, that in the eagerness to hurry the amendment through, all complicating aspects were avoided.

It is only by inference that any insight into the views in Congress on Negro citizenship can be determined. Since the opponents of the amendment attacked it on the grounds that it violated the police power of the state, it is possible that they included under this power the right of a state to create its own citizens and thus indirectly citizens of the United States.

The uncertain position in which the Negro was at first left by the Thirteenth Amendment was not to continue for long. As was said by Blaine, a contemporary observer, "opinion and events moved rapidly to the point where it was considered advisable to place the matter of citizenship on such substantial foundation as would prevent the possibility of sinister interpretation by the Judiciary and to guard it at the same time against construction in different

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25 Illustrative of the attitude of the conservatives was the speech of Henry Wilson in the Senate who urged the amendment as a just retribution against the South for causing the war. Cong. Globe, 38 Cong., 1 Sess., 1224 et seq. Representative Ingersoll of Illinois said he desired to see the Negro receive his "natural and God-given rights". Ibid., 2990.

26 For a representative speech in the Senate contending that the amendment violated the police power of the states see the speech of Garrett Davis of Kentucky, Cong. Globe, 38 Cong., 1 Sess., Append., 104 seq.; for a representative speech in the House see the speech of George H. Pendleton, Ibid., 2990 seq., and speech of S. S. Cox, Ibid., Cong. Globe, 38 Cong., 2 Sess., 238 seq.
States". 27 Blaine very definitely had the Thirteenth Amendment in mind in this statement, but his remarks were more significant in which he anticipated the Fourteenth Amendment. In a statement in which he clearly showed an appreciation of the effect of the war on nationality he said:

"If we are now to have a broader nationality as the result of our civil struggle, it was apparent to the mass of men as well as the publicist and statesman, that citizenship should be placed on unquestionable ground — on ground so plain that the humblest man who should inherit its protection would comprehend the extent and significance of his title". 28

The first attempt by Congress to place citizenship on a "subs-
tantial foundation" was made in the enactment of the Civil Rights Bill of 1866. 29 In part it provided for the following:

"all persons born in the United States and not subject to any foreign power, excepting Indians not taxed, are hereby declared to be citizens of the United States; and such citizens . . . shall have the same right, in every State and Territ-
tory, to make and enforce contracts, to sue, be parties, and give evidence, and to inherit, pur-
chase, lease, sell, hold, and convey real and personal property, and to full and equal bene-
fit of all laws and proceedings for the security of person and property, as is enjoyed by white persons, and shall be subject to like punish-
ment, pains, and penalties, and to none other. . ." 30

Additional articles provided for a penalty of $1000 fine or one year imprisonment or both, for violation of the act, and for the District United States Courts to have jurisdiction. 31

27 James G. Blaine, Twenty Years in Congress, II, 189.
28 Ibid.
29 U.S. Stat. at Large, XIV, Ch. XXXI, p. 27.
30 Ibid.
31 Ibid.
In providing for an addition to the class of citizens of the United States there was raised again the question of the right of Congress to create citizens by any means other than by naturalization. It will be recalled that at the time of the debate over the Missouri Constitution, it had been denied that Congress was empowered to create citizens of the United States by any other method. In addition, the argument had occurred again and again in the state courts. It is not surprising that this same argument was offered against the Civil Rights Bill. Senator Davis of Kentucky argued that since Negroes were not foreigners, they, therefore, could not be made citizens by Congress. They could not be made citizens by the States, because they had forfeited all rights of creating citizens upon becoming members of the union.32 Further attack on the bill was made by Davis on the ground that if Negroes were made citizens, they would immediately come into possession of a full measure of privileges and immunities.33

No speech in the Senate on the Civil Rights Bill was more significant than that made by Beverdy Johnson of Maryland. In a strong argument in denial of the contention that Negroes were not eligible to citizenship, he asserted that if citizenship were to be confined to white persons, it would be only fair to assume that the framers of the Constitution would have made specific provision for it by

32 Cong. Globe, 39 Cong., 1 Sess., 523. It is interesting to note that while Davis denied the state the right to create citizens, he held that the Thirteenth Amendment violated the police power of the states. To have been consistent he should have defended a state's right to create citizens as an exercise of the police power.

33 Ibid. Senator Cowan of Pennsylvania also argued against the bill as an unconstitutional act of Congress.
providing that "no man should be a citizen of the United States except
a white man." But it was, he thought, state and not national ac-
tion by which Negroes could come into the privileges of citizenship.
From this point Johnson proceeded to deal with the decisions of Taney
and Curtis in the Dred Scott case. Taney had erred, he said, "in the
historical facts were or were not negroes in the States of the United
States citizens of such States, all or any one, at the time the Con-
stitution was adopted." If the court had decided that they were
citizens of the States before the adoption of the Constitution, then
according to their own view it would have followed that they became
under the constitution citizens of the United States. . . . It had
been assumed by Justice Curtis that citizenship might be achieved by
nativity in the United States. But in Johnson's opinion this could
not be interpreted as sufficient to make a person a citizen of a
state, and by virtue of his state citizenship, a citizen of the United
States. What was necessary was for a person to be accepted first as
a citizen of a state, then he became a citizen of the United States.
It was therefore within the power of Congress only to declare that
citizens of the states became citizens of the United States. He
agreed with Curtis, he said, that "citizenship of the United States,
consequent upon birth in a State, is dependent upon the fact whether
the constitution and laws of the State make the party so born a citi-
zen of the State.

34 Ibid., 530.
35 Ibid., 529.
36 Ibid. It seems that Johnson did not see the full meaning
of Taney's distinction between citizens of the states and those whom
he considered citizens in a national sense before and after the for-
mation of the constitution. The latter class he referred to as "citih-
zens in the several states."
37 Ibid., 1776.
38 Ibid., 1777.
Johnson was apparently greatly influenced by Curtis' doctrine on the origin of national citizenship through the authority and action of the states. From this doctrine Johnson decided that naturalized persons were not citizens of the states unless accepted by state action. It was his belief that an act of Congress removed the disability of alienage only, but that it did not create a citizen of any state.

Johnson objected to the proposed Civil Rights Bill because he regarded it as hostile to the criminal codes of the states. He objected that "it converts a man that is not a citizen of a State into a citizen of the State, it gives him all the rights that belong to a citizen of the State..." Although Johnson and Curtis were in agreement on the origin of national citizenship, Johnson differed from Curtis in that he regarded the privileges and immunities of national citizenship as separate and distinct from those of state citizenship. For instance, he considered that the national government must protect citizens against invasion, because the state had no place in foreign affairs. But such rights as were included in the Civil Rights Bill were state and not national rights, and the bill then being considered was very definitely a violation of the rights of the states. It was the duty of the national government "to protect citizens of the United States where that protection can not be obtained through the instrumentality of the States; but where the rights of citizens of the United States are given by State laws over subjects intrusted exclusively to state legislation.

39 Ibid., 1775.
40 Ibid., 1776.
41 Ibid., 1777.
it is the exclusive business of the State to protect them". 42

It was on this point that Beverdy Johnson was perhaps most modern in his ideas on the subject of citizenship. In adhering to the doctrine of Justice Curtis that national citizenship originated with state authority and action, he was destined to be repudiated along with his predecessor by the Fourteenth Amendment. But in making a distinction between the privileges and immunities of state and national citizenship he was urging acceptance of a doctrine that was to become, beginning with the Slaughter House decision in 1873, a permanent principle of American citizenship. 43

The Civil Rights Bill of 1866 was sponsored in the Senate by Lyman Trumbull of Illinois, chairman of the Judiciary Committee, who, like Beverdy Johnson, was one of the leading constitutional lawyers of the period. No better impression of the confusion of thought existing at the time can be secured than from a comparison of Trumbull and Johnson. In most respects Trumbull broke completely with his contemporary's doctrines. It will be recalled that Johnson believed that only those naturalized citizens, whom the states chose to accept, could become citizens of the states. 44 To this Trumbull replied that when a naturalized foreigner became a citizen of the United States, "he certainly has a right . . . to go into any State of the union and there reside. Does he not then

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42 Ibid.
43 It should be noted that Johnson did not carry his distinction between the privileges and immunities of state and national citizenship to its logical conclusion, inasmuch as he apparently conceived of the states as protecting some of the rights of United States citizenship.
44 Supra., 127
become a citizen of the State?" \textsuperscript{45} The naturalized foreigner became a citizen of the state in which he was naturalized and had precisely the same rights as native citizens of that state.

Another distinction between the views of Trumbull and Johnson was in the idea of the former on the privileges and immunities of national citizenship. Where Johnson had made the privileges and immunities of national citizenship separate and distinct from the rights of state citizenship, Trumbull made state citizenship a creation of national citizenship, and he saw no distinction between the privileges and immunities of the two. He emphasized the doctrine of Chief Justice Marshall \textsuperscript{46} that citizens of the United States were citizens of the states. He described the rights of United States citizenship as "those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill and they belong to them in all the States of the Union. . ." \textsuperscript{47}

It is clearly evident that Trumbull looked upon the privileges and immunities of state citizenship as being the same as the rights of national citizenship and that they were to be determined always by national authority. He believed that it was by virtue of his national citizenship that an individual could claim the rights of personal security, liberty and private property. \textsuperscript{48}

\begin{itemize}
\item \textsuperscript{45} \textit{Conc.}, \textit{Globe}, 39 Cong., 1 Sess., 1781.
\item \textsuperscript{46} \textit{Supra}.
\item \textsuperscript{47} \textit{Conc.}, \textit{Globe}, 39 Cong., 1 Sess., 1757.
\item \textsuperscript{48} \textit{Ibid.}. The Supreme Court denied this doctrine in the decision in the Slaughter House cases (1873), \textit{16 Wallace}, 36 \textit{Infra}. \textsuperscript{152} \et seq.
\end{itemize}

The clause in the Civil Rights Bill "excluding Indians not taxed" represented an effort to prevent most of the Indians in the United States from becoming citizens through the new measure. It was explained by Senator Trumbull that the Judiciary Committee had first thought of phrasing the bill so as to include all persons not subject to any "tribal authority", but that this was dismissed because of the realization that many Indians not subject to tribal authority were "yet so wild and uncivilized as to be unfit for citizenship". It was then decided to phrase the bill as it was drafted in the final form.49

The form in which that part of the bill dealing with Indians had been drafted was not at first acceptable to Senators from the Northwest, where the Indian population was greatest. Senator Doolittle of Wisconsin opposed the granting of citizenship to Indians because they were unprepared for it.50 Senator Williams of Oregon opposed granting citizenship to a class that were treated as wards and were under the control of the government and the Indian tribes. In order to meet the difficulty, he wanted an amendment which would distinguish between "wild, savage and untamed Indians and those who associated with white people, own property, and exercise the privileges that generally attend a citizen in a community".51

The responsibility of explaining to the satisfaction of the senators from the Northwest the clause "excluding Indians not taxed" fell to Senator Trumbull. This expression, he said, "meant that

49 Ibid. 571.
50 Ibid.
51 Ibid. 573.
Indians were not counted in the census. They are not regarded as part of our people. . ."52 With this assurance, the debate was resumed on other features of the bill.

Two things should be pointed out concerning the debate over the relation of Indians to the Civil Rights Bill. The first is that there was a desire to set up a cultural requirement for admitting Indians to citizenship, which was comparable in some degree to the view of the opponents of Negro citizenship. In the second place, there was a recognition of the principle that although some Indians were made citizens of the United States, the individual states were not to be prohibited from passing laws "to protect the general peace and welfare of the United States".53 It is significant that at the time that such conservatism was being displayed toward the Indians, and it was admitted that states might restrict them by an exercise of the police power, citizenship for all Negroes was being demanded and it was denied that the states might exercise their police power in dealing with the colored race.

In the House much the same confusion of thought was brought out in debate. One of the central characteristics of the House debate was the failure among those who supported the bill to distinguish between the privileges and immunities of state and United States citizenship. Illustrative of this were the remarks of Representative Wilson, a Republican from Iowa, and chairman of the

52 Ibid.

53 Ibid., 574. This view was expressed by Senator Henderson of Missouri. This view as well as his specific recommendation that the states might restrict the sale of liquor to Indians who were United States citizens was not questioned.
Committee on Judiciary. Early in the debate Wilson declared that citizenship could best be defined in accordance with English thought which "must lead to the conclusion that every person born in the United States is a natural-born citizen of such States, except it may be that children born on our soil to temporary sojourners or representatives of foreign governments are not native-born citizens of the United States". 54 The right of suffrage was not an attribute of United States citizenship, nor was the right to sit on juries or to attend the public schools; for these were matters left to the control of the states. The immunities of United States citizenship "secure to citizens of the United States equality in the exemptions of the law. A colored citizen shall not because he is colored be subject to obligations, duties, pains, and penalties from which other citizens are exempt". 55 These rights were not civil rights or immunities. The civil rights of an individual were simply the "absolute rights such as the right of personal security, the right of personal liberty and the right to acquire and enjoy property". 56 It is difficult to say whether Representative Wilson recognized fully a distinction between state and national citizenship, but he at least realized a distinction in stating that control over the suffrage, jury service and schools belonged to the states. 57 He was careful to state that "the bill so far as it de-

54 Ibid., 117. In these exceptions Wilson anticipated the decision of the Supreme Court in the case of U.S. v. Wong Kim Ark (1898) 169 U.S. 549. In re. 201 et seq.
55 Ibid.
56 Ibid.
57 Ibid.
declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. . ." The spirit of the Constitution was being reduced to statute form, and no new rights or principles were being established. All that the states were required to do, in order to comply with the proposed law, was to follow the principles laid down by Justice Washington in the case of Corfield v. Coryell.

Representative Thayer held a view similar to Wilson's on the rights of the citizens of the United States. He considered that they were "those rights which constitute the essence of freedom, and which are common to all civilized States. . ." and which secured "life, and property and made men equal before the law. . ."

Representative Shellabarger of Ohio took much the same view on the privileges and immunities of United States citizens as did Wilson and Thayer. It was the duty of Congress to protect the rights of petition and property, and he also believed:

"that the Government which has the exclusive right to confer citizenship and which is entitled to demand service and allegiance, which is supreme over that due any State may, may, must protect those citizens in those rights which are fairly conducive and appropriate and necessary to the attainment of his protection as a citizen." 50

Although there is some indication in these words that a citizenship of the state was conceived of, one can not be sure that there was any sharp distinction between the privileges and immunities arising

53 Supra. 32.
60 Ibid., 1292.
from the two authorities of state and nation. The most reasonable conclusion that may be made from Shellabarger's statement is that he was far behind Johnson in the Senate in this respect.

Only one member of the lower house indicated a clear cut distinction between the rights of states and United States citizenship. This was Representative Raymond of Indiana. In speaking of Article IV, section 2 of the United States Constitution, he said: "we must not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the union". It had been intended by Article IV, section 2, to "secure equal privileges and immunities to citizens of each State while temporarily sojourning in another State". Its secondary purpose was to prevent any state from discriminating in favor of or against citizens of other states. For example Indiana was prohibited by this provision from giving to citizens of Kentucky "any privileges and immunities it does not equally give to the same class of citizens from any other State".

It is difficult to summarize the congressional discussion on the Civil Rights Bill because of the uncertain position taken by most of the members. This uncertainty was undoubtedly due to both the past and the present; from the past there was the accumulated heritage of confusion that had characterized legal thinking on the subject of citizenship throughout the first three-quarters of the Nineteenth Century, while the present contributed an increase in the stress on nationalism. The effect of the latter was to make

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61 Ibid., 1269.
62 Ibid.
it much harder to maintain a balance between the powers of the state and nation in matters relating to the rights of citizens. The one outstanding feature of the debates as far as citizenship was concerned was the failure to distinguish between the privileges and immunities of state and United States citizenship. And this it must be remembered, was taking place just at the time that the power and scope of the national government was being enlarged in practically every field. Under such circumstances it was inevitable that there should be a movement toward the gradual inclusion of all privileges and immunities under the authority and protection of the United States government. The tendency to do this as shown in the Civil Rights Bill -- it reached its height in the Fourteenth Amendment and the enforcement acts of 1870 and 1871.

In addition to this tendency to give national citizenship greater emphasis and to enlarge its privileges and immunities at the expense of state citizenship, there are to be noted two other principles which received wide acceptance. First, Curtis' view that national citizenship originated from state citizenship was accepted by Beverdy Johnson only, while the view of Taney that national citizenship was an outgrowth of national authority was widely accepted. Secondly, it is to be noted that almost without exception, the doctrine was held that citizenship was an inevitable derivative of birth in the nation.

It was not until after the adoption of the Fourteenth Amendment that the principles set forth in the Civil Rights Bill received careful attention from the courts. Only three cases were
decided by the federal tribunals, and of these, only one was the basis of a decision by the United States Supreme Court. The case of United States v. Rhodeis involved the right of a Negro to testify against a defendant under circumstances in which a white man was permitted to testify. The decision of Justice Swayne for the Circuit Court of the District of Kentucky went no further than to declare that the Thirteenth Amendment was no doubt intended to go beyond "mere consequences of manumission by private individuals."  

A decision by Chief Justice Chase for the Circuit Court of the District of Maryland was likewise brief. A Maryland statute provided for the apprenticing of Negroes although all members of the race had been freed by the state constitution of 1864. The court overruled the statute as a violation of the Civil Rights Bill, which it said had been enacted under the second article of the Thirteenth Amendment.

The opinion of the United States Supreme Court in the case of Biyew et al. v. United States was no more satisfactory as an interpretation of the subject of citizenship as it had been affected by the Civil Rights Bill, than the decisions made by the Circuit Courts. In the opinion for the court Justice Strong declared that the United States Circuit Court of the District of Kentucky had no jurisdiction of the crime of murder under the Civil Rights Bill.

63 (1871) Fed. Case No. 16,151.
64 Ibid.
66 (1871) 12 Wallace, 581.
and that this statute did not permit jurisdiction of the federal courts merely because two persons who witnessed a murder were Negroes and were prevented from testifying by Kentucky law.\textsuperscript{67}

\textsuperscript{67} Ibid., 583.
Chapter IX

The Fourteenth Amendment and the Enforcement Acts

The movement toward the sweeping away of all distinctions between the rights of state and United States citizenship which had been begun with the Civil Rights Bill reached its height in the amendment framed by Congress and adopted by the states by 1868. Further evidence of the intent of Congress was revealed in the Enforcement Acts of 1870 and 1871.

By the time Congress came to consider the resolution proposing the amendment, the question of who were citizens of the United States had been settled. It appears that by this time it was accepted as an established principle that all persons born in the United States (if subject to their jurisdiction) were citizens of the United States. Congress was so convinced of this, that the resolution as first proposed, and as it was adopted by the House, contained no definition of citizenship. Instead of the question of a rule of citizenship occupying the attention of the member, the privileges and immunities of citizenship pushed to the foreground as the chief topic of interest. The readiness on the part of the House to assume that there was no need of a definition of United States citizenship may have been because of the belief that the amendment was simply a statement of that which was already the law of the land. Senator Howard, in discussing the definition of citizenship added to the original House resolution, said that this clause was "simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States and subject to their jurisdiction"
is by virtue of natural law a citizen of the United States. ... Thaddeus Stevens, in urging the adoption of the resolution in the House, did not emphasize the need of setting up a rule to determine who were citizens, but saw in it the answer to a need of putting the provisions of the Civil Rights Bill protecting civil rights beyond the danger of repeal by the states. It was the duty of Congress "to correct the unjust legislation of the States so far that the law which operates upon one man shall operate equally upon all". Applying this principle to the problem of racial discrimination in the South, Stevens demanded that the criminal laws there be applied to whites and blacks alike, in order that whatever laws protected whites should afford equal protection to Negroes.

In these few remarks of Thaddeus Stevens are to be found the intent and purpose of Congress in enacting the Fourteenth Amendment. That purpose was to transfer the guardianship of all civil rights from the states to the general government. It was intended that instead of the national government acting as guarantor of a class of rights associated with national citizenship only, it assume responsibility for all privileges and immunities, including those now regarded as under the control of the states. No interpretation other than this can be placed upon the assertion of Stevens that it was the duty of Congress to correct the injustices caused by the discriminatory legislation of the southern states.

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1 Cong. Globe, 39 Cong., 1 Sess., 2890. This view was later repeated by the Supreme Court in its decision in the case of U.S. v. Wong Kim Ark. Infra, 201-202.
2 Cong. Globe, 39 Cong., 1 Sess., 2459.
3 Ibid.
4 Ibid.
Stevens spoke for a house in which the dominant Republican majority was almost solidly in favor of the resolution, and the result was that little opposition was made to his extreme views. It appears, since these views were not challenged, that they were generally acceptable. A speech of another member of the House should, however, be considered, since it confirms Stevens and demonstrates beyond a doubt the intent of the House. That member was James A. Bingham of Ohio, who spoke of the privileges and immunities clause of the first section of the proposed amendment as empowering the national government "to protect by national law the privileges and immunities of all citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State". 6

In the Senate, Howard of Michigan spoke in a manner similar to Stevens and Bingham, of the purpose and intent of the amendment. It was his belief that its purpose was to make the United States government the protector of all the privileges and immunities known to civilization. His approach to the problem of determining what these were began with Justice Washington's famous enumeration in the case of Corfield v. Coryell. 7 The precise nature of these rights could not be defined, Howard said, but they formed a part of the body of

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5 The vote in the House on May 10, 1866 in favor of the resolution was 123-37. Ibid., 2545.
6 Cong. Globe, 39 Cong., 1 Sess., 2542.
7 Supra., 30.
privileges and immunities of United States citizens. To them he would add the rights secured by the first eight amendments to the Constitution as further privileges of national citizenship. These two classes of privileges and immunities were secured by the Constitution, but Congress was powerless to enforce either of them against infringement by states. Furthermore they were not a restraint upon the states. To meet this situation, the proposed amendment would provide the legal instrument necessary to guarantee the rights of citizenship.

There is no question that the foregoing statements of members of the House and Senate indicate that there was a determination on the part of Congress to make the national government the protector of all privileges and immunities of citizenship, by wiping out of any distinction between the privileges and immunities. As a recent writer has said it was intended to revolutionize the federal system; "to nationalize all civil rights; to make the Federal power supreme; and to bring the private life of every citizen directly under the eyes of Congress."

Within three years after the adoption of the Fourteenth Amendment, Congress enacted three different laws designed to carry out its protective features. Whatever had been lacking

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8 Howard overlooked the fact that the Supreme Court had denied that the amendments curbed the states. Barron v. Baltimore (1833). supra, 31. Later confirmation of this view was made in Twitchell v. The Commonwealth (1868) 7 Wallace 321; infra., 188 ; The Justice v. Hurry (1869) 9 Wallace 274. infra., 189 ; Presser v. Ill. (1885) 116 U.S. 252, infra., 189 ; Spies v. Ill. (1897), 123 U.S. infra., 190.


10 Charles D. Collins, The Fourteenth Amendment and the States, 10.

in a full and complete interpretation of the first section of the amendment on the part of members of Congress was supplied by the enactment of these measures in 1870 and 1871; based as they were on the enforcement clause, they stand as an interpretation of the amendment that leaves no doubt of the intent of its framers. It will be recalled that the Fourteenth and Fifteenth Amendments provided for action on the part of the national authority in case of denial of the rights of citizenship by the states. It failed, however, to provide for a curb on denial by individuals. Nevertheless the first enforcement act was directed against any person within the states who committed acts resulting in the denial of privileges and immunities. It was provided by section 1 that all United States citizens who were otherwise qualified to vote "shall be entitled and allowed to vote... without distinction of race, color, or previous condition of servitude." It was also provided that fines and imprisonment were to be meted out to individuals or groups of individuals who deprived any person of his right of franchise, of his civil rights and equality. Jurisdiction over cases arising from the violation of the law was vested in the United States Courts, while the President was empowered to use the military and naval forces to enforce the act.

12 Ibid., 102.
13 Ibid.
14 Ibid., 103.
15 Ibid., 105.
16 Ibid. Of the first enforcement act John W. Burgess wrote in 1902: "There is not the slightest doubt in the minds of any good constitutional lawyer at the present time, that Congress overstepped its constitutional powers... which related to the exercise of the suffrage and trenched upon the reserved power of the States". Reconstruction and the Constitution, 255.
The first enforcement act was supplemented by an act of February 28, 1871, which is more commonly known as the Federal Election Act. This measure placed the entire control of registration and voting in the hands of officers of the United States when and where representatives to Congress were to be chosen. Since state and congressional elections were usually held at the same time and place, and under the same control, it was inevitable that state elections would pass under federal control. And this undoubtedly was the chief purpose of the act so far as the southern states were concerned.

The third enforcement measure enacted by Congress has been usually known as the Ku Klux Act, since its purpose was to strike at that organization. Of the enactment of this measure it has been said that "Congress simply threw to the winds the constitutional distribution of powers between the "States" and the United States Government in respect to civil liberty, crime and punishment. . ." The denial of the privileges and immunities of United States citizenship was made a federal offense. Conspiracy on the part of two or more persons was made subject to fine and imprisonment. The following acts were denounced by the law; conspiracy against the government or laws of the United States or its officers; conspiring to deny equal protection of the laws of the United States or the privileges and immunities of United States citizenship, and conspiracy to interfere with voting in the federal elections.

18 Burgess, Reconstruct. and Const., 257.
20 Ibid., 135.
In addition the President was empowered to suspend the writ of *habeas corpus* whenever in his opinion conditions within the states would cause justice to be denied.

Taking these acts as a whole the most obvious encroachment made by them on the states was in the control they exerted over political privilege: the regulation of registration and voting by federal supervisors, the placing of cases arising from the denial of the franchise in the hands of the federal courts, and the use of the army and navy to insure the enjoyment of the political privileges. And in providing so effectively for the protection of the civil rights of the citizens of the United States, there was not the slightest intention on the part of Congress to maintain a distinction between the privileges and immunities of state and national citizenship. The effect of this change was that the dual character of the rights of citizenship was completely obliterated and all privileges and immunities, irrespective of their source, were brought under the control and regulation of the national government. It should be recalled that dual citizenship and dual rights had been perceived by only a few up to the time of the adoption of the Fourteenth Amendment. Citizenship of the state and of the United States was recognized in the Fourteenth Amendment, but a corollated duality of privileges and immunities was not perceived. Thus the Enforcement Acts hardly represent a conscious encroachment on the states, or transfer to federal authority.

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One of the few provisions of the Fourteenth Amendment which was later interpreted in such a way as to violate the intentions of the framers was that portion of the first section which defines citizenship of the state and the United States.\textsuperscript{22} This definition had not been contained in the resolution as it was passed by the House on May 10, 1865.\textsuperscript{23} On May 29 Senator Howard of Michigan proposed to amend the resolution which the House had passed and sent to the Senate for its approval.\textsuperscript{24} This proposal was worded as the amendment was later approved by the Senate and House and ratified by the states. On June 8 the amended measure passed the Senate\textsuperscript{25} and it was approved by the House without debate five days later.\textsuperscript{26}

In discussing the proposed amendment to the resolution, Howard described it as "simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States and subject to their jurisdiction is by virtue of natural law a citizen of the United States. . .\textsuperscript{27}" He believed that it settled the question of citizenship by removing all doubt as to what persons were and were not citizens.\textsuperscript{28}

\textsuperscript{22} "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the States wherein they reside."

\textsuperscript{23} \textit{Cong. Globe,} 39 Cong., 1 Sess., 2869.

\textsuperscript{24} \textit{Ibid.}

\textsuperscript{25} For five days preceding the introduction of this amendment the Republicans had been in secret caucus. Benjamin J. Kendrick, \textit{The Committee of Fifteen on Reconstruction}, 316 n. Of this caucus the author said: "So far as I know the secret proceedings of this caucus have never come to light in memoirs, nor in letters published or unpublished has any senator then present made a statement of what went on in this caucus." \textit{Ibid.}

\textsuperscript{26} The final vote in the House on June 13, 1866 was 120 to 37.

\textsuperscript{27} \textit{Cong. Globe,} 39 Cong., 1 Sess., 2890.

\textsuperscript{28} \textit{Ibid.}
In later times the clause "subject to the jurisdiction thereof" was to be of importance.\textsuperscript{29} Because of this fact the interpretation placed upon it by Senator Howard at the time that the amendment was being considered is of interest and significance. Of the clause he had the following to say: "This will not of course, include persons born in the United States, who are foreigners, aliens, who belong to families of ambassadors, or foreign ministers."\textsuperscript{30} Senator Cowan of Pennsylvania asked "if the child of a Chinese immigrant in California is a citizen?" In view of the later decision of the Supreme Court in the case of\textsuperscript{31} this question was significant, or rather, the fact that members saw no need of answer, is of significance. Other senators joined Howard in support of the amendment proposed by him but not so much because they share his view that it was declaratory of the law of the land already, as because they saw a real need to remove the confusion that had surrounded the subject of citizenship. Reverdy Johnson declared that citizenship of the United States was recognized by the Constitution, but that there was a serious need of a definition of who were citizens.\textsuperscript{32} As matters then stood a citizen of a state became a citizen of the United States but there was a serious defect in the fact that there was no definition "as to how citizenship can exist in the United States except

through the medium of a citizenship of a State. 33

This defect which was pointed out by Johnson was corrected by
the first sentence of the first section of the amendment. This was
done by changing the origin of national citizenship so as to make
it dependent upon birth in the United States. There could no longer
be any doubt that citizens of the United States came into possession
of that character by the authority of the United States, instead of
being dependent upon the state. In addition, United States citizens
were also to be citizens of the states of their residence and the
primacy of United States citizenship to state citizenship was es-

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The relation of the Indians in the United States today to
the Fourteenth Amendment seems a minor matter, but at the time the
amendment was being discussed, its relation to the Indian problem
was a very important subject to members of Congress from the North-
west where the Indian population was large. Senator Boolittle of
Wisconsin expressed the fear that large numbers of Indians on the
reservations under the jurisdiction of the United States would be-
come citizens. 35 Senator Trumbull sought to quiet the fears of the
members from the Northwest by explaining that the term "subject to
the jurisdiction thereof" in the amendment meant "complete juris-
diction, not allegiance to anybody else." 36 Indian tribes

33 Ibid. See also the speech of Senator Henderson of Missouri
for the expression of a similar view. Ibid., 3031-3032.
34 Willoughby, Const. Law of the U.S. See also Selective
35 Cong. Globe, 39 Cong., 1 Sess., 2392.
36 Ibid.
with which the United States had treaties were not subject to the
jurisdiction of the United States and to have brought them under
such jurisdiction would violate treaties in which the United States
had pledged itself not to place the tribes under its laws. 37

There was no discussion in Congress on that section of the
amendment which forbids a state "to deprive any person of life,
liberty, or property without due process of law, or to deny to
any person within its jurisdiction the equal protection of the
laws". It is probable that these clauses were added to give the
Negro additional protection and that they had no special significance
at the time. In the earlier years due process had been interpreted
as applying to procedure rather than the substance of any alleged
right which might be involved. 38 It is more than likely then that
the framers of the amendment had only in mind the guaranteeing of
such court procedure, that the Negro would be entitled to the same
rules in the courts as whites. As has been said "only in subse-
quent years did the full force of the amendment come to light..." 39
And it was not until 1879 that the equal protection clause came be-
fore the Supreme Court for interpretation. 40

There has been no period in the history of the United States
in which a greater revolution has been achieved in the constitutional
structure of the American government, than in the period from the

37 Ibid.
38 Andrew C. McLaughlin. A Constitutional History of the
United States, 461.
39 Ibid.
Dred Scott decision to the decision in the Slaughter House cases in 1873. Within this comparatively short time there were admitted to United States citizenship as well as to state citizenship some three to four millions of Negroes, who in 1857 had been adjudged by the highest tribunal in the land as unworthy to be admitted to those privileges. And in order to admit this class there had been adopted and incorporated into the Constitution of the United States a definition of citizenship. In providing that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the States wherein they reside", there was offered for the first time in American legal history an opportunity to avoid the controversy and confusion that had been so characteristic of earlier periods. Congress already demonstrated a recognition of a distinction between state and United States citizenship by including this clause in the amendment. After the adoption of the amendment there was no question of the acceptance of the doctrine of dual citizenship. In not distinguishing between the privileges and immunities of state and United States citizens, Congress was reflecting the vagueness on that problem which had been so common in the years before the enactment of the amendment. Since no distinction was seen between rights of state and United States citizens by Congress, it saw no need to make a distinction in the amendment in the privileges and immunities of citizenship.

The belief of the framers of the amendment that they had produced a legal instrument by which the national government would be empowered to absorb completely the jurisdiction of the states over
their citizens was not shared by the United States Supreme Court, and beginning with the Slaughter House decision in 1873, the intention of Congress was largely repudiated. But this is not to say that the work of Congress was in vain; on the contrary, without the amendment the courts could not then and after have announced doctrines which have been of lasting significance and use.
Chapter X

The Decision in the Slaughter House Cases

Until 1873 the intent of Congress to set aside all distinctions between the privileges and immunities of state and national citizenship by placing all privileges and immunities beyond the reach of the authority of the states remained unchallenged by the United States Supreme Court. Up to within a few years of the decision in the Slaughter House cases\(^1\) the courts had acquiesced in the Reconstruction program and had not disturbed the strong nationalistic program of Congress.\(^2\) But with the year 1873 there came a distinct reaction against extreme nationalism and the courts began an open renunciation of its previous acquiescence to the policy of Congress.\(^3\)

Although the full tread of the opinion rendered in 1873 was not fully appreciated until the decision was given in the Civil Rights cases ten years later, all the fundamentals of the present-day view on American citizenship were set forth by Justice Miller in the de-

\(^1\) 16 Wallace, 36.

\(^2\) In the cases of Mississippi v. Johnson (1867) 4 Wallace 475 and Georgia v. Stanton (1867) 6 Wallace, 50, the Supreme Court had denied it had jurisdiction in the reconstruction program. But in other matters the court showed signs of reaction against strong nationalism in decisions in the cases of Thomas v. Union Pacific R.R. Co. (1870) 9 Wallace, 579, in which the court upheld the right of a state to tax a railroad built with United States funds; in Collector v. Day (1870) 9 Wallace, 113, in which the court rejected the right of Congress to tax state officials. Cited by Warren, Supreme Court, III. 257.

\(^3\) Ibid., 254.
cision in the Slaughter House cases. The facts of these cases have become a familiar story in American constitutional history. The Crescent City Livestock Landing and Slaughtering Company, a corporation created by the legislature of the State of Louisiana, held a monopoly in New Orleans of the landing and slaughtering of animals intended for food. The company was required to permit the use of their establishment upon the payment of a fixed maximum charge. The butchers of New Orleans contested the law on the ground that it constituted servitude within the meaning of the Thirteenth Amendment and that it violated the privileges and immunities, equal protection and due process clauses of the Fourteenth Amendment.

Justice Miller began the decision with the observation that the Fourteenth Amendment provided a definition of citizenship not previously found in the Constitution. Before the adoption of the amendment the matter of definition of citizenship had been the occasion of much discussion in the courts, by the executive departments and in the press, he said. Whether the opinions of Justice Curtis that national citizenship originated from state citizenship was sound or not had never been judicially decided, but the majority of the court had at the same time decided that Negroes could not become citizens of the United States. This decision had never been overruled, and if the recently emancipated slaves were to be citizens anything short of a constitutional amendment would be insufficient. In order to

4 16 Wallace, 49-57.
5 Ibid., 72-73.
accomplish this primarily, and "to establish a clear and comprehensive definition of citizenship which should declare what constituted citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed. . .". Justice Miller believed that the clause settled the question raised by Justice Curtis in the declaration that only those who were citizens of the states were citizens of the United States. It also put at rest the contention of Chief Justice Taney that Negroes could not be citizens. This clause declared, he said, "that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction, citizens of the United States".

The first part of the decision which has just been discussed served simply as an introduction to the more important matter of the dual character of American citizenship. In words too clear to be misunderstood Justice Miller completely cut the ground from under the position of the framers of the Fourteenth Amendment that no distinction should be made between the privileges and immunities of state and national citizenship. "The distinction between citizenship of the United States and of a State is clearly recognized and established", he said. A person could be a citizen of the United

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6 Ibid., 73. He also said: "That its main purpose was to establish the citizenship of the negro can admit of no doubt." 7 Ibid.  
8 Ibid. At this point Justice Miller took pains to explain that the phrase "subject to the jurisdiction thereof" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States".  
States without being a citizen of a state; in order to become the latter he had to become a citizen of the United States but to acquire national citizenship it was only necessary that a person be born or naturalized in the United States. It was quite clear that there was a citizenship of the United States and of the state, each distinct from the other and dependent upon different characteristics or circumstances within the individual. Moreover, corresponding to the two types of citizenship there were two kinds of privileges and immunities of citizens, one for state and another for national citizens.

From this point the opinion proceeded to an examination of the character and scope of the privileges and immunities of citizens of the United States. In making this examination Justice Miller cited the decision of Justice Washington of the United States Circuit Court in the famous case of Corfield v. Coryell, as well as three opinions of the United States Supreme Court, the oldest of which had been made as recently as 1868. It is to be recalled that Justice Washington did not distinguish between rights of state and United States citizens, but had described the privileges and immunities of citizenship "in the several states" as "those privileges and immunities which are fundamental, which belong of right to the citizens of all free governments, and which have at times been enjoyed by citizens of the several states." Some of the privileges which he considered fun-

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10 Ibid.
11 Supra., 36 of seq.
13 4 Wash. 431.
damental were "protection by the government, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety." Justice Miller believed that the validity of Washington's doctrine had been demonstrated by its adoption in the case of Ward v. Maryland, for in that decision the court had enumerated "nearly every civil right for the establishment and protection of which organized government is instituted". These rights in the language of Justice Washington were those which were fundamental.

The second case which was referred to by Justice Miller was of even greater importance than the Ward case, since the opinion had been written by Miller himself in 1868. This was the case of Crandall v. State of Nevada. The decision had declared invalid a special tax of one dollar imposed by the state upon every railroad passenger who rode out of the state. It had been claimed by the plaintiff that this tax was a denial of the privileges and immunities of United States citizenship. In the opinion for the court Justice Miller had described the privileges of a citizen of the United States to include "the right to come to the seat of the

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15 *Ibid.* The opinion in the case of Ward v. Md. had been written by Justice Clifford, who concurred in the majority opinion in the Slaughter House cases. This fact makes Clifford's opinion of special interest. In reference to Article IV, section 2 he said, "the clause plainly and unmistakedly secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation; to acquire personal property; to maintain action in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens".
16 (1868) 6 Wallace, 35.
government to assert any claim he may have upon that government or to transact any business he may have with it." Access to the seaports, to the government subtreasury, land and revenue offices and the courts in the several states were all rights which were "independent of the will of any State over whose soil he must pass "in order to secure these rights.

In addition to the privileges and immunities of United States citizenship which he had enumerated in the Crandall case, Justice Miller further described the rights of national citizenship in the Slaughter House decision. One such additional privilege was the right of a citizen to demand the case and protection of the federal government over his life, liberty and property when he was on the high seas, or within the jurisdiction of a foreign government. There was no doubt that these were rights of a United States citizen, he said. In addition the right peaceably to assemble and petition for redress of grievances, and the privilege of the writ of habeas corpus were, in Justice Miller's opinion, rights of national citizenship. The right to use the navigable waters of the United States, and the privileges secured by treaties of the United States and foreign powers, were both dependent on citizenship of the United States. Still another privilege of citizens of the United States was the right, conferred by Section 1 of the Fourteenth

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17 Ibid.
18 Ibid.
19 16 Wallace, 70.
Amendment, to become citizens of any state with the same rights as other citizens of that state. And finally, there was to be added the rights secured by the Thirteenth Amendment.21

So far in his opinion Justice Miller was dealing with the privileges and immunities of national citizenship. But in the first part of his opinion he had clearly distinguished between state and United States citizenship which he regarded as depending upon different characteristics or circumstances in the individual.22 And having defined by many specific illustrations the privileges and immunities of United States citizens, the next logical step was to consider the matter of the privileges of state citizenship. In making this examination Justice Miller found the case of Paul Y. Virginia,23 which the Supreme Court had decided in 1868, to be a precedent which might be followed. The decision in this case had been written for the majority of the court by Justice Field, who was now opposing Miller in the Slaughter House decision. A law of the State of Virginia of 1865 had required out-of-state insurance companies to deposit bond before a license was granted them. The question at issue was the alleged impairment of the privileges and immunities of United States citizenship and the right of Congress to regulate commerce.24 Only the former issue is relevant here, of course.

Article IV, section 2 of the Constitution of the United States was said"to place citizens of each State upon the same footing with

21 16 Wallace, 75.
22 Ibid., 74.
23 8 Wallace, 168.
24 Ibid., 169-170.
citizens of other States, so far as the advantages resulting from citizenship from those States are concerned.\textsuperscript{25} The opinion then went on to state that the provisions relieved citizens of a state of alienage when within another state; it prohibited discrimination against them, it gave them the right of free ingress into other states, and egress from them, it insured the same freedom in acquisition and enjoyment of property in other states as citizens of those states, and it insured for them the equal protection of the laws of a state into which they might go.\textsuperscript{26} But Field qualified this with a statement which Justice Miller looked upon as bearing out his contention that a distinction should be made between the privileges and immunities of state and United States citizenship. The statement made by Field was: But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens of the latter State under their constitution and laws by virtue of their being citizens. . . It was not intended to give the laws of one State any operation in another State.\textsuperscript{27}

Field was quoted in part by Miller with the observation that the Fourteenth Amendment did not create the privileges and immunities of state citizenship which had been referred to by Field, and that it gave no protection to citizens of the states. Nor did

\textsuperscript{25} Ibid., 180.
\textsuperscript{26} Ibid.
\textsuperscript{27} Ibid.
it authorize any control of the power of the state government over
the rights pertaining to its own citizenship. The only purpose of
the privilege and immunities clause of the amendment had been "to
declare to the several States, that whatever those rights, as you
grant or establish them to your own citizens, or as you limit or
qualify or impose restrictions on their exercise, the same, neither
more nor less, shall be the measure of the rights of citizens of
other States within your jurisdiction". 28

The opinion next pointed out that up to the adoption of the
Fourteenth Amendment only a very few limitations were imposed upon
the states by the United States Constitution. These had been such
as those prohibitions against ex post facto laws, bills of attainder
and laws impairing the obligation of contracts. 29 It surely was
not the purpose of the amendment, Justice Miller said, by the simple
declaration that no state should make or enforce any law abridging
the privileges and immunities of citizens of the United States, to
transfer the protection of all civil rights from the states to the
national government. Nor was it intended to bring within the power
of Congress the body of civil rights theretofore belonging to the
states, in the provision that Congress shall have power to enforce
the amendment. 30

The dissenting opinion in the Slaughter House cases was de-
ivered by Justice Field, and was concurred in by Justices Swayne
and Bradley and Chief Justice Chase. In this minority opinion,

28 16 Wallace, 77.
29 Ibid., 77
30 Ibid.
doctrines were presented that thoroughly demonstrated the purpose of the framers of the Fourteenth Amendment and the Enforcement Acts of 1870 and 1871. Justice Field declared that by the amendment, citizenship of the United States was made dependent upon the place of birth but not upon the constitution or laws of any state. A citizen of a state was not only a citizen of the United States but "the fundamental rights, privileges and immunities, which belong to him as a free man and a free citizen now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State". 31 Justice Field agreed that degrees of enjoyment might be affected by local conditions, but action by the states which would amount to a control by them of a portion of the rights of citizens would not be legal. This was true because no portion of the attributes of citizenship was derived from state laws; they, therefore, were beyond the destructive power of the states. 32

The Fourteenth Amendment neither conferred new privileges and immunities nor enumerated or defined the existing rights. Justice Field said. It assumed that there were rights and privileges belonging to citizens and which the states might not abridge. If this prohibition on the states comprehended only the privileges and immunities which had been specially designated in the Constitution before the adoption of the amendment, as the majority opinion of Justice Miller held, then the amendment "was a vain

31 Ibid., 95.
32 Ibid.
and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. If the position taken by the majority was a correct one, no state could ever have interfered by its laws, and no new amendment was really necessary to prevent such interference. For the supremacy of the Constitution and the laws of the United States had always controlled state interference. "But if the amendment refers to natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence."

The opinion of Justice Field on the interpretation to be placed on Article IV, section 2 of the Constitution of the United States differed radically from the opinion of Justice Miller. It will be recalled that the latter cited the words of Washington in the case of Corfield v. Coryell in describing what he believed were the privileges of United States citizenship. From the fact that this case and others for which it was a precedent, was used by Justice Miller in defining the privileges and immunities of citizens of the United States, it is clear that he believed that the privileges and immunities clause of the Fourteenth Amendment added nothing to the protection of citizens of the United States which they did not already enjoy before the adoption of the amendment. Justice Field compared Article IV section 2 with the Fourteenth Amendment by say-

33 Ibid., 96.
34 Ibid.
35 Supra, 154.
36 6 Wallace, 76.
ing that the former protected the citizens of one state against hostile and discriminating legislation of the other state, while the latter protected every citizen of the United States against discrimination against him in favor of others, whether they reside in the same or different states. 38 If the purpose and effect of Article IV, section 2 was to guarantee equality of privileges and immunities between citizens of different states, under the Fourteenth Amendment the same equality was secured between citizens of the United States. 39

The case, Justice Field said "was of greatest importance and involved nothing less than the question whether the recent amendments . . . protect the citizens of the United States against the deprivation of their common rights by State legislation." 40 The amendment had been adopted to meet objections which had been raised to the Civil Rights Bill and in order "to place the common rights of American citizenship under the protection of the National Government. . . ." 41 Before the enactment of the amendment there had been a great difference of opinion whether national citizenship was independent of state citizenship, and if it were independent, as to the manner in which it originated. With a great number the opinion prevailed that national citizenship did not exist independently of the state, he said. 42

Among the epoch-making decisions of the United States Supreme Court the opinion of Justice Miller in the Slaughter House cases takes a position of first rank. Indicative as it was of the reaction

38 16 Wallace, 100.
39 Ibid.
40 Ibid., 89.
41 Ibid., 93.
42 Ibid., 94.
against the extreme centralizing tendency of the Reconstruction period, its greatest importance lay in the fact that it swept this tendency aside and once again established the principle of the division of authority between the states and the nation. As a recent writer has said, "the decision left the states, as they were before, in charge of the general field of legislation for the controlling and regulating of their internal concern. ..." 43 The framers of the Fourteenth Amendment believed that they had completely transferred power over all civil liberties to the control of the national authority. 44 The opponents to the amendment charged that the whole body of civil rights would be nationalized 45 and the framers of the amendment accepted that view. 46 Had not the court prevented the aims of the framers from becoming a permanent policy, the traditional arrangement of the states and nation, functioning together within the federal system, would have been permanently destroyed. The states would have been reduced to impotence through the placing of all privileges and immunities of citizenship under the authority of the national government. 47

The opportunity to restore the balance of authority between the states and United States over the rights of citizenship came as

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44 John W. Burgess, Political Science and Comparative Constitutional Law, I, 225.
45 See the remarks of Randall of Pa. and Rogers of N.J. in the House, May 10, 1866, Cong. Globe, 39 Cong., 1 Sess., 2530, 2538.
46 See especially the remarks of Bingham of Ohio, a member of the committee on Reconstruction, May 10, 1866, Ibid., 2542.
a result of the failure of Congress to distinguish between the privileges and immunities of state and United States citizens. This failure to make the distinction was no doubt brought about by the fact that before and at the time of the enactment of the Fourteenth Amendment no clear concept existed of two separate and distinct classes of rights of citizens. Congress therefore saw no need to distinguish between them, and thus the way was left open for the Supreme Court to declare in the Slaughter House decision that there are privileges and immunities of state and United States citizens, each separate and distinct from the other. If Congress had recognized any distinction, the wording of the amendment would undoubtedly have been different, and would have made the majority opinion in the Slaughter House cases impossible.

The majority opinion in the Slaughter House cases was a shock to those who had seen the amendment enacted and had appreciated the aim of the framers. As a recent writer has said: "That the decision in the Slaughter House cases defeated by a limitation not anticipated "in" the intent of those by whom the Fourteenth Amendment was framed is doubtless true..." 48 A contemporary observer has said that the Committee on Reconstruction and Congress believed that the amendment had far greater scope than the interpretation of Justice Miller permitted. 49

It appears that as far as the privileges and immunities of national citizenship were concerned, Justice Field was quite correct in saying that the privileges and immunities clause of

48 Richman, Pol. Sc. Quar., V 120.
49 James G. Blaine, Twenty Years in Congress, II, 419.
the amendment "was in the main an idle enactment and accomplished... nothing". If the position taken by Justice Miller was correct, and was to stand as the recognized principle of American law, no new amendment had been necessary, for no state could interfere with national rights before the adoption of the amendment. Recent authorities accept this view. The protection of the privileges and immunities of national citizenship was already provided for. "The mere fact that the constitution and laws of the United States have created a privilege or given an immunity, is of itself sufficient to put it beyond the reach of an unfriendly legislation." The due process and equal protection clauses of the Fourteenth Amendment are broader in scope since the word "persons" is used in them, yet these clauses involve citizenship inasmuch as rights of citizenship may be denied through a denial of due process and equal protection. The court gave these provisions only slight attention. On the limitation in the amendment against

50 16 Wallace, 96.

51 In his Law Am. Const., 331-332, Burdick says "if the provision of the amendment only prohibited the abridgment of privileges and immunities inhering in United States citizenship... this provision was unnecessary and accomplished nothing, because without it, the interference of a State would have been unconstitutional."

52 Charles H. Cooley, Constitutional Law of the United States, 3rd. ed., 274, Continuing the discussion he said: "It is plain that the State laws can not impair what they can not reach... The law must have been then [before Fourteenth Amendment] as it is now, namely, that State law is powerless to take away, restrain or abridge that which the Federal authority has lawfully given." Ibid., 275.
the states denying "life, liberty or property without due process of law", the court simply said: "the argument has not been much pressed...

It is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana... be held to be a deprivation of property within the meaning of that provision."53 In view of the later decisions of the Supreme Court on the extent of the states' police power over liberty and property, it seems that the decision might have been otherwise had the case been argued more fully on due process.55 As for the equal protection clause of the amendment, the Court doubted if it had been intended to cover infractions by the state other than against the Negro.56

That the Court was completely blind to the future trends with respect to both the due process and equal protection clauses is now very evident.57 This lack of foresight is significant because a great deal of the transfer of control over citizens rights, which the nationalists failed to accomplish through the privileges and immunities clause was accomplished through the due process and equal protection clauses. But the full force of the provision was

53 16 Wallace.
54 See Twining v. N.J. (1908) 211 U.S. 78, and cases cited.
55 Warren has pointed out that "Field always insisted in subsequent cases, that the question whether the statute involved had any real relation whatsoever to the policy power had not been properly presented or considered". Sup. Court in U.S. Hist., III, 271.
56 16 Wallace.
57 Warren has estimated that from 1873 to 1922 about eight hundred cases have been before the court involving state laws under due process. Sup. Court in U.S. Hist., III, 271.
not seen in 1873, and the Court was reluctant for some time afterwards to declare state laws invalid under this provision. Five years after the decision in the Slaughter House cases Justice Miller complained of the surprising number of cases with which the docket was crowded and in which the Court was asked "to hold that State Courts and State legislatures have deprived their own citizens of life, liberty or property without due process of law". 58

Chapter XI

Interpretation of the Fourteenth Amendment Since 1873;
Privileges and Immunities and Equal Protection

There can be no mistaking the great significance of the decision of Justice Miller in the Slaughter House cases as it related to the years preceding it, while it is equally beyond question that it was of tremendous significance to the period after 1873. For when the majority opinion in this case is examined in the light of later decisions in cases bearing on citizenship, its importance as a foundation for them appears as great as the initial step taken in 1873 to overthrow the plan of the radicals to bring the rights pertaining to state citizenship under national control. Aside from the disposition later shown to invalidate state laws on the ground that due process had been violated, and to expand the application of the equal protection clause to cases not exclusively affecting Negroes, the court has made no fundamental departure from the principles set forth in the Slaughter House decision. Since 1873 the opinions bearing on the Fourteenth Amendment and citizenship have followed precisely the principle of dual citizenship, and the corollary doctrine of a distinction between the privileges and immunities of state and national citizenship. The importance of later decisions lay in the fuller meaning which was given to the principles established in the Slaughter House cases, either in the form of reiteration of first principles, or by statement of corollaries which naturally arose from the original doctrines. It is in both of these respects that decisions
of the Supreme Court since 1873 on the Fourteenth Amendment as it related to citizenship are important.

Decisions of the court since 1873 in which some problem of citizenship has been involved have without exception made the opinion of Justice Miller in the Slaughter House cases the foundation of the opinions. For a short time — in fact, until the decision was made in the case of U. S. v. Cruikshank in 1876\(^1\) the Court was called upon to give further interpretation of the privileges and immunities clause. Although both matters were very much in the background at this early period, the questions of due process and equal protection were also presented to the Court for its consideration. It was not long before the latter provision began to be invoked against state laws.\(^2\)

In addition to the cases decided by the Supreme Court since 1873 which may be classified according to their relation to the privileges and immunities and equal protection clauses of the Fourteenth Amendment, two other classes should be noted which have been important as either direct or corollary interpretations. One class is of those cases which involve the relation of the bill of rights in the United States Constitution to the limitations on the states found in the Fourteenth Amendment. In the second place, there are the cases bearing on the phrase "subject to the jurisdiction thereof", and involving the citizenship of Indians, of children of Orientals whose parents are ineligible to United States citizenship.

\(^1\) 92 U. S. 542.

and of natives of the insular possessions of Puerto Rico and the Phillipines.

During the same term of court in which the decision was made in the Slaughter House cases the Supreme Court made a practical application of the doctrine of dual citizenship. A Mrs. Bradwell had been denied the privilege of practicing law in the state of Illinois by the state supreme court. Since the denial had been made by an agent of the state, the Fourteenth Amendment was clearly involved. At this time the court said: "The right to control and regulate the granting of license to practice law . . . is one of these powers which are not transferred for its protection to the Federal Government." This was true because the exercise of such a right was in "no manner governed or controlled by citizenship of the United States. . . ."

A year later in the case of Bartemyer v. Iowa the court was called upon to decide whether or not the right to sell liquor was a privilege of United States citizenship. In the opinion for the court Justice Miller declared that in accordance with the principle laid down in the decision in the Slaughter House cases the sale of liquor was not "one of the rights growing out of citizenship of the United States. . . ." It is interesting as well as significant that Justice Miller touched lightly upon the subject of due process of law. He pointed out that, although the case had not been contested on the due process clause of the amendment, it was applicable if absolute

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3 Bradwell v. Illinois (1875) 16 Wallace, 130.
4 Ibid., 129.
5 Ibid.
6 (1874) 18 Wallace, 129.
7 Ibid.
prohibition prevented the sale of liquor held at the time the law was passed. But this was the limit of the discussion of the due process clause which was later to assume such great importance.

In the same year that the Hartman case was decided, the Supreme Court gave its opinion in a case involving the question whether the right of suffrage was a privilege of a citizen of the United States. This right, the court said, had not been among the original privileges and immunities of United States citizenship granted by the Constitution of the United States. The Court further stated that "the amendment had not added to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had." The United States had no voters of its own creation. The United States House of Representatives was chosen by state voters and the Senate by the state legislatures. That the states had exclusive rights over suffrage was to be seen in the clause of the Fourteenth Amendment which provided for a reduction in the representation of the states in the House if they denied the suffrage to Negroes.

A problem somewhat different from those in the cases just discussed was presented by U. S. v. Cruikshank, which the United States Supreme Court decided in 1876. This case arose from the Ku Klux Act of 1871 and involved the question whether the denial

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8 Ibid.
9 Minor v. Happersett (1874) 21 Wallace, 162.
10 Ibid., 171.
11 Ibid.
of the privileges and immunities of United States citizens by individuals constituted a violation of the Fourteenth Amendment. In the opinion of the Court, to which only Justice Clifford dissented, Chief Justice Waite repeated the principle of dual citizenship and the correlated distinction between the privileges and immunities of state and national citizenship. The right of peaceful assemblage had always been one of the attributes of citizenship under a free government, and was not a right conferred by the Constitution, but it had been found already in existence when the Constitution was founded. "The government of the United States, when established, found it in existence, with the obligation on the part of the States to afford it protection." 14 It was the opinion of the Court that the right of the people peaceably to assemble for the purpose of petitioning Congress for "redress of grievances or for anything else connected with the powers or duties of the national government is an attribute of national citizenship." 15 But inasmuch as the indictment did not show that the meetings which had been broken up were for this purpose, it could not be said that privileges and immunities of citizens of the United States had been denied. 16 The Court apparently meant that the right to petition Congress was protected from infringement by individuals by the original Constitution rather than the Fourteenth Amendment. It was, therefore, not inconsistent with other decisions in which it was declared that the privileges and immunities clause of the Fourteenth Amendment for-

14 Ibid., 549.
15 Ibid., 552.
16 Ibid., 553.
nished no protection against denial by individuals of rights of United States citizenship.

It should be noted that the Court regarded the right of peace-ful assemblage as a fundamental right which existed before the Constitu-
tion. In this respect the reasoning is similar to the argu-
ment of Representative McLane at the time of the debates on the Missouri Constitution that some privileges rested on a natural rights basis, and also to Justice Washington's conclusion that some rights of citizenship were "fundamental". Closer in point of time was Justice Miller's opinion in the Slaughter House case which repeated the Washington doctrine.

It had been contended that the defendants were guilty of denying the right of every citizen of the United States to bear arms as guaranteed by the Second Amendment to the United States Constitu-
tion. The provisions of this amendment, the Court said were in-
tended as a restriction on Congress, but it had "no other effect that to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes to ... powers which relate to merely municipal legislation [state regulation] ... ". With respect to due process the Court said that the amendment prohibited the denial of due process by a state "but this adds nothing to the rights of one citizen against another". Only an additional protection had been furnished against encroachment by any state upon the fundamental

17 Supra., 44.
18 Supra., 30.
19 Ibid.
20 Ibid., 554.
rights of every citizen. The Court took pains to stress that the states were prohibited by the amendment from denying equal protection of the laws to all persons within their jurisdiction. The amendment prohibited a state from denying equal protection, but it did not add anything "to the rights which one citizen had under the constitution against another... Every republican government is in duty bound to protect all its citizens in the equality of rights, but this duty was with the states."22

In the decision in the case of Walker v. Sauvinet23 Chief Justice Waite made application of the ruling in the Slaughter House cases on the privileges, and immunities of citizens of the United States. In this opinion it was said "A trial by jury in suits at common law... is not a privilege or immunity of national citizenship which the States are forbidden by national law to abridge".24 Thus, as in the Cruikshank decision, the court was emphatic in denial that the first eight amendments to the Constitution of the United States restrained the states. With respect to due process the court said that if a trial was held according to the settled course of judicial procedure, this requirement of the Fourteenth Amendment was met. "Due process of law is due according to the law of the land", the court said. The power of regulating the methods of trial by jury was a power which the court considered vested with the states, and the power of the United States government over it

21 Ibid.
22 Ibid., 555.
23 (1876) 92 U.S. 90.
24 Ibid., 92.
25 Ibid.
was only "to determine whether it is in conflict with the supreme law of the land..." 26

Although the Fifteenth, rather than the Fourteenth Amendment, 27 was involved in the case of U. S. v. Reese, it did have a bearing on the privileges and immunities of national citizenship. In an opinion by Chief Justice Waite the court declared that the Fifteenth Amendment did not confer the right of suffrage on anyone. Its purpose was to prevent the states from "giving preference in this particular to one citizen of the United States over another on account of race, color or previous condition of servitude". 28

Within the short period of three years the court had demonstrated conclusively its steadfastness to the principles laid down in the Slaughter House decision. During this short period it had centered its attention on the privileges and immunities clause, rather than on the due process and equal protection clause of the Fourteenth Amendment. Since the matter of the privileges and immunities of citizenship gave way to a great extent after the year 1876, to the question of equal protection of the laws, the period from 1873 to 1876 may be identified by the emphasis on the rights of United States citizenship as protected by the privileges and immunities clause of the Amendment, which were first outlined in the Slaughter House decision. One of the most important traits of the decisions of this period was the painstaking care with which

26 Ibid.
27 (1876) 92 U. S. 214.
28 Ibid.
the Court repeated in every decision the doctrine of a dual set of
privileges and immunities of citizenship, which had first been pro-
mulgated by Justice Miller. Faced with opportunities to apply his
principles to practical situations, the Court made this application
so as to leave no doubt of its commitment to the doctrine of a dual
set of privileges and immunities of citizenship. Some of the rights
which were not privileges and immunities of United States citizens
were the right to practice law in the courts of a state, the right
to sell liquor, the right of suffrage, and the right of protection
by Congress against the encroachment by fellow-citizens on the
privileges and immunities of state citizenship. The right to trial
by jury in civil cases, and the right to bear arms were privileges
for which the Third Amendment to the Constitution was a protection
against the encroachment of Congress only, and not by the states
or individuals in the states.

The question of equal protection of the laws was not before
the court during this early period. But it should be noted that
the problem of due process received slight attention in the case
developing from the prohibition law of the state of Iowa, as well
as in the three year period following the decision in the Slaughter
House cases — in fact, there was none for a considerable number
of years afterwards — of a disposition on the part of the court
to interfere with state regulation of business, or labor condi-
tions and social activities. The cases brought under the examin-
ation of the court rather concerned methods of judicial procedure
or regulation or restriction of an individual's vacation.

It should be made clear that the Court in the Cruikshank decision declared that citizens of the United States could secure the courts' protection against denial of their rights by individuals provided the alleged right was guaranteed by the original Constitution.

Three cases decided by the Supreme Court in 1880, which involved the question of a denial of equal protection of the laws to Negroes, marked the beginning of a period in which the chief point at issue was the equal protection clause of the Fourteenth Amendment. In the case of Straneder v. W. Va., the decision of the Court declared illegal a statute providing for the choosing of jurors from lists of white citizens. It was not necessary, the court said, that Negroes be tried before juries of Negroes, but to exclude members of the Negro race from jury service was patently a denial of the equal protection of the law.

Two other cases dealt with infractions of the equal protection clause of the Fourteenth Amendment. The case of Va. v. Rives involved an alleged discrimination against Negroes in the selection of juries. In the opinion of the Court it was declared that the protection which was afforded by the Fourteenth Amendment against discrimination, was against state action, and not discriminatory action on the part of individuals. Since all male citizens of the state were eligible for jury service, it could not be said

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30 100 U.S. 303.
31 Ibid., 309.
32 Ibid., 313.
that the state was guilty of discrimination. Furthermore the court ruled that reasonable latitude was to be allowed the judge in making a selection of jurors. 33

In the case of Ex parte Va. it was admitted that the judge had excluded Negroes from juries. This act was ruled by the Supreme Court to constitute action by the state since the judge acted as its agent. This was declared a violation of the Civil Rights Act of 1875. 35 It is to be noted that prior to the more complete nullification of the Civil Rights Act in the decision in the Civil Rights cases in 1883 the Supreme Court declared a portion of the Act unconstitutional.

In 1883 the Supreme Court of the United States gave two decisions which brought to a close the efforts of the United States government to deal with the Negro question in the South by indictment in the federal courts of those charged with violation of either the enforcement acts of 1870 and 1871 or the Civil Rights act of 1875. It is equally true, and more important from the point of view of citizenship, that these decisions definitely repudiated the plans of the framers of the Fourteenth Amendment to incorporate all privileges and immunities of citizenship under the authority of the national government. Although it may be said that this was the unmistakable effect of the Slaughter House decision, the fact remains that Justice Miller's opinion was not acquiesced in or recognized universally for some time after 1873. This was demonstrated by the passage by Congress in 1875 of the Civil Rights

33 Ibid., 318.
34 Ibid., 329.
35 Ibid., 347.
Act, and the continued efforts on the part of the government to secure convictions under the enforcement acts of 1870 and 1871, and the act of 1875. In the decision in the case of U. S. v. Harris, the court cited the cases of U. S. v. Cruikshank and Va. v. Rives in support of the view that the prohibitions in the Fourteenth Amendment acted against the states and not against the individual. It had not been intended that Congress be empowered "to punish a private citizen for an invasion of the rights of his fellow citizens conferred by the State of which they were both residents or all citizens alike." The Ku Klux Act of April 20, 1871, was declared unconstitutional.

The decision of the Court in the Civil Rights cases, which was made in 1883, was the climax of a period of ten years of interpretation of the privileges and immunities and equal protection clauses of the Fourteenth Amendment. By this decision there was established once and for all the principle of the dual character of the privileges and immunities, as well as the doctrine that the protection which was offered to citizens of the United States by the privileges and immunities clause of the Fourteenth Amendment was against the states and not individuals. These cases arose out of prosecutions for violations of the Civil Rights Act of 1875. The first section of this act had provided that all

36 106 U. S. 629.
37 Supra, 191-194.
38 100 U. S. 312.
39 106 U. S. 639.
40 Ibid., 644.
41 Ibid., 639.
42 109 U. S. 3.
persons within the jurisdiction of the United States should be entitled to the full and equal enjoyment of "the accommodations, and privileges of inns, public conveyances, on land or water, theatres, and other places of public amusement... and applicable alike to citizens of every race, and color, regardless of previous condition of servitude". 43 Five cases were involved and included the following classes of offenses: two were for denials of a seat in the theatre to colored persons, two others for denial of accommodations in a hotel to a colored person, while the fifth case was for a denial of a seat to a colored person in a train with white persons. 44

Such discriminations the Court said, were not violations of the Fourteenth Amendment. "Individual invasion of individual rights is not the subject matter of the amendment. It does not invest Congress with the power to legislate upon subjects which are within the domain of the State legislature, but to provide modes of relief against State legislation..." 45

The court then went on to say that until some state law was passed resulting in discrimination, or some action through its officers had been taken adverse to the rights of citizens which the Fourteenth Amendment was designed to protect, no law of Congress could be put into operation. 46 Since the Civil Rights Act was not corrective, it was null and void. 47

43 Ibid., 9.
44 Ibid., 3-4.
46 Ibid., 13.
that were protected by the privileges and immunities clause of the Fourteenth Amendment against state action could not be impaired by wrongful acts of individuals if they were not supported by state authority. "The wrongful act of an individual, unsupported by any such authority [state] is simply a private wrong, or crime of that individual." 48

It has been said that the distinction between the citizenship of the state and of the United States which was first made a principle for interpreting the Fourteenth Amendment by Justice Miller in the Slaughter House cases, became a guiding principle of the court in later decisions. In these decisions circumstances required that the court designate that certain privileges and immunities of a civil and political nature were attributes of state rather than national citizenship. On the whole no effort was made to define what privileges of citizenship originated with the national government, but there was a very clear inference that there was a body of rights which were national in origin. In the Cruikshank decision the court had declared that the "natural" right to assemble for the purpose of petitioning Congress for redress of grievances was a privilege of national citizenship. Furthermore, throughout the period from the time of the decision in the Slaughter House cases to the rendering of the opinion by Chief Justice Waite in the Civil Rights cases, there was always a strong implication that the court would define the privileges and immunities of United States citizenship whenever an occasion demanded it.

48 Ibid., 17.
An opportunity was offered the United States Supreme Court in 1884 to determine whether voting for members of Congress was a privilege of citizens of the United States.\(^49\) It was alleged that the defendant had violated a portion of the Enforcement Act of April, 1871, which punished acts of conspiracy designed to prevent the free exercise of any right or privilege secured either by the United States Constitution or laws. Since the case involved a denial of the right to vote for members of Congress, this portion of the act was upheld as valid under the Fifteenth Amendment.\(^50\) The court said that "it is not true... that electors for members of Congress owe their rights to vote to the State law in any sense which makes the exercise of the right depend exclusively on the law of a State..."\(^51\)

In the same year as this decision the court declared that the right to follow any of the ordinary occupations was one of the privileges of citizens of the United States.\(^52\)

Two cases which the United States Supreme Court decided in 1884 and 1891 respectively arose from a provision of the Civil Rights Act of 1875 which provided for punishment of conspiracy to impair privileges secured by the Constitution of the United States.\(^53\) The first of these cases dealt with an effort to exclude United States citizens from the public lands within a state. The defendant had claimed that the right to enter the public lands was not

\(^{49}\) Ex parte Yarbaugh, 110 U. S. 651.

\(^{50}\) Ibid., 663.


\(^{52}\) Butchers' Union etc., Co. v. Crescent City Co., III U.S. 746.

\(^{53}\) U. S. v. Waddell, 110 U. S. 76.
privilege of United States citizenship, but that the protection in such a right had to come from the state. In the decision which denied the allegation, the Court pointed out that the clause in the Civil Rights Act which affirmed the right to go into the public lands of the United States referred to rights of United States citizenship which were guaranteed by the original Constitution. It declared that portion valid, since Congress had unquestioned power to legislate for the territories. 54 The decision also declared that it would be strange if the United States could not protect the occupancy of land which was part of the property of the United States.

The case of Logan v. U.S. 56 arose from violence done to a prisoner while in the custody of a United States marshal. In the opinion for the court, Justice Gray said that there was no doubt that Congress had the power to provide for the punishment of all crimes against the United States. The failure of the marshal to protect his prisoner was no excuse, and there was a right "secured by the Constitution and laws of the United States to be protected." 57 In this opinion the Court was carrying out the principle it had set forth in the Cruikshank decision that citizens of the United States were to look to the national government for protection of their privileges and immunities of national citizenship. In both the Cruikshank and Logan decisions the Court made it plain that protection against the denial of rights

54 Ibid., 79.
55 Ibid., 81.
56 144 U.S. 263.
57 Ibid., 285.
of United States citizens was to be found in the original Constitution, but not in the Fourteenth Amendment.

In case of In re Quarles 58, decided by the court in 1894, involved the question whether it was a privilege of United States citizenship to inform the United States government through its agents of a violation of the federal laws. In the decision in which this was affirmed as a right of a citizen of the United States, the court cited the decision in the Logan case and declared "The United States are a nation, whose powers of government, . . . within the sphere of action confirmed to it by the Constitution, are supreme and paramount. 59 Congress had the power to enforce in any manner it chose "every right, created by, arising under, or dependent upon the Constitution. . . ." 60 The right to inform of violation of the law was not dependent upon the Fourteenth Amendment but rested upon the original Constitution. 61 In this view the Court was reaffirming a principle it had set forth in the Cruikshank and Logan cases, namely, that it was the original Constitution and not the privileges and immunities clause of the Fourteenth Amendment, to which United States citizens might look for redress from injury by their fellow-men.

The decisions in these cases represented both a designation of privileges and immunities of citizens of the United States, and an application of principles to actual situations.

58 158 U.S. 532.
59 158 U.S. 532.
60 Ibid.
61 Ibid., 536.
Although the number of cases was small which came before the Court the principle was laid down in the decisions broad enough to be taken as an expression of doctrine. Especially should the doctrine set forth in the Quarles case be noted, for in that decision the Court declared that Congress was to enforce in such manner as it deemed best "every right, created by, or dependent upon the Constitution. . . " 62 It was also said in that decision that Congress was empowered by the original Constitution but not by the Fourteenth Amendment to protect citizens of the United States against action of individuals. This was in agreement with Justice Miller's interpretation which had caused Justice Field to call the privileges and immunities clause of the amendment a vague and empty generality. In stating that the right of an individual to protection by a United States marshal while in his custody was a privilege and immunity of United States citizenship, the Court based this particular privilege on the original Constitution, and established the general rule that it was the original Constitution and not the privileges and immunities clause of the amendment to which citizens of the United States must look for protection against action by individuals.

It is difficult to attempt a comprehensive definition of the privileges and immunities of citizens of the United States, inasmuch as the Court has never given any full and exact enumeration under either Article IV, section 2 of the original Constitution or of the privileges and immunities clause of the Fourteenth

62 158 U.S. 535.
Amendment. It has chosen rather to follow a principle laid down by Justice Curtis in 1856 of defining Article IV, section 2 only when the occasion of a particular case demanded it. 63 All that may be safely said is that the privileges and immunities of citizens of the United States are those rights which the United States courts from time to time have designated as inherent in and guaranteed by the Constitution of the United States. If these may be enumerated from the cases in which the court has indicated certain rights they are as follows: the right to pass through or reside in any other state for the purposes of trade, agriculture or professional pursuit, to claim the benefit of habeas corpus, to sue in the courts of other states, to take, hold, and dispose of property and to be exempt from higher taxes than are paid by citizens of the state. 64 the right to come to the national capital for purposes of asserting a claim upon the national government or transacting any business with it, the right of access to the seaports, to the land and revenue offices and courts in the several states, 65 the right to claim protection of the government while upon the high seas or in the jurisdiction of a foreign power, 66 the right to assemble in order to petition Congress for a redress of grievances, 67 the right of those qualified to vote

63 In a decision in the case of Connors v. Elliott, 18 Howard, 591 Justice Curtis, in referring to Art. IV, sec. 2 said: "It is safer and more in accordance with the duty of a judicial tribunal to leave its meaning to be determined in each case, upon a view of the particular rights asserted and denied therein."

64 Supra. 3c.

65 Crandall v. Nevada (1868) 6 Wallace, 36.

66 Slaughter House cases (1873) 16 Wallace, 79.

for the most numerous branch of the state legislatures to vote for
national officers,\textsuperscript{68} the right to follow any of the ordinary occupa-
tions,\textsuperscript{69} the right to enter the public lands of the United States,\textsuperscript{70}
the right to be protected against violence while in the lawful custody
of a United States marshal,\textsuperscript{71} and the right to inform the United States
of the violation of federal laws.\textsuperscript{72}

There was still another class of cases which came before the
Supreme Court after 1873 which should be examined briefly in order to
complete the narrative of the court's interpretation of the privileges
and immunities clause of the Fourteenth Amendment. When the amend-
ment was adopted in 1868 there was raised anew the question of the re-
lation of the first eight amendments to the Constitution of the United
States to the restrictions in the Fourteenth Amendment against the
abridgement of the privileges and immunities of citizens of the United
States. Before the incorporation of the amendment into the Constitu-
tion, the question was clear. As has been said: "It had been re-
peatedly decided that the first eight amendments constituted limita-
tions only upon the federal government and did not affect the States".\textsuperscript{73}

But with the addition of the Fourteenth Amendment to the Constitution,
it was contended that the privileges and immunities guaranteed in the
bill of rights constituted privileges and immunities of United States

\begin{itemize}
\item[68] \textit{Ex parte Yarbaugh} (1883) 110 U.S. 651. See also \textit{Wiley v.
Sinkler} (1900) 179 U.S. 53.
\item[69] \textit{Butchers Union etc. Co. v. Crescent City Co.} (1883) 111 U.S.
746.
\item[70] \textit{U.S. v. Waddell} (1884) 110 U.S. 76.
\item[71] \textit{Logan v. U.S.} (1892) 144 U.S. 263.
\item[72] \textit{In re Quarles} (1894) 158 U.S. 532.
\item[73] \textit{Burdick, Law Am. Const.}, 332-333.
\end{itemize}
citizenship which the states were prohibited from abridging by the first section of the Fourteenth Amendment. In contending for that position, those who insisted upon it were certainly not following the precedent of the Supreme Court in past decisions. It has been noted that before the Civil War the court had on several occasions, and particularly in the case of Barron v. Baltimore, 74 declared that the first eight amendments were restraints on Congress and not on the states. In the same year that the court delivered the decision in the Dred Scott case, it cited the Barron case and declared that the Fifth Amendment, which prohibited a denial of due process, in no way restrained the states in the taking of property for public use. 75

Nine years later at the time that Congress was considering the Fourteenth Amendment, the court declared that the Eighth Amendment prohibiting excessive bail, fines and imprisonment, applied only to the national government. 76 In the same year that the amendment was declared in force, the court repeated its declaration that the Fifth Amendment acted upon Congress only, and added that the Sixth Amendment occupied the same position. 77

This was the situation when Congress set to work in 1866 to nationalize all privileges and immunities by means of the Fourteenth Amendment. With this aim in view it was but natural and logical

74 (1833) Peters, 243. Other cases were: Livingston v. Moore (1833) 7 Peters, 469; Fox v. Ohio (1846) 5 Howard, 410; Smith v. Md. (1855) 13 Howard, 71.
75 Withers v. Buckley (1855) 20 Howard, 84.
76 Pernear v. Commonwealth (1866) 5 Wallace, 475.
77 Twitchell v. Commonwealth, 7 Wallace, 321.
that the view should be taken that the bill of rights in the United States Constitution made up a part of the privileges and immunities of citizens of the United States which the states were prohibited by the new amendment from abridging. When members of Congress expressed the view that all privileges and immunities were placed under the protection of the national government, they were but the forerunners of litigants who were later in the courts to urge that the restrictions on Congress found in the bill of rights were a part of the great body of rights which the new amendment was designed to protect from state encroachment. Senator Howard in arguing for the Fourteenth Amendment had declared that the protection afforded rights of citizens by the first eight amendments must become rights to be guarded from state action by the proposed amendment. 78

The Supreme Court immediately denied the position which Congress had taken by ruling that the states were not subject to the bill of rights. In 1869 the court declared that the first eight amendments were restrictions on Congress alone. 79 The Seventh Amendment was specially dealt with in two cases which the court passed upon in 1874 and 1877. 80 In both decisions the court declared that this amendment did not restrict the states; while in 1881 a similar position was again taken with respect to the Fifth Amendment. 81

A case came to the Supreme Court in 1885 involving an amendment which had not so frequently been claimed as protection against state action. 82 The state of Illinois had enacted legislation

78 Cong. Globe, 39 Cong., 1 Sess., 2765.
which prohibited the formation of private military companies, and in
so doing had taken steps that might have conceivably violated the
Second Amendment to the Constitution of the United States. In its
decision, however, the court reaffirmed its traditional view, and de-
clared that the amendment had no other effect than to restrict the
power of the national government. "The people", the court said"are
left to look for their protection against any violation by their
fellow-citizens to what may be called the power relating to municipal
or internal police". However, the court gave the warning that the
states could not prevent "the people from keeping and bearing arms
so as to deprive the United States of their rightful resources for
maintaining the public security and disable the people from per-
forming their duty to the general government".

In 1887 at the trial of those involved in the Haymarket riot
in Chicago an effort was made to secure a ruling from the United States
Supreme Court that the bill of rights constituted privileges and immu-
nities of citizens of the United States which the states were enjoined
from abridging by the Fourteenth Amendment. In the decision denying
this, the court declared that it had been decided more than a half-
century before and adhered to since that time that the bill of rights
did not restrict the action of the states.

83 "A well regulated militia being necessary to the security
of a free State, the right of the people to keep and bear arms shall
not be infringed."
84 116 U.S. 255.
85 Ibid.
87 Ibid., 165.
In 1889 a case came to the United States Supreme Court which involved a New York law providing for the death penalty by use of the electric chair. It was claimed for the defendant that this constituted cruel and unusual punishment and violated the due process clause of the Fourteenth Amendment. On this contention the Court ruled that a method of inflicting the death penalty which was applied equally to all and which did not inflict a tortuous and prolonged death was not to be deemed "cruel and unusual" as the terms were ordinarily understood. The Court said also that undoubtedly the due process and equal protection clauses of the Fourteenth Amendment "forbade any arbitrary deprivation of life, liberty, property, and secured equal protection to all under like circumstances, and that in criminal justice the same punishment must be inflicted on all. But the due process and equal protection clauses of the amendment were not designed to interfere with the power of the state to protect the lives and liberties and property of its citizens, to promote their health, peace, morals, and good order."  

In spite of the many occasions on which the Supreme Court had emphatically declared that the first eight amendments limited the power of Congress and not the states, it found it necessary to repeat this doctrine as recently as 1900, and 1908. In the latter year the court explained more fully than it had before the

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88 In re Kemmler, 136 U.S. 436.
89 Ibid.
90 Ibid., 448.
92 Twining v. N.J., 211 U. S. 78.
position of the bill of rights. At that time the court said that it was "possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law... If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."

It is to be doubted that the court could have placed any different interpretation upon the bill of rights and have still retained the distinction between the privileges and immunities of state and United States citizens it had insisted upon in the decisions in the Slaughter House case and other cases. In making those decisions it had repeatedly said that the privileges and immunities clause of the amendment added nothing to the privileges and immunities of citizens of the United States which they had not enjoyed before the amendment came into existence.

The half-century of futile effort to bring the privileges and immunities of the bill of rights within the scope of the Fourteenth Amendment thus left the first eight amendments in the same position they occupied before 1868 unless the rights denied were of such a nature as to bring them under due process. They are limitations upon Congress, but the states are not affected by them except in cases where the limitations protect due process. It is only when they come within the meaning of the due process clause of the original

93 Ibid., 99.
constitution and the Fourteenth Amendment, as was ruled in the case of Twining v. N. Y. that they may be included within a class of privileges which the state may not deny.

Inasmuch as the framers of the Fourteenth Amendment intended for the national bill of rights to be brought under the privileges and immunities clause of the amendment, their purpose was apparently defeated by the courts. Actually, however, by bringing the bill of rights under due process the court fulfilled the aim of the framers through an interpretation of the amendment which certainly had not occurred to them.
Chapter XII

Citizenship of Indians and Orientals and of Natives in the Colonial Possessions of the United States

In addition to the complication caused by the presence of the Negro, the problem of citizenship in the United States has been made more difficult by the presence of Indians and other colored races within the United States, and since the turn of the last century, by the natives of the insular possessions. With respect to the Indians, Charles H. Cooley wrote in 1873 "aborigines were not citizens, yet they were under the protection of the laws and may be said to owe allegiance to the government. . .". He further stated that it would be illogical to regard them as citizens enjoying the full rights of American citizenship so long as they remained semi-independent and owed obedience to their tribe. Not until this tribal relation had been dissolved were Indians to become citizens.

It has been noted that when the Civil Rights Bill of 1866 was being considered in Congress the fear was expressed that the many Indians, who were not in tribes, would become citizens by virtue of the measure, although many of them were not fitted for the responsibility of citizenship. The bill as enacted carried a provision excluding "Indians not taxed". This provision was explained by Senator Trumbull to refer to those Indians who were not counted in the census. At the time the Fourteenth Amendment was being con-

1 Story, Comm. II, appendix, 654, 4th ed. by Cooley
2 Ibid., 655.
3 Supra., 130-131.
4 U.S. Stat. at Large, XIV, Ch. XXII, p. 27.
5 Cong. Globe, 39 Cong., 1 Sess., 573.
sidered in the Senate objection was made that the first section would immediately make Indians citizens of the United States. 6 Senator Trumbull at that time explained that the clause "and subject to the jurisdiction thereof" meant that only those who were completely under the jurisdiction of the United States and who did not owe allegiance to another power were citizens of the United States. 7 In the decision of the majority in the Slaughter House cases Justice Miller did not speak specifically of what he believed to be the meaning of the jurisdiction clause in the Fourteenth Amendment, but simply said that it "was intended to exclude from its operation children of ministers, consuls and citizens or subjects of foreign states born within the United States." 8 It seems that the inference to be drawn from Cooley and Trumbull would be that Indians upon leaving the tribes become at once citizens of the United States. This problem was first considered by the Supreme Court after the adoption of the Fourteenth Amendment in the case of Elk v. Wilkins. 9 The plaintiff Elk was an Indian and a resident of the state of Nebraska; he had severed his tribal relationship and was completely under the jurisdiction of the United States. 10 The question before the court was: did an Indian become an American citizen by birth in the United States simply upon breaking off his tribal relationship, or was it necessary that Congress enact special

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6 Ibid., 2896.
7 Ibid., 2893.
8 16 Wallace, 73.
9 (1884) 112 U.S. 94.
10 Ibid., 95.
legislation before he could become a citizen? In the decision for
the court Justice Gray denied emphatically that the severance of re-
lations with the tribe was sufficient, and insisted that Congress had
to give its consent before an Indian became a citizen of the United
States. The alien and dependent condition of members of the Indian
tribes could not be discharged, he said, at their own will, but it
required the assent of Congress, given in the form of either a treaty
or statute. 11 The jurisdiction clause of the Fourteenth Amendment
did not refer to persons who were merely subject to the United States
in some respect or degree, but to those who were completely subject
to the political jurisdiction and who owed direct and immediate
allegiance to the nation. 12 Indians in the tribal state were de-
clared to be no more subject to the jurisdiction of the United States
than foreigners seeking naturalization; and persons not subject to
the national jurisdiction at the time of their birth, could not be-
come so afterwards except by being naturalized either individually
through the naturalization laws or collectively by treaty. 13

Justice Gray, in short, upheld the opinion of Justice Miller
that the jurisdiction clause excluded children of ministers, cons-
suls, and subjects of foreign powers and applied the doctrine to the
Indian with the statement that they were no more subject to the juris-
diction of the United States than children of subjects of foreign
powers. 14

11 Ibid., 100.
12 Ibid., 102.
13 Ibid.
14 112 U.S. 102. Of this view John W. Burgess said in 1902:
"This is doubtless a sound interpretation of that provision, but it
does not rest at all for its validity upon the dictum that children
born in the United States of parents who are subjects of foreign states
are not citizens of the United States". Pol. Sc. and Comparative Const.
Law, 1, 223–224.
Justice Gray found proof of the correctness of his opinion in the acts of Congress dealing with Indian problems. For instance the phrase "Indians not taxed" had been in the Civil Rights Bill of 1866, as well as in the Constitution. Further proof was to be found in the many treaties with the Indian tribes by which entire tribes had been naturalized. Nor would it have been necessary to enact the naturalization act of July 15, 1870 if Indians became citizens without government action.

There was just one point in the dissenting opinion of Justices Harlan and Wood which should be referred to. In speaking of the Civil Rights Bill of 1866, they stated that it was the first recognition of Indian citizenship. The correctness of this view may be seen in the fact that in the Thirty-ninth Congress, members of the Senate from the Northwest objected to the clause "Indians not taxed" until they were assured that Indians in the tribal state were not to be regarded as citizens of the United States. The fact that the members opposed the naturalization of Indians who were yet wild and in the tribal state as well as those who were unfit for citizenship, although separated from any tribe, showed that there was no opposition to some Indians being made citizens, and that it was recognized that the bill did create citizens of certain Indians. There is, of

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15 112 U.S., 103.
17 112 U.S., 104, citing U.S. Stat. at Large, XVI, Ch. 296, p. 361.
18 112 U.S., 114.
course, no disagreement in this with the view of Justice Gray, for
the Civil Rights Bill confirmed his contention that an act of Con-
gress was necessary to admit Indians to citizenship. But there is
disagreement between the view of Congress in 1866 and the majority
opinion in the Elk case, inasmuch as Congress undoubtedly felt that
the declaration made in the Civil Rights Bill would be sufficient
to naturalize on the basis of birth all Indians who broke their
tribal relations, while Justice Gray held that naturalization must
be effected by either treaty or law.

The opinion of the court, then, in the case of Elk v. Wilkins
was clearly a reversal of the earlier opinion in Congress. Indians
in the United States occupy a peculiar position, both with respect
to the procedure of acquiring citizenship and with respect to the
nature of their citizenship after they have acquired it. In de-
cisions made since 1884 the sentiment has been that they are wards
of the nation, although it would seem that by the common-law doc-
trine which is applied to Negroes and to native-born whites, they
would become, upon leaving the tribe, citizens of the United States,
by virtue of their birth in the land. Instead, the courts have
chosen to place them in a peculiar position. They must be natural-
ized just like foreigners, and before being naturalized they are
kept in a condition of tutelage. While in the latter position, the
court has ruled that they do not owe allegiance to a state in which
they reside. 20 Their lands are subject to control by the United States
government. 21 Congress has the right, the court has said, to exer-

exercise exclusive police power over acts committed by Indians on reservations. It has been also said that Indians can not plead the immunities of citizenship, if the government places restrictions upon them for the protection of tribal Indians.

In two acts of Congress passed since the decision of the United States Supreme Court in the case of Elk v. Wilkins the view in that decision has been followed. By the Dawes Severalty Act of 1887, it was provided that the President might end tribal government in any reservation at his discretion and distribute land to individual owners. The act further provided that upon the completion of the allotment of land, every Indian, born in the United States, who had voluntarily left his tribe and taken up a civilized life, was to be declared a citizen of the United States and was entitled to all privileges of citizenship.

By the Burke Act of 1906 Congress sought to avoid certain abuses that had resulted from the grant of immediate citizenship under the terms of that act; evils resulted from the fact that the sale of liquor to them could not be prohibited and that unscrupulous politicians sought their vote. In order to reduce the chances of these abuses, the Burke Act provided for the President to withhold full title to land until in his judgment individuals were ready to assume the responsibility of citizenship, and that grant of cit-

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24 U. S. Stat. at Large, XXIV, Ch. 119, p. 380.
zension was not to be made until the full title to land was acquired.

In its larger aspects the question of citizenship by place of birth was left in a state of uncertainty by the decision in the Elk case. It has been seen that Justice Miller in 1873 declared that the Fourteenth Amendment was intended to exclude from citizenship by birth in the United States, the children of ministers and consuls of foreign powers and of parents subject to some foreign state. Justice Gray, in referring to the jurisdiction clause of the amendment had insisted that complete jurisdiction was necessary in order to satisfy the meaning of the provision.

Thus as late as 1906 the principle of citizenship by birth was applied in the United States only to native-born whites, whose parents did not owe allegiance to some foreign power, and to native-born Negroes, Indians were required to fulfill two requirements before they were eligible for citizenship, namely, severance from the tribes and naturalization by Congress. Children born within the United States to diplomatic representatives of foreign powers and to foreigners owing allegiance to some foreign state, were not considered citizens by virtue of birth in the United States.

25 112 U.S. 112.

26 Supra., 153 n.

27 Supra, at Large, XXXIV, Ch. 2348, p. 182-183.
In 1898 the Supreme Court of the United States was asked to decide whether or not the child of Chinese parents who were subjects of the Chinese emperor, was a citizen of the United States by virtue of birth in the United States. Wom Kim Ark had been born in 1873 in California. In 1890 he had gone to China with his parents, and was permitted to return to the United States, while the latter remained in China. But upon his return to the United States in 1894 from a second visit, Wom Kim Ark was denied admission upon the ground that he was not a citizen of the United States.

There has not been a decision of the United States Supreme Court that has dealt more thoroughly with the subject under examination than the majority opinion on the case of Wom Kim Ark. In this opinion a thorough and complete review was made of the use of the common-law doctrines in England, the United States, and Europe. In England, Justice Gray said, the principle of citizenship by locality of birth had been an accepted doctrine for over three hundred years. A child born in England to alien parents had been considered under the jurisdiction of the crown to whom it owed allegiance, "unless the child of an ambassador, or other diplomatic agent of a foreign state or an alien in hostile occupation of the place where the child was born".

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29 Ibid., 652.
30 Ibid., 658.
country, with similar exceptions, become its citizens. By reference to the leading cases which had come before the courts since the founding of the Constitution, Justice Gray argued that the doctrine of citizenship by birth had been established as a rule of law.

Justice Gray did not find that at the time of the adoption of the Fourteenth Amendment there had been any settled and definite rule of international law, generally recognized by civilized nations, which was inconsistent with the principle of citizenship by birth. The tendency in Germany, Norway and Sweden had been to base citizenship on descent, but in Denmark and Portugal, it was based on birth, as it was under certain conditions in France, Belgium, Spain, Italy, Greece and Russia.

It will be recalled that Justice Miller in the decision in the Slaughter House cases declared that the jurisdiction clause of the Fourteenth Amendment was not intended to include children born to any diplomatic representative or to aliens owing allegiance to any foreign power. Justice Gray believed that this statement was undoubtedly aside from the question under consideration, and was unsupported by any argument or reference to authority. It was apparent he said, that this portion of the opinion had not been framed with as great care as the other parts, as could be seen from the fact that foreign ministers and consuls were associated together. Care had not been exercised in this, for consuls were not

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31 Ibid., 560-663.
32 Ibid., 667.
33 Ibid., citing Cockburn, Nationality, 14-21.
34 Supra., 153 n.
35 169 U.S. 678.
recognized as being entrusted with the power of higher representatives. The meaning of the clause "and subject to the jurisdiction thereof" as a qualification to the clause "all persons born or naturalized in the United States" seemed to Justice Gray to be sufficiently clear. It was intended to exclude "by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national Government unknown to the common-law) the two classes of cases -- children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State . . ." The clause "subject to the jurisdiction thereof" must be presumed to have been understood and intended in the same sense as the words "within the limits and under the jurisdiction of the United States" and the opposite of the words "out of the limits and jurisdiction of the United States" as used in the naturalization acts.

36 Ibid. Writing eight years before Justice Gray's decision, John W. Burgess commented thus on Justice Miller's remarks: "consuls and the citizens and subjects of foreign states unless they are of the family or suite of an ambassador are themselves subject, while in the United States, to the jurisdiction of the United States. . . Certainly then their children are. . . Certainly. . . the children born within the United States, of parents who are foreign consuls or subjects of foreign states, but who do not belong to the family or suite of an ambassador or minister or of the diplomatic head of a foreign state, are not by the wording of the fourteenth amendment excluded from the citizenship of the United States. . ." Pol. Sc. and Comparative Const. Law, I, 221-222.

37 169 U.S. 682.

38 Ibid. In the dissenting opinion of Chief Justice Fuller and Justice Harlan it was said that "to be completely subjected to the political jurisdiction of the United States is to be in no respect or degree subject to the political jurisdiction of any other government." Ibid., 725. And it was further said that the phrase "born or naturalized" in the Fourteenth Amendment meant under such circumstances as to be completely subject to jurisdiction, as completely as citizens of the United States, who were not in any way subject to any foreign power. Ibid., 729-730.
The decision in the case of Nom Kim Ark was significant in that it settled a confusion caused by the Fourteenth Amendment and because it asserted the common-law doctrine which has prevailed as the controlling doctrine for the territorial United States up to the present time. So far reaching has been the effect of this decision that as has been said "a child born of Chinese subjects is eligible for the office of President, although his parents may not be naturalized under our law". 39

Although since the Nom Kim Ark decision children born in the United States to Orientals have been universally regarded as citizens, the policy of the United States has been to limit the privilege of naturalization to members of the white and Negro race.

In fact, it was not until 1870 that alien Negroes were given the privilege of naturalization. 40 In the case of In re Ah Yup 41 the court decided that as Mongolians the Chinese could not come under the term "white person" in the naturalization laws. Since this decision, it has been cited by state and federal courts in denying citizenship to Chinese, 42 Japanese 43 and Burmans. 44 In 1882 Congress expressly excluded the Chinese from the privileges of naturalization by enacting a law prohibiting any state or United States court from admitting them to citizenship. 45

39 William Guthrie, Lectures on the Fourteenth Amendment to the Constitution of the United States, 57.
41 (1878) 5 Sasyer, 155.
42 In re Hong Yen Chang (1890) 34 Calif. 163; In re Gee Hop (1895) 71 Fed. Case 274.
44 In re Po (1894) 28 N.Y. Supp. 383.
45 U.S. Stat. at Large, XXII, p. 61.
At the close of the Nineteenth Century the Spanish-American War made the problem of territorial expansion the leading matter of discussion, and there was renewed the question of the rights of inhabitants of territories in possession of the United States, but not forming a part of the United States. With the exception of Alaska, all the territory acquired before the war with Spain had been contiguous to the United States, and as has been said, "the natural expectation was, that the land thus acquired, would be peopled by American citizens and would ultimately compose a portion of the union".46

With the acquisition of the non-adjacent territories of the Philippines and Puerto Rico there arose the question whether the Constitution placed the same restrictions on the government of the United States in dealing with the inhabitants of the new possessions as with citizens of the United States. The Supreme Court first gave attention to this matter in the decision in the case of Downes v. Bidwell,47 in which it was asked to decide on the legality of the provision of the Foraker Act which placed a 15% tariff on imports into the United States from Puerto Rico. The Court was asked to hold such a duty a violation of Article I, section 8, reading: "all duties, imports and excises shall be uniform throughout the United States". This plea, the court said made it necessary to inquire "whether there be any territory over

46 McLoughlin, Const. Hist. of the U.S. 768.
47 (1900) 182 U.S. 244. In the decision in the case of De Lima v. Bidwell (1901) Ibid., 1, the court had held that inasmuch as by the treaty with Spain, Puerto Rico had ceased to be a foreign nation, the collection of duties on goods from the island under the Dingley tariff was unconstitutional.
which Congress has jurisdiction which is not a part of the United States, by which term we understand the States whose people united to form the Constitution and such as have been admitted upon an equality with them.\textsuperscript{48} Such an inquiry led to the conclusion that it had been intended that some territory was not to be a part of the United States. This might be seen in the distinction made in the Thirteenth Amendment between the United States and any place subject to its jurisdiction. The court said that Congress in dealing with Louisiana, Florida and other territories had felt at perfect liberty to apply the guarantees of the Constitution only so far as it deemed advisable. In the territories established from the original North-west territory and Alaska, Congress had felt it necessary "either to extend the Constitution and the laws of the United States over them, or declare that the inhabitants shall be entitled to enjoy the right of trial by jury, of bail and the privileges of the writ of habeas corpus as well as other privileges of the bill of rights".\textsuperscript{49} The power to acquire territory, the court believed carried with it the implication not only of the power to govern but "to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the American Empire".\textsuperscript{50} Indeed it was doubted that Congress would ever agree to the annexation of territory "upon the condition that its inhabitants, however foreign they may be to our

\textsuperscript{48} 182 U. S. 278.
\textsuperscript{49} Ibid., 279.
\textsuperscript{50} Ibid.
habits, traditions and modes of life, shall become at once citizens of the United States." The court believed that it was pertinent to the question at hand, to point out, that in all the treaties by which territory had been acquired, special provisions had been made on the subject of privileges and immunities of citizenship. Under the Florida and Louisiana treaties the inhabitants were to be incorporated in the United States, and to be admitted as soon as possible to all the rights of citizenship; in the case of Mexico, Congress had been required by the joint resolution of February 2, 1848, to incorporate the inhabitants into the United States, but had been empowered to extend the rights of citizenship at its own discretion; in the case of Alaska, the inhabitants who remained in the territory three years were to be admitted to the enjoyment of all rights; while in the case of the Philippines and Puerto Rico, the political and civil rights of the inhabitants were to be determined by Congress. All of these cases were regarded by the court as evidence of "an implied denial of the right of the inhabitants to American citizenship until Congress by further action should signify its assent."

The decision in the case of Downes v. Bidwell formed the foundation for later decisions arising from the insular possessions, and the territory of Alaska. In the case of Hawaii v. Mankichi

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51 Ibid., 279-280.
52 Ibid., 280.
53 Ibid.
54 (1903) 190 U. S. 197.
the court was called upon to decide whether Hawaiian law providing for indictment by presentment and for a verdict of a trial jury by a vote of nine of the twelve members, violated certain provisions of the Fifth and Sixth Amendments to the United States Constitution. 55

The decision of the court held that the rights guaranteed by these amendments were not fundamental and had not been extended to Hawaii by the joint resolution of Congress annexing the island. 56 In a concurring opinion Chief Justice White and Justice McKenna declared that "neither the terms of the resolution, nor the situation which arose from it, served to incorporate the Hawaiian Islands into the United States and make them an integral part thereof". 57 The resolution of annexation made it clear that the permanent status of the inhabitants was to be determined by Congress, and it failed to show that they were endowed with the rights of an incorporated people. 58

In a decision the next year (1904) the idea of incorporation was made a central point in an opinion to which only Justice Harlan dissented. 59 In this case the court was asked to decide whether in the absence of a law of Congress, jury trial applied to the Philippines. The court pointed out that it had been settled by the decisions in the cases of Downes v. Bidwell and Hawaii v. Mankichi that such a guarantee would not apply to the inhabitants until Congress passed special legislation. Therefore, jury trial was not required in the Philippines until Congress acted. 60

55 Ibid., 212.
56 Ibid., 212.
57 Ibid., 219.
58 Ibid.
60 Ibid., 143.
The provision in the Alaska treaty, that the inhabitants who remained in the territory for three years were to enjoy all the rights of United States citizens, clearly placed them under the protection of the Constitution. Nevertheless Congress enacted legislation permitting the impanelling of juries of fewer than twelve members. In a decision in which the ideas of incorporation and unincorporation were set forth as established doctrines, the court declared Alaska to be in the incorporated class and entitled to all guarantees of the Constitution.

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Chapter XIII

Summary

The concept of citizenship in the United States as held today is the result of an evolutionary process running back to the first years of the nation's history. Beginning with the Confederation period each decade added its contribution with the result that citizenship is now conceived of in terms of several universally accepted principles. Throughout most of the development great difference of opinion prevailed among jurists and statesmen who sought solutions to problems of citizenship. Two things were chiefly responsible for this. First, the federal system gave rise to the problem of relationship of state and national citizenship, and, second, the presence of the free Negro led to serious complications due to the social problem involved.

One of the early difficulties experienced in America arose from the lack of terms necessary to a discussion of questions of citizenship. English terms had been practically discarded, but new terms were not at once developed. This is illustrated by a confusion of the terms "subject" and "citizen" in the state constitutions of the Confederation period.

In neither the treaties entered into with European powers nor in the state constitutions was there a definition of state or United States citizenship or a statement of what constituted the status of citizens of either type. Yet, in two respects the people of the Confederation period made a beginning toward developing a concept of citizenship. Article 4 of the Confederation recognized
as citizens of the states the free inhabitants and provided that citi-
zens of each state were entitled to all privileges and immunities in
the several states.

The Constitution of 1787, like the Articles, recognized state
citizenship but made an advance in recognizing also citizenship of
the United States. Yet no definition was made of the privileges and
immunities of either state or United States citizens or of the rela-
tion of the two types of citizenship. Moreover, the slight atten-
tion given the subject of citizenship in the constitutional conven-
tion and the vagueness of the provisions of the Constitution demon-
strated that the early statesmen had little appreciation of the
problem.

The failure of the framers of the Constitution to define the
relationship of state and United States citizenship presented a
problem to the first Congress at the time of the consideration of
the Naturalization Act of 1790. The Act shows that no clear-cut
idea of a distinction between state and United States citizenship
existed in Congress. The Act is nevertheless important inasmuch
as it was the occasion of the raising of the question of the re-
lation of state and national citizenship.

No phase of citizenship was approached with greater confusion
than the privileges and immunities of state citizens in other
states. Basing their ruling on Article IV, section 2 of the Con-
stitution of the United States both state and federal courts were
in close agreement that a conservative interpretation should be
placed on that article. In Maryland special conditions were per-
mitted for the recovery of debt by one of its citizens from a
citizen of another state, while in Massachusetts a court ruled that not all the privileges enjoyed by citizens of that state might be claimed by citizens of other states when in Massachusetts. The tendency to place a conservative interpretation upon the comity clause of the United States Constitution was continued in the federal courts. Especially important was the case of Corfield v. Coryell, in which Justice Washington declared that only "fundamental" rights were comprehended in Article IV, section 2. Fundamental rights included "protection by the government, the enjoyment of life, and liberty, with the right to acquire and possess property ... and to pursue and obtain happiness and safety." The later significance of Washington's view lay in the fact that it was taken as a precedent for Justice Miller's opinion in the celebrated Slaughter House cases.

The difficulty caused by the presence of the free Negro arose in the debates in Congress over the provision in the Missouri Constitution of 1821 which required the state legislature to prohibit free Negroes from migrating into the state, and was continued by cases in state courts involving claim to citizenship made by free Negroes. Consideration of the Missouri Constitution clearly showed that any previous rule implying that all free inhabitants were citizens was rejected because of the presence of the free Negro. Clear thinking had not yet been achieved and the Negro was to make it even more difficult. Despite great differences of opinion, the mere attempt at definition of citizenship represented an advance over earlier periods. Moreover, the problem could not be avoided because questions continued to be raised which had to be decided
according to some rule of citizenship or other. Hence even in the
Missouri debates ideas were advanced which persisted and were
elaborated on in the later views of both Taney and Curtis in the
Dred Scott decision. Senator Smith argued, as Taney did later,
that the free Negro's historic position denied his citizenship,
while the arguments of other opponents of Negro citizenship were
similar to Taney's opinion that the tests of citizenship were the
political privileges enjoyed by an individual. On the other hand,
in the views of Otis and others that the mark of citizenship was
the possession of the right to protection of life and property,
there was a concept similar to Curtis' in his dissent in the Dred
Scott case. Furthermore, the view of Curtis that citizenship de-
pended on social and civil rather than political rights antici-
pated the Fourteenth Amendment and the Supreme Court decision in
the Slaughter House cases.

The Missouri debates were also the occasion of discussion of
rights of states to exclude citizens from other states. Opponents
of free Negro citizenship declared that exclusion laws were not a
violation of the privileges and immunities clause of the United
States Constitution, but a proper exercise of the states' police
power. Friends of free Negro citizenship held that no state could
deny, with few exceptions, rights to citizens of other states it
granted its own. In this view the opinion of Justice Miller in
the Slaughter House decision of 1873 was anticipated.

Thus, broadly speaking, the thinking about citizenship divided
men into two groups. These two types of thought on citizenship are
well shown in the cases in state courts involving free Negroes.
Courts of two northern and two southern states declared free Negroes to be citizens, while many other courts in the south denied the claim. As it had been claimed in the Missouri debates and was later urged by Chief Justice Taney in the Dred Scott decision, the test of citizenship usually set up by the opponents of free Negroes was political rights. It was claimed that since Negroes did not possess these rights they were not citizens. Courts, however, that acknowledged free Negroes as citizens regarded civil rights as the test of citizenship.

One matter of great importance linked with the question of the free Negro's citizenship was the question of his right to migrate from one state to another. Many states had laws excluding free Negroes. And these laws clearly raised the question of the right of migration as guaranteed by the privileges and immunities clause of the United States Constitution. These laws were defended upon the ground that they were a proper exercise of the states' police power. It was contended that the privileges and immunities clause did not prevent states from enacting laws necessary for the preservation of the public safety.

The legal position of Indians in the United States before the Civil War was not unlike the free Negro's position. Against them it was argued that they were not citizens because they did not possess political privileges, just as the argument was advanced against free Negroes. Also, the citizenship of Indians was denied because many of them were members of tribes and, as such were considered as wards of the nation.
An additional test of citizenship made before the Civil War arose from the claim of corporations to the rights of citizenship. Although the courts refused to recognize corporations as citizens, a concession was granted of permitting them to sue and be sued in the federal courts.

It has been seen that as far as the free Negro and Indian were concerned, the doctrine of citizenship by locality of birth was not recognized. Yet at the same time, all whites born in the United States were deemed citizens. No fact presents stronger proof than this of the influence of the presence of the free Negro as a complicating factor on citizenship before the Civil War.

Expatriation received the attention of both state and federal courts before the Civil War. In general, the federal courts held to the view that United States citizens could not divest themselves of allegiance to the United States without the government's consent. State courts did not always agree with this view but apparently no serious trouble was made by this difference of opinion.

In the opinions of Taney and Curtis in the Dred Scott case an advance was made in the evolution of today's concept of citizenship. Each of these jurists made a contribution in the sense that he expressed views which are at the present time recognized doctrines. Taney's contribution lay in the principle that United States citizenship arose from national authority, rather than that citizens of the United States were individuals upon whom state citizenship had first been conferred, as Curtis claimed. Taney also hinted at two sets of privileges and immunities. Curtis' claim to fame, too,
rests upon a denial of the opposing jurists' contention. It was to his credit that he set forth the principle that citizenship was dependent upon civil rather than political rights. Although Taney's position with respect to Scott's right to sue cannot be supported, he made an advance over his predecessors and contemporaries in perceiving that United States citizenship was independent in origin from state citizenship. On the other hand Curtis' view that citizenship was dependent upon civil privileges was essentially modern in character.

Following the Dred Scott decision in 1857 a rapid advance was made in the evolution of the concept of citizenship. For a short time after 1857 Taney's views were accepted with strict fidelity. With the coming of the Civil War, however, rapid change soon made acceptable the view that the free Negro was a citizen on account of birth in the United States. This opinion was first given official sanction by Attorney General Edward Bates, who also declared that citizens possessed rights which the states cannot abridge.

Four years after the announcement of Bates' opinion Congress recognized the principle of citizenship by birth in the United States in the Civil Rights Bill. Rising to a position of first importance at that time was the subject of privileges and immunities of citizens. Only Reverdy Johnson distinguished between the rights of United States and state citizens. Illustrative of the growing nationalistic sentiment were the speeches of Trumbull in the Senate and Wilson in the House, neither of which made any distinction between the two classes of rights. In this view was
the beginning of a movement to make the United States the guarantor of all rights of citizenship, which reached its height in the Fourteenth Amendment and the Enforcement Acts.

In the debates on the Civil Rights bill, Taney's view on the origin of national citizenship was practically universally accepted. In considering the problem of Indian citizenship members of Congress apparently believed that wherever individual Indians left their tribes and took up civilized modes of living, they immediately became citizens. The Supreme Court ruled this view unacceptable in the case of Elk v. Wilkins in 1884.

The adoption of the Fourteenth Amendment represented the point of general acceptance of the principle that no distinction existed between rights of state and United States citizens. Although a distinction was clearly made between citizens of the state and the United States, in the first clause of the amendment, it was clearly intended to bring all rights of citizens under the protection of the United States. At the time of the enactment of the amendment it was apparently an accepted view, as it had been at the time of the passage of the Civil Rights Bill, that Indians did not become citizens until they had left their tribes. Furthermore, in contrast to later views in Congress and in the Supreme Court it was the accepted view that no act of Congress was necessary to make citizens of Indians who left the tribes. The problem which was later to rise concerning rights of citizenship of natives of the colonial possessions apparently did not occur to members of Congress at the time the amendment was enacted.
Equal in importance to the Dred Scott case and the Fourteenth Amendment was the majority opinion of Justice Miller in the Slaughter House case in 1873. Up to that time the view prevailed almost universally that no distinction existed between the privileges of state and United States citizens. In the opinion by Justice Miller there was set forth the principle of privileges and immunities of state and United States citizens which was certainly not seen or intended by those who framed the Fourteenth Amendment. Yet the principle of dual rights of citizenship has remained to the present as one of the cardinal principles of American citizenship.

Justice Miller undertook to enumerate some of the principle rights of both United States and state citizens. As a general principle of United States citizenship, he cited the fundamental rights first enumerated by Justice Washington in Corfield v. Coryell. He also cited the privileges and immunities of United States citizens as described by Justice Clifford in Crandall v. Nevada, which the Supreme Court had decided in 1868. From citations from these two decisions and additions made by Justice Miller, it may be said that in his opinion the rights of United States citizens included the following: the privilege of protection by the government, with the right to acquire and possess property and to obtain happiness and safety; the right to come to the seat of the government to assert any claim against it or to transact any business with it; access to the seaports, to the sub-treasury, land, and revenue offices; to protection by the federal government of life, liberty and property when on the high seas or within the jurisdiction of a foreign government; to assemble peaceably in
order to petition Congress for redress of grievances; the right to
the writ of habeas corpus; the right to the use of the navigable
waters of the United States; and the right to become citizens of
any state with the same rights as other citizens of that state.

Rights of state citizens were considered in terms of Article
IV, section 2. In describing those rights Justice Miller cited a
previous decision of Justice Field in Paul v. Virginia. It was
said that in any state citizens of other states were on the same
footing as citizens of that state. State citizens were also to
be free from discrimination and they had free ingress and egress
into other states and out of them. The Article further insured
the same freedom in acquiring and enjoying of property in other
states as citizens of those states.

The equal protection and due process clauses of the amend-
ment were broader in that they referred to persons. Justice Miller
gave little attention to these clauses. He doubted that the equal
protection clause was intended to cover any state infraction except
against Negroes. His total failure to see the possibility of the
due process clause is significant because of the later transfer
of control from state to United States over citizens' rights which
was made through that clause.

The importance of Justice Miller's decision did not end in
1873, but its effect was of great significance in later times.
Later decisions bearing on the privileges and immunities clause of
the Fourteenth Amendment usually gave fuller meaning to the majority
opinion in the Slaughter House cases by means of corollary state-
ments which naturally arose from the original doctrine. In the
Cruikshank case in 1875 the Supreme Court stressed the point that
the amendment was intended as a protection against denial of rights by the states, but not against denial by individuals. The latter right pertained to United States citizens, but was guaranteed by the original Constitution, not by the amendment. In a series of other cases the court decided that the following were rights of state, but not United States citizens: The right to practice law in the courts of the states, the right to sell liquor, the right of suffrage in state elections and the right to petition to assemble. The latter right had existed in all free governments and was not conferred by the Constitution except in cases where assembling had been for the purpose of petitioning Congress. The right to trial by jury in civil cases and to bear arms which Amendments VII and II respectively provided for, were protections against the encroachment by Congress only, but not by the states or individuals in the states.

Although the equal protection clause referred to persons rather than citizens, citizenship was involved in interpretation of that clause. The subject of equal protection was brought before the Supreme Court of the United States in three cases involving the exclusion of Negroes from juries at times when members of that race were on trial. Exclusion by state law was declared unlawful, but the court ruled in a second case that the Fourteenth Amendment offered no protection against denial of equal protection resulting from acts of individuals. In a third case the court ruled that as an agent of a state the presiding judge could not exclude Negroes from juries without violating the equal protection clause of the Fourteenth Amendment.
The decision of the United States Supreme Court in the Civil Rights cases in 1883 brought to a close a ten years' period in which the principles first laid down in the Slaughter House cases were fully established. By the decision of 1883 it was definitely established that American citizenship is dual in character and that the protection offered by the privileges and immunities clause of the Fourteenth Amendment is against state, but not individual action, affecting rights pertaining to United States citizenship.

The enactment of the Fourteenth Amendment caused an effort to be made to bring the rights guaranteed by the first eight amendments of the United States Constitution under the protection of the privileges and immunities clause of the Fourteenth Amendment. In a series of cases involving the Second, Fifth, and Seventh Amendments respectively, the court held that the prohibitions contained in each of them were directed against Congress and not the states. Although this position was affirmed by the court on numerous occasions, in the latter part of the Nineteenth Century, it found it necessary as late as 1908 to repeat its views. In the latter year the court expanded upon its previous opinions with the statement that some of the rights guaranteed by the amendments might possibly be protected against state action because denial of those rights constituted a denial of due process. By this view the aim of the framers of the Fourteenth Amendment was fulfilled in a measure, but through an interpretation which certainly had not occurred to them.
Recent developments in the evolution of the concept of citizenship through interpretation of the Fourteenth Amendment concern Indians and Orientals born within the United States and the natives of the colonial possessions. At the time of the enactment of the Civil Rights Bill and the Fourteenth Amendment the opinion prevailed in Congress that Indians became citizens of the United States upon leaving their tribes and assuming civilized modes of life. However, in the case of Elk v. Wilkins in 1884 the Supreme Court overruled this, and declared instead that Indians must be naturalized before they became citizens. Congress has followed that principle in both the Dawes Act of 1887 and the Burke Act of 1906 in prescribing the manner by which Indians might acquire citizenship.

The question of the citizenship of children born in the United States to parents owing allegiance to a foreign power was decided by the Supreme Court in 1898. The clause "and subject to the jurisdiction thereof" in the Fourteenth Amendment, excluded from citizenship of those born in the United States only three classes:—Children born to alien enemies in hostile occupation of the country, children of diplomatic representatives of foreign states, and children of foreign tourists and commercial representatives in the United States. Although under this decision all Orientals born in the United States are citizens, it has been the policy of Congress to deny privileges of naturalization to Oriental immigrants.

With the acquisition of territory as a result of the Spanish-American War, the question was raised of the rights of natives of the
colonial possessions. Did they become citizens? If not, what privileges were secured to them by the court or laws of the United States? Did they possess the same protection against denial of rights by Congress or other powers as citizens of the United States? In the case of Downes v. Bidwell the Supreme Court ruled that natives are guaranteed fundamental rights by the Constitution, but Congress may admit to citizenship or not at its discretion. The right to acquire territory implied the right of Congress to determine the status of the inhabitants of any territory. The court later declared that Congress was at liberty to withhold the privilege of jury trial from natives of Hawaii and the Philippines.
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