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by

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Committee in charge:

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Professor Harry N. Scheiber
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Abstract

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Doctor of Philosophy in Jurisprudence and Social Policy

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This study examines the evolution of the concept of citizenship under the United States Constitution. It traces how a concept of citizenship that was once centered on individual states (state citizenship) developed into a concept centered on a single, overarching status that is meaningful across the United States (federal citizenship). The author defines citizenship as a constitutional status, which is accompanied by certain rights that are unique to the status, and backed up by the power of the government to protect those rights on behalf of people who possess the status. For citizenship to be meaningful, the government needs to possess authority over all three aspects of citizenship.

The study focuses on a series of interstate conflicts from the mid-nineteenth to mid-twentieth century over the status of persons, especially blacks, immigrants, and paupers. This resulted in a progressive expansion of the scope of federal citizenship at the expense of state citizenship. The Fourteenth Amendment was a turning point in the relationship between state citizenship and federal citizenship. It was meant to extend the scope of all aspects of federal citizenship, so that the *status* of federal citizenship was to be granted to a broader population, that important *rights* were to be attached to federal citizenship, and that the federal government was to have a broad power to *protect* the rights of federal citizens. In practice, however, this change was not immediate and clear-cut. Diverse groups (blacks, immigrants, and paupers) that had been excluded from state citizenship only gradually came to be included and protected under the umbrella of federal citizenship. This study shows the struggles over this transfer of authority from the state governments to the federal government.

The study utilizes primary sources from all three branches of the government, both at the federal and state level (especially states that were involved in interstate controversies) as well as secondary sources to examine the conflicts over citizenship that led to changes in their scope and the location of authority. The author concludes that contemporary conflicts involving state discrimination against nonresidents should be assessed in light of the broader historical trend towards a more inclusive, nationalized notion of citizenship instead of an exclusionary, localized citizenship based in the states.

Table of Contents

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I. Introduction

The purpose of this study

The purpose of this study is to trace the evolution of citizenship in the United States from the standpoint of federalism and the Constitution. The United States has evolved from English colonies that were established independently of each other into a federation of states that is governed by a single Constitution that binds all the states as the "supreme law of the land".[1] The history of United States is one of gradual political unification and integration of its people.

In the area of citizenship the United States started with a system in which each colony controlled the various aspects of citizenship.[2] The U.S. Constitution inherited this practice, leaving each state to define and control citizenship. The concept of federal citizenship was established and infused with meanings through a gradual process over the next two centuries. It is only recently in constitutional history that U.S. citizenship has become a "passport" that is valid in the union, with which one could enter and reside in any state and claim the full benefits of a citizen. This study seeks to trace this historical development, focusing on the conflicts that led to the gradual strengthening of the idea of federal citizenship. It is a study of how citizenship was integrated from citizens of individual *states* into citizens of the *United States*.

Throughout this study I focus on three aspects of citizenship: status, rights and protection. First, citizenship is a *status* to be granted by the government. A sovereign nation has exclusive control over whom it grants the status of citizenship to. This means that the sovereign is free to grant as well as exclude a person from that status at will. The nation may bind itself to grant citizenship automatically under a certain condition, as the Fourteenth Amendment now does in the United States. But no *other* nation can force a nation to grant the status. In this study I will examine the extent to which individual states had control over the status of citizenship to the exclusion of intervention by any other entity including the federal government, and how this control was ultimately transferred to the federal government.

Second, citizenship brings it with certain *rights* to the person who bears that status. For example, while there are some exceptions, citizenship has been a prerequisite for voting. Citizenship has long been a requirement for the assertion of various other rights including property rights (right to own land, etc.), economic rights (access to occupations, access to common resources of the state, etc.), provision of social welfare, and so on. In this study I will look at what kind of rights states have attached to state citizenship and how the introduction and expansion of federal citizenship has altered this arrangement.

Finally, citizenship entails the power of the government to *protect* the rights of citizens. It is meaningless if the government can grant the status of citizenship and declare the rights that citizens have, but lacks the power to protect those rights. It is often said that citizenship, as a fundamental idea, entails the duty of protection owed to citizens by the

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[1] U.S. Constitution, Article VI.

[2] Formally, colonists were British subjects and their status was based on their loyalty to the English king. However, due to the distance between the colonies and England, colonies largely controlled the status and rights of its members.

sovereign, and allegiance owed to the sovereign by citizens. This reciprocal relationship binds the two together.[3] The question then, is how these ties are constructed. In the case of the United States, such ties did not initially exist between the federal government and people who were citizens of individual *states*. Further, a large portion of the population (blacks, foreigners) was excluded from citizenship altogether. This study traces how the federal government expanded its power to protect the rights of people based on federal citizenship, and how the state governments lost the power to grant or deny rights based on *state* citizenship.

Related to the elements I stated above is the power to control immigration, or the physical entry of persons into the territory. Since physical presence is in principle a prerequisite for citizenship and can strengthen the claim to rights[4], the first step of exclusion from citizenship is to prevent the entry of a person. This is why immigration and naturalization is dealt with by a single comprehensive law today. But the United States has a history of regulation of immigration under which each colony (and later the states) dealt with migration of persons on its own. Thus, I will trace the transfer of this authority to regulate immigration from the states to the federal government.

Citizenship as a constitutional concept

This study approaches citizenship as a constitutional concept. Under this concept, citizenship is a status which could be acquired by a person who has satisfied a set of criteria defined by the constitution and the law through a standardized legal process. This status in turn leads to the person gaining a set of legal rights unique to the status. A classic study by T. H. Marshall, for example, analyzes citizenship through a series of rights under the labels of civil rights, social rights, and political rights.[5] Citizenship is a status that leads to

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[3] A rare episode that brought this aspect of citizenship to the forefront was the mass renunciation of American citizenship by American citizens of Japanese ancestry who were placed in internment camps during World War II. One scholar points out that this was an instance in which the government abandoned its side of the reciprocal obligations (to protect the rights of citizens), which in turn led American citizens of Japanese ancestry to foreswear allegiance and elect the government to which they would swear allegiance. Patrick O. Gudridge, "The Constitution Glimpsed from Tule Lake," *Law and Contemporary Problems*, Vol. 68 (Spring 2005), 81-118. The idea that the people could make such a choice ("volitional allegiance") was the backbone of the American Revolution. See James H. Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill, NC: University of North Carolina Press, 1978), especially Ch.7. But note that many of the Japanese American renunciations were overturned on the grounds that they were not done voluntarily but were done under conditions of duress and coercion. John Christgau, "Collins versus the World: The Fight to Restore Citizenship to Japanese American Renunciants of World War II," *Pacific Historical Review*, Vol. 54, No. 1 (Feb., 1985), 1-31.

[4] For example, the procedural rights are different between a person who has not yet entered the border and is being denied entry, and a person who is inside the border and facing deportation proceedings. The latter has a stronger claim to procedural as well as substantive rights. Compare 8 U.S.C. 1225 (removal of inadmissible arriving aliens) and 8 U.S.C. 1229 (removal proceeding against aliens residing in the United States).

[5] T. H. Marshall, *Citizenship and Social Class* (London: Pluto Press, 1992).

a bundle of rights. Therefore, cases contesting citizenship would arise when someone claims a right based on citizenship and others deny that right or challenge the citizenship status of that person.

There are other approaches to citizenship, focusing on the political, sociological, or psychological dimensions of citizenship.[6] The political approach to citizenship considers participation in the political community as a crucial marker of citizenship. This is the classic republican notion of citizenship, where participation in self-government is reserved to citizens and was the duty of citizens. Although this sounds exclusionary, citizenship based on political participation can also be more inclusive than that based strictly on legal definitions. Political participation, not necessarily by voting but through demonstrations, political organizing, and other direct means may be seen as the *exercise* of citizenship in this sense even if the participants lack the legal status of citizenship. A massive demonstration by undocumented immigrants to influence legislation would be seen as an exercise of citizenship under this perspective.

The sociological approach extends the range of activities that count as a marker of citizenship. For example, social affiliation with others who are also considered citizens may be deemed crucial. Attendance in common schools, activities in religious and charitable organizations, and general acceptance into social circles through friendship and marriage may all be components of citizenship in this sense. It focuses on recognition *among citizens themselves*, rather than acquisition of formal status and rights through the government. Citizenship in this sense may be hard to achieve even after the legal status and rights of citizenship have been conferred to that person. For example, even after formal citizenship was conferred to blacks by Constitutional amendment after the Civil War, many whites refused to grant social recognition of blacks as co-equal citizens.

The psychological approach focuses on the perception of the person about his or her affiliation. It is whether that person feels that he or she belongs to a particular nation, and whether others also share that view. This may also be called *identity*. A person may feel discomfort, inadequacy, or even hostility about belonging to a particular nation, even though he or she is legally a citizen. Or it may be the other way around, where the person would feel he or she is a member of a particular nation despite the lack of formal citizenship.

A full study of history of citizenship in the United States will have to embrace all of these dimensions. Meanwhile, this study, by seeing citizenship as a constitutional concept, primarily examines the struggle over government power and policy regarding who should acquire the *status* of citizenship, what *rights* should accompany that status, and what kind of *protection* should be provided to enforce the rights of citizens.

Another point that will come up in this study is the question of whether citizenship has

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[6] Scholars have used various labels to describe the different dimensions of citizenship. Here I relied on labels based on academic disciplines as used in Peter H. Schuck, "Citizenship in Federal Systems," *The American Journal of Comparative Law*, Vol. 48, No. 2 (Spring, 2000), 195-226. Irene Bloemraad, in her review of current studies of citizenship, describes four dimensions: legal status, rights, identity, and (political) participation. Irene Bloemraad, "Citizenship and Immigration: A Current Review," *Journal of International Migration and Integration*, Vol. 1, No. 1 (Winter, 2000), 9-37.

just been a proxy for race. In other words, has the debate over citizenship been a convenient way of debating whether a person of particular race should be included or excluded from that polity without specifically naming that race? Such a perspective sees as the central purpose of citizenship distinctions an effort to establish a hierarchy between the races. The more superior the race the higher its claims to citizenship, the more inferior the lower its claims, and the lowest may be excluded from citizenship entirely. Seeing citizenship as a proxy for race has been strong and persistent in the United States, as Rogers Smith has detailed in his work.[7] This study reflects this perspective in that a significant portion of it is about exclusion of racial minorities from citizenship. The debate over slavery and free blacks was about whether blacks could be citizens. The debate over immigrants was a debate over whether Southern and Eastern Europeans or Asians could be citizens.

However, while racial minorities as a target of exclusion has been a major element that affected the meaning of citizenship, it is only a part of the picture. The same mechanisms that excluded racial minorities were used to exclude people regardless of race, and the people debating constitutional provisions regarding citizenship had as much focus on their *quest for power* to control the field as much as *who* should be excluded. For example, states enacted poor laws and passenger laws in order to exclude people from other states as well as other nations on the basis of their economic effects on the community, regardless of their race. While such laws had a disproportionate effect on certain groups, the excluded were not uniform in race, ethnicity, gender, or other biological traits. Shipping companies challenged state passenger laws on the basis of its burden on their business, and states responded on the basis of their discretion to admit or exclude a person who would become a burden. The ability to expand business or to exercise governmental power was a motive behind the struggles over citizenship as much as the motive to establish a racial hierarchy.

Thus, while race is frequently an element in this study, I do not exclusively focus on racial exclusion. I will look at various motives behind the conflicts over the authority to control citizenship, in other words the authority to decide whether to include or exclude a person from that status and to determine what rights should flow from that status.

The academic context of this study

In this study I seek to bring together the perspectives gained from two broad areas of inquiry by previous scholars. One is the history of federalism and the status of blacks in the United States, and the other is federalism and the regulation of *interstate* and *international* migration. In both areas of inquiry scholars have provided a detailed analysis of a specific time period or a specific group of people. I think that these studies present threads that could be weaved together.

Federalism and the status of blacks have been intertwined throughout U.S. history. The U.S. Constitution started out with a compromise between the North and the South over slavery, permitting individual states to decide the matter. In the 1830s and 1840s the difference in the status of blacks between the states led to frequent conflicts over slave transit and fugitive slaves. In the 1850s the conflict reached a boiling point with the *Dred*

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[7] Smith calls this *ascriptive* citizenship. Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997).

Scott decision, which ultimately led the regions into a war against each other. In the 1870s and 1880s the regions continued the battle in politics and law over the meaning of federal citizenship and the Congressional power to intervene on behalf of blacks who had become federal citizens.

Feeley and Rubin argue that a major reason to pursue federalism is to sustain a distinct political identity, backed by distinct cultural values, along geographical lines.[8] They argue that such a need no longer exists in the American polity, while in the past the preservation of slavery (before the Civil War) and apartheid (after the Civil War) in the Southern states had served as "the only impediment to the development of a unified political identity."[9] Scheiber also points out from the standpoint of historical progression in the relationship between the federal and state governments that it was in the area of civil rights of Southern blacks that a "residue of dual federalism" (under which federal and state governments operate in independent spheres) was evident even after centralization had accelerated in many other areas of policy-making (especially economic regulation).[10] He also finds that parochialism, including the rejection of foreigners as well as regional interests outside one's own, had been a common factor in the debate over law and policy in the states throughout U.S. history. The Supreme Court thus had to frequently consider the extent to which states could favor in-state interests over out-of-state interests.[11]

This study extends these analyses through the lens of citizenship. Citizenship has served as a constitutional mechanism to sustain such distinct identities, erecting a barrier (by physical prevention or by deprivation of rights) against the entry of those deemed undesirable by the existing community. And the entry of a person into a polity is an area in which power-sharing is difficult. Either the government allows a person in or not—for one authority to allow a person in while the other rejects the same person defeats the purpose of the exercise of this authority. Over time, nationalization of citizenship made the preservation of local identities more difficult, and the erosion of local identities in turn sustained the nationalization of citizenship. From the standpoint of power, the power was initially in the hands of the states (prior to the Civil War), followed by a period in which the federal and state governments fought over *exclusive* control (Reconstruction era), with the federal government ultimately winning it over (the New Deal era).

A critical part of this development was the struggle over the power to control both interstate and international migration, not just of blacks, but also of other groups that were targeted for scrutiny, including aliens and paupers. In the 1830s and 1840s conflicts arose between the state governments and the federal government over state poor laws and passenger laws that regulated both interstate and international migration of persons. In the

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[8] Malcolm M. Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (Ann Arbor: The University of Michigan Press, 2008).

[9] Ibid., 121-122.

[10] Harry N. Scheiber, "Federalism and Legal Process: Historical and Contemporary Analysis of the American System," *Law and Society Review*, Vol. 14, No. 3 (Spring, 1980), 663-722 at 680.

[11] Harry N. Scheiber, "Xenophobia and Parochialism in the History of American Legal Process: From the Jacksonian Era to the Sagebrush Rebellion," *William and Mary Law Review*, Vol. 23 (1982), 625-662.

1850s, Congress began to explore the possibility of federal regulation of immigration. Finally, beginning in the 1870s Congress enacted federal laws that regulated immigration and, over the next few decades, gained exclusive authority over the field with the backing of the courts. Along with the physical control of immigration, the indirect means of controlling immigration by depriving the rights of the people became a problem. Such indirect methods also faced constitutional scrutiny after the Fourteenth Amendment was ratified, and states eventually lost most of its authority to delineate the rights of citizens and non-citizens (aliens).

So far, the constitutional history of slavery, the history of poor laws and its vestiges in contemporary social welfare laws, and the history of immigration regulation have been separate fields of inquiry. Though they all share a concern for citizenship, they have not mutually spoken to each other. This study seeks to show how the diverse studies all constitute a dialogue over the broad question of how citizenship came to be nationalized in the United States. By pulling together the story of diverse groups (slaves and free blacks, immigrants, paupers) and issues (slave transit, restrictions on free blacks, immigrant exclusion, poor laws and settlement), I hope to construct a broad narrative of slow but steady constitutional change towards a nationalized citizenship that is inclusive of all persons within the United States.

To illustrate the intent of this study with an example, a contrast with James Kettner's work, which is one of the most well-known historical studies of American citizenship, may be useful.[12] The main focus of Kettner's study was the ideas surrounding citizenship in England and during the colonial era of what became the United States (though the study includes one chapter towards the end on citizenship and federalism). This study shifts the focus to the United States *after* Independence, and how citizenship based in individual states came to be nationalized since then. Further, this study brings in the perspective of international migration, where federal control of citizenship matters a lot. Can the federal government control its borders and grant or withhold federal citizenship to aliens? Or do the states control even this aspect of citizenship? So far, the studies of citizenship in the context of domestic society in the United States and the studies of citizenship in the context of international relations have not been weaved together.

Process of constitutional change

At the beginning, the United States was a confederation of states that retained borders between the citizens of different states. But the Founders of the U.S. Constitution wrote a document that set the path for inclusive national citizenship. They initially compromised, temporarily allowing various forms of exclusion at the state level. But the broad principles of inclusion and equality were set out from the beginning as political ideals of the United States. The inalienable rights of individuals, free movement in pursuit of opportunity, equal treatment of oldcomers and newcomers were ideas that were enshrined in this document.

The Constitution has a unique logic in which doctrines constructed in one area could migrate to other areas through the institution of judicial review. There, the Court may resolve one issue based on doctrines derived from another issue by analogy. Slavery,

[12] James H. Kettner, *The Development of American Citizenship, 1608-1870*.

immigration, and paupers are usually separate issues in a person's mind. But the Constitution can bind them together as an issue of *whether states can exclude persons from the status and rights of citizenship*. A challenge against exclusivity by any group using the language of the Constitution can open a path for similar challenges by other groups. Weakening the ability of the states to exclude persons from citizenship can affect diverse groups, providing a more inclusive version of citizenship for all.

To give an example, in 1868 the Fourteenth Amendment was ratified, declaring that all persons born in the U.S. should be granted federal citizenship, that federal citizens should have guaranteed privileges, and that all persons should be treated equally under the law. This provision initially opened a path to citizenship for blacks. But it also became a basis for providing citizenship to children born of Chinese and Japanese immigrants, even though the parents themselves had been excluded from citizenship.[13] Further, it became a basis for striking down provisions that excluded the poor from the states, instead requiring the states to provide equal treatment to newcomers.[14]

Migration of persons and demands for inclusion by newcomers has been a central driving force behind the conflicts and changes in the idea of citizenship. The people who sat down and deliberately considered a plan for the Constitution in 1787 had written a document that was a logical compromise as of that date. The provisions related to slavery and citizenship achieved a fine balance under the prevailing political circumstances. But because so many of the provisions related to personal status were based on a fine balance, a slight change in the circumstances required a new Compromise. It is the movement of people, whether they were slaves, immigrants, paupers, that forced changes in the balances that sustained the Constitution.

The logic of change is as follows. People who were once excluded continue to press on the borders of citizenship such that the demand was first made visible; soon a constitutional challenge to the established order of exclusion and inclusion would arise; and the pressures mount to such a degree that the problem requires an interstate or federal solution and a new agreement would have to be struck. While there may be backlashes and backtracking, the larger force is towards progressive inclusion of the once excluded, because the basic political principles of the United States places the burden of proof on those who wish to exclude or discriminate with an assumption in favor of those who demand inclusion.

While the final arbiter of change may be the Court in that it has the power to declare the laws of the land, it is the pressure or demand made by these groups for inclusion that allows the Court to utter its words. The pressure or demand does not necessarily have to be organized and resourceful. Paupers may not be organized and may not seem to have any political power, but if enough of them move about they will create political pressure through the agency of others who speak on their behalf or those who oppose their presence.

I hope that this study would provide a historical context to the debate over state regulation of immigration and citizenship. Owing to the sense that the federal government has been ineffective in regulating immigration, especially from Mexico, there is a revival

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[13] The Naturalization Act of 1790 (1 Stat. 103) limited the eligibility for naturalization to "any alien, being a free white person".

[14] See Chapter IX of this study.

today (the first decade of the twenty-first century) of state and local regulation intended to prevent or discourage immigration.[15] But the fact that states have regulated immigration in the past should not serve as a justification for their intervention now. The constitutional context was different before and then. Today, the entire constitutional system has changed, from one that was based on the primacy of state citizenship to one that is based on federal citizenship. Regulation of immigration alone cannot be taken out of context. A revival of exclusive, state-based citizenship would have an effect on other groups that have been traditionally excluded, including blacks and paupers. This study should show that citizenship in the United States need to be considered in broad light of historical developments that involve diverse groups of people.

Sources

This project examines the process of conflict and change in the meanings and usages of provisions in the U.S. Constitution on the issue of citizenship. This starts with but goes beyond tracing the development of constitutional doctrines by judges or analyzing the words of the judges as a self-contained logic. While judges have the power to make an authoritative interpretation of the Constitution and the law, the cases they have to deal with arise from a particular social and political context in which they operate. Judges are not acting behind a blind curtain, and know the context and the implications of their interpretation in that context. They take cues from and respond to outside events as much as to briefs submitted by lawyers. I will inquire into the different interests behind the decisions regarding citizenship and the Constitution. How did these decisions affect those interests, and how did the latter respond? What did government officials with the power to enforce the laws think of citizenship?

As primary sources, first, I use major judicial decisions. The important cases themselves have been identified by previous studies. I will reexamine those cases, focusing on the nuances of the judges' thinking on federal and state citizenship. I also look at the records of other branches of the government. Studies of constitutional development gives too much weight to judges' opinions for the simple reason that their voices are better preserved. But in our daily lives it is the society, the politicians, and the newspapers that engage in a controversy and promote competing ideas. The courts only step in at the last-stage. This is why I seek to cover sources from a broader range of actors that shaped the constitutional debate.

For example, the slave transit and fugitive slave cases did not suddenly arise as a Supreme Court case. There were longstanding controversies between the governors of states, between the state legislatures of the North and the South, and even between the governor and legislature within the same state. I visited the archives of the states that were involved in these controversies in search of materials that recorded the positions of state officials. Since these controversies were most frequent in the Border States (located between the anti-slavery North and the pro-slavery South), I visited Maryland, Virginia and

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[15] Most recently, Arizona passed a law that is designed to "identify, prosecute, and deport illegal immigrants." The law requires immigrants to carry immigration documents and gives state police broad authority to detain people who are suspected to be illegal. "Arizona Enacts Stringent Law on Immigration," *The New York Times*, Apr. 23, 2010.

Pennsylvania. And because New York became actively involved in a controversy with Virginia, I went there too. There I looked into records of the state legislatures, such as minutes of debate, committee reports and communications from the governor; and the records of the executive branch, such as copies of letters sent to and received from other governors and messages sent to the legislature.

I also looked at newspapers, commentaries and old constitutional treatises to see how the issues were framed and debated at the time. For example, constitutional treatises in the nineteenth century often included an extensive discussion of sovereignty, citizenship, and international law. What is taken for granted and no longer much discussed in constitutional law courses were not so back then. A nation-state could not exist without determining the confines of sovereignty, citizenship (or subjects) and territory, and it was international law that determined the principles regarding these elements. Since individual states asserted sovereignty and control over citizenship in the United States, constitutional treatises had to inquire into whether such assertions were valid, which in turn led to discussions of fundamental principles of sovereignty.

In addition to the sources above, I utilized secondary sources that provide detailed analyses on focused aspects of controversies surrounding citizenship. For example, Paul Finkelman has conducted an extensive study of decisions by the state courts regarding the interstate movement of slaves.[16] What I hope to do is to place the fruits of such studies in the context of evolution from state-centered citizenship to federal citizenship, and to synthesize the process towards inclusion of various groups who were once targets of exclusion.

Overview of the study

In the following chapters of the study I wish to depict the gradual but steady trend towards a national, inclusive vision of citizenship under the U.S. Constitution, focusing on blacks, immigrants and paupers who all suffered under a state-level, exclusive vision of citizenship.

Chapter II looks at how states exercised control over citizenship at the time of Independence, based on the colonial traditions. States regulated the movement of people into their territory directly through the control of borders, and indirectly through the control of rights and benefits granted to people within its borders. I also discuss how the status of "citizenship" was also in its formative stage during this time and that it competed with other personal status distinctions as the basis of determining a person's rights.

Chapter III examines how federal and state citizenship was conceived by the Founders at the time of the ratification of the U.S. Constitution in 1787. What did the Founders think about the eligibility for citizenship and the rights of citizens and what did they think was the relationship between state and federal citizenship? I examine the discussion of citizenship and rights during the Philadelphia Convention and the debates in state conventions over the ratification of the U.S. Constitution.

Chapter IV explores in detail the constitutional conflicts over the interstate migration of slaves (both fugitive slaves and slaves who accompanied their masters) and free blacks

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16 Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981).

prior to the Civil War. This raised the question of who had the authority to define the status and rights of blacks and what respect should be paid by a state to the laws of other states regarding the matter. The chapter includes a detailed look at the disputes between the governments of Maryland and Virginia and between Virginia and New York over the status of black people. Here I use legislative and executive documents from the state archives while incorporating information uncovered by the studies of other authors.

Chapter V discusses how interstate disputes discussed in the previous chapter culminated in a national constitutional crisis. The *Dred Scott* decision by the U.S. Supreme Court foreclosed all avenues of citizenship for blacks and ended the prospect for a constitutional compromise to the issue. But while the *Dred Scott* decision and its author, Chief Justice Taney, is often criticized for overstepping the boundaries of a judicial decision, I would like to show that the arguments regarding citizenship in that decision was within the range of expected discourse at the time. Taney was not inventing a new framework or providing a novel argument. Various groups, including blacks, have long faced exclusion from the framework of state-centered citizenship.

Chapter VI examines how the regulation of both domestic and international migration by individual states through passenger laws and poor laws gradually came into conflict with federal law and policy. Since physical exclusion is the most effective way of limiting claims to citizenship, the power to control immigration is part and parcel of powers over citizenship. This chapter looks at how states such as New York and Massachusetts comprehensively regulated immigration on their own up to the Civil War. It was after a series of constitutional litigation that gradually narrowed the scope of permissible state regulation that room for federal regulation was opened up. However, prior to the Civil War, Congress itself was unsure about the extent of its power to regulate immigration.

Chapter VII discusses how guaranteeing the status and rights of federal citizenship to blacks and making federal citizenship primary over state citizenship became the central focus of Reconstruction after the Civil War. The Reconstruction Amendments to the Constitution and civil rights legislation attempted to infuse meaningful rights to federal citizenship, while the Court struggled to reconcile these developments with its precedents regarding federalism. In the end, the conservative idea that preserved the prerogatives of individual states prevailed and federal citizenship was made a dormant force that would have to wait a later revival. But the path was set forth for the future, with politicians ever more conscious of the potentials of federal citizenship and the requirements for making it "work". Even the backlash clarified the future path.

Chapter VIII examines how the federal government gained exclusive control over immigration at the expense of the states. After the Supreme Court held that Congress had exclusive power over immigration, federal law in this field steadily expanded. Along with the centralization of the naturalization process, Congress gained the full range of controls over the status of persons who migrated to the United States. The states lost the ability to directly control foreign immigration, and their powers over the treatment of immigrants already residing within their borders also faced constitutional challenges. For example, Chinese immigrants were among the first groups to utilize the Fourteenth Amendment to challenge state laws in order to secure their rights.

Finally, Chapter IX examines how states lost control over the *interstate* movement of U.S. citizens. Poor laws were obliterated by pressure from below in the context of mass

interstate migration, and by the decisions of the U.S. Supreme Court demanding that states should treat all *federal* citizens equally, even if they were new to the state. A series of welfare-related cases decided since the middle of the 20th century deprived the ability of the states to exclude paupers or to discourage their entry by limiting their rights.

Altogether these chapters depict a broad historical trend in which state-centered citizenship in the U.S. Constitution gradually lost its power and was taken over by the authority of the federal government and its assertion of the primacy of federal citizenship.

II. State citizenship and the colonial tradition

> What has been said as to the right of a sovereign State to determine the status of persons within its jurisdiction applied to the States of this Union, except as it has been modified or restrained by the Constitution of the United States.[1]

This chapter looks at how citizenship was defined by individual states when the United States was established by the Constitution of 1787. Traditions since the colonial era were retained, with each state determining for itself what the status and rights of people residing within its borders were. The concept of citizenship was rudimentary, and various other personal status distinctions determined the rights that a particular person had.

This chapter first looks at how the status and rights of citizenship was defined in the state constitutions. Then it examines how states treated naturalization. It is in the naturalization process that a polity becomes most self-conscious about who it should include in or exclude from its body of citizens. How were states involved in the naturalization process, and what rights did they give to naturalized citizens? What other personal status distinctions were there to determine a person's rights? Through this the chapter seeks to show how the status and rights of persons were determined by individual states in the early days of the U.S. Constitution.

Citizenship in State Constitutions

After the colonies which were to become the United States declared independence from Great Britain, each proceeded to define the terms of naturalization and citizenship on their own. For example, a Virginia act passed in May 1779 declared that:

> …all white persons born within the territory of this commonwealth and all who have resided therein two years next before the passing of this act, and all who shall hereafter migrate into the same, other than alien enemies… shall be deemed citizens of this Commonwealth… and all others not being citizens of any of the United States of America shall be deemed aliens.[2]

At this point there was no overarching citizenship over that of the citizenship of individual states. There were three distinct status embodied in this provision: "citizens of this commonwealth", "citizens of any of the United States of America", and "all others… who shall be deemed aliens". There was no distinction between "citizens of other states" and "aliens" regarding the eligibility to become citizens of Virginia. Both had to satisfy the same two conditions to become its citizen: he had to be white and had to have continually resided in the state for two years.

However, the language designated separately "citizens of other states" and "aliens", suggesting that "citizens of other states" was a half-way point between citizens of Virginia

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[1] *Lemmon v People*, 20 N.Y. 562 at 603 (1860).

[2] St. George Tucker, *Blackstone's commentaries: with notes of reference, to the constitution and laws, of the federal government of the United States; and of the Commonwealth of Virginia*, Vol. 3 (Book II) (Philadelphia: William Young Birch and Abraham Small, 1803), Appendix, Note C.

and aliens. This quasi-citizenship for "citizens of other states" was the meaning of federal citizenship. In other words, federal citizenship was not a status that was higher than state citizenship, but an *inferior* status that gave to citizens of other states *partial access* to the rights of state citizens.

Being a citizen of another *state* as opposed to being a citizen from another *country* made a difference under the Articles of Confederation (which preceded the U.S. Constitution). Article IV of that document protected the privileges and immunities of the inhabitants of any state who traveled to another state:

> …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 regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce…[3]

Here, the inhabitants of other *states* were given privileges that those who were from other nations did not have. The idea of a federal citizenship that entitled a person to rights in any of the states in the union was emerging. However under the Articles, each state decided who its citizens were. The Articles did not create a separate category of federal citizenship that could be granted by the federal government.

How much did state citizenship matter? State constitutions were careful to specify what rights the "people", in the abstract sense, had. The Bills of Rights in state constitutions often exceeded that of the U.S. Constitution in length and detail. However, the beneficiaries of those rights varied and were not always designated in terms of citizens and non-citizens. Citizenship was a concept that was still in the process of formation. One study notes that during this period "*subjects* no longer acknowledged a royal master, while citizens had scarcely as yet emerged into the light of public law [italics original]."[4]

Various personal status distinctions were used in state laws without definition. Their meanings could only be found in customs and practices. For example, state constitutions often used the term "freemen". Distinctions between those who were temporarily sojourning in the state and those who had acquired "domicile" (permanent residency) also existed. Finally, whether a person had property or not was as important as whether a person was a citizen, especially in the area of political rights.

In all state constitutions there were citizens who had political rights (the right to vote and eligibility for office) and those who did not have them. Citizens with political rights were called electors. Eligibility to become an elector was typically defined by race, gender, age, length of residency in the state and ownership of property. Since around the time of the War of Independence, calls for suffrage reform led some states to expand the franchise to a broader group of taxpayers, instead of limiting it to those who owned real property.[5] It was difficult for political leaders to sustain strict property requirements when

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[3] Articles of Confederation (1781), Art. IV.

[4] Gordon E. Sherman, "Emancipation and Citizenship," *The Yale Law Journal*, Vol. 15, No. 6 (Apr., 1906), 265.

[5] For example, New Hampshire (1775), New York (1774), and New Jersey (1776) as well as

one of the asserted causes of rebellion against the British King was the imposition of "taxation without representation."

What follows are examples from the Constitutions of Maryland, South Carolina, and Massachusetts, showing the various distinctions among people and the fluctuation in terminology. These states were chosen because they later parted their ways on questions of citizenship, with the North granting citizenship to blacks and the South denying them. Maryland as a border state would be caught in the conflict between the two conflicting tendencies. The following examples show that there was nothing in the use of the term "citizenship" in these early constitutions that inevitably excluded blacks or suggested such a course of development.

Constitution of Maryland, 1776

The Declaration of Rights in the Constitution of Maryland used "the people of this State", "the inhabitants of Maryland", "all persons", "every man", "every freeman" as beneficiaries of rights, while the term "citizen" did not even appear in the document. For example, the term "freeman" was used in a provision that resembled the Due Process Clause of the U.S. Constitution. Article XXI of the Declaration said:

> …no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land.

Also, article XVII gave "every freeman" the right to seek judicial remedies for an injury to his person or property.

The Constitution contained extensive provisions on the question of religion (articles XXXIII through XXXVI of the Declaration). Article XXXIII gave the legislature the power to lay a general tax "for the support of the Christian religion", but also reserved to the individual the right of directing his money "to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county". The religious denomination or the county served as a unit of community where members were to support each other when they fell destitute.

Political rights were granted to freemen, with further qualifications based on property. The state constitution stipulated that:

> All freemen, above twenty-one years of age, having a freehold of fifty acres of land, in the county in which they offer to vote, and residing therein-- and all freemen, having property in this State above the value of thirty pounds current money, and having resided in the county, in which they offer to vote, one whole year next preceding the election, shall have a right of suffrage…[6]

South Carolina (1776) either expanded the franchise to taxpayers or people who owned any form of property above a designated value. Chilton Williamson, *American Suffrage from Property to Democracy: 1760-1860* (Princeton, New Jersey: Princeton University Press, 1968), Chapter 5.

[6] Constitution of Maryland (1776), Art.II.

Long-term residence and ownership of property determined the eligibility for office. Members of the House of Delegates had to be "residents in the county where they are to be chosen, one whole year next preceding the election, above twenty-one years of age, and having, in the State, real or personal property above the value of five hundred pounds current money." The difference from the right to suffrage was the amount property one had to own. For the right of suffrage, it was thirty pounds, and to be eligible to become a Delegate, it was five hundred pounds.

In 1810, two amendments regarding political rights were ratified. Article XII of the Amendment abolished property qualifications from eligibility for office. Article XIV of the Amendment abolished property qualifications regarding the right to vote. It now gave suffrage to "every free white male *citizen* of this State, above twenty-one years of age, and no other, having resided twelve months within this State… [emphasis added]." This was in accordance with the trend towards the abolition of property requirements. But the constitution did not define who citizens were, which later led to an intense debate over the status of free blacks.[7]

Constitution of South Carolina, 1790

The Constitution of South Carolina referred consistently to state citizenship while citizenship of the United States was never mentioned. For the exercise of political rights, citizenship of the state and attachment to the election district was the basic prerequisite. This qualification was further refined by race, gender, age, and property qualifications. "Every free white man, of the age of twenty-one years, being a citizen of this State," who had resided in the state for two years preceding the election, and who had a "freehold of fifty acres of land or a town lot" for at least six months previous to the election, could vote (Art. I, Sec. 4). Also, a person who did not own land but had paid a tax of "three shillings sterling" the year before could vote.

To be eligible for a seat in the house of representatives of the state, the person had to be a "free white man, of the age of twenty-one years, and hath been a citizen and resident in this State three years previous to his elections" (Art. I, Sec. 6). But he did not have to be a resident of the election district so long as he owned property there. If the person was a resident, he had to possess a "freehold estate of five hundred acres of land and ten negroes, or of a real estate of the value of one hundred and fifty pounds sterling, clear of debt." If he was a non-resident, he had to possess a "freehold estate therein of the value of five hundred pounds sterling, clear of debt". So non-residents could vote so long as he satisfied the higher qualification for property ownership. Requiring the ownership of "ten negroes" enforced the viewpoint held by that state that slaves were property, not persons. Landowners were privileged, for they can stand for election in any district where they held over five hundred acres of land.

From this provision we can see that the attachment to community as a prerequisite to voting was not determined by merely being an inhabitant in the state. Rather, ownership of a sufficient amount of property served as proof that the person had a long-term interest in

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[7] See Chapter V of this study regarding the debate at the Maryland state constitutional convention of 1850.

the community. Absentee landlords thus could vote while residents without property could not.

For the state Senate, the standards were set higher for each of the elements of qualification. To be eligible for a seat, one had to be a free white man, of the age of thirty years, and had to have been "a citizen and resident in this State five years" preceding the election. He also had to possess a freehold of the value of three hundred pounds sterling if he was a resident of the election district, and one thousand pounds sterling if a non-resident (Art. I, Sec.8). The standards were even higher for becoming a governor. He had to have been a resident and citizen of the state for ten years, and had to possess a settled estate of fifteen hundred pounds (Art. II, Sec. 2).

An amendment to the South Carolina constitution was ratified on December 19, 1810. Conforming to the trend at the time, the amendment eliminated property qualifications for voting. But at the same time, it excluded "paupers, and non-commissioned officers and private soldiers of the Army of the United States" from suffrage. Granting suffrage to non-commissioned officers and soldiers of the U.S. Army would have added numerous people who came from other states and resided temporarily to the voting population. This was considered detrimental to the interests of the state. Previously, these groups by definition would have been excluded by property qualifications, but now they had to be explicitly excluded.

Constitution of Massachusetts, 1780

The Declaration of Rights of the Constitution of Massachusetts[8] used "all men in society" (as having religious rights), "people of this commonwealth" (as having the right to self-government), "all the inhabitants of this commonwealth" (regarding electoral rights), "each individual of the society" (regarding the "enjoyment of his life, liberty, and property"), "every subject of the commonwealth" (regarding the right to have a recourse to law and rights pertaining to criminal procedure) as the beneficiaries of rights. The term "citizen" appeared in Article XXIX of the Declaration, which said that judges of the supreme judicial court should have life tenure "for the security of the rights of the people, and of every citizen."

In Massachusetts too, property and residence requirements for public office were adopted with higher requirements for higher positions. For the Senate elections, suffrage was granted to "every male inhabitant of twenty-one years of age and upwards, having a freehold estate within the commonwealth, of the annual income of three pounds, or any estate of the value of sixty pounds" (Chapter I, Section II). The same provision defined the term "inhabitant" for the purpose of elections. It stated that "every person shall be considered an inhabitant… in that town, district, or plantation where he dwelleth, or hath his home". To run for the Senate, a person had to possess within the commonwealth a freehold of the value of three hundred pounds or personal estate of six hundred pounds. He also had to have been an inhabitant for five years immediately preceding the election).

Suffrage qualifications for the House of Representatives were similar to the Senate except that the person also had to be resident in the town in which he would vote for at least

[8] Constitution or Form of Government for the Commonwealth of Massachusetts (1780).

one year preceding the elections (Chapter I, Section III). To be elected, a person had to possess within the town he would represent a freehold of the value of one hundred pounds or any taxable estate of the value of two hundred pounds, and had to have been an inhabitant of the town for at least one year. Like other states, qualifications to become the governor were higher. To run for the governorship, one had to have been an inhabitant for at least seven years, and had to possess a freehold of the value of one thousand pounds (Chapter II, Section I).

Property qualifications for voting were eliminated by a constitutional amendment in 1821.[9] Landless people were previously considered unfit for suffrage—when the state constitutional convention proposed the Massachusetts Constitution of 1780, the delegates responded to complaints against property requirements by pointing out the dangers of making politics "liable to the control of men, who will pay less regard to the rights of property because they have nothing to lose".[10] But after the amendment in 1821, every male *citizen* who was twenty-one years old and had resided in the state for a year were given the right to vote, while "Paupers and persons under guardianship" were excluded. The amendment also required voters to have paid state or county tax or to have been exempted from taxation.[11]

Article XXIII of the Amendment (1859) brought up the citizenship of the *United States* to the Massachusetts Constitution for the first time. The amendment denied the right to vote or eligibility to office to persons of foreign birth unless he resided "within the jurisdiction of the United States for two years subsequent to his naturalization". So not only did it exclude people without U.S. citizenship, it excluded even those with U.S. citizenship, if their citizenship had been recently gained through naturalization.[12] Another amendment gave persons who had "served in the army or navy of the United States in time of war" the right to vote even if he had received public aid or if he could not pay the poll tax.[13] These articles suggest that establishing loyalty to the *United States* in addition to attachment to the *state* was gaining importance in the decision to grant suffrage in Massachusetts.

None of the state constitutions above used the term "citizenship" systematically, and instead used various other status distinctions, such as freemen, inhabitants, and electors, to define the rights of people. Nor was the eligibility for citizenship or authority for granting citizenship spelled out in these documents. Electors who held political rights composed a different group which was defined by various requirements such as length of residence in the state, ownership of property and payment of tax. Citizenship was a concept in its formative stage, and not yet a status that defined what rights a person had.

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9 Amendments, Article III.

10 "Address of the Massachusetts Convention to their Constituents," Oscar and Mary Handlin, ed., *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780* (Cambridge: Harvard University Press, 1966), 437.

11 This tax requirement was eliminated by Amendments, Article XXXII (1891).

12 However, the provision was not to affect the rights of "any child of a citizen of the United States, born during the temporary absence of the parent" from its territory. The entire provision, however, was "wholly annulled" by Article XXVI of the Amendments in 1863.

13 Amendments, Article XXIX.

Naturalization and state citizenship

Naturalization and denization in the colonies

Naturalization is to grant the status of citizenship to foreigners and supplements the grant of citizenship by birth. The power to naturalize a person is a necessary component of sovereignty—otherwise the polity would have no boundaries to citizenship.

During the colonial era, procedures and qualifications for naturalization varied from colony to colony and from time to time. The English government had the power to naturalize people residing in the colonies and make them English subjects. The English parliament could grant naturalization while the King could also make people *denizens* (a status in-between aliens and subjects). But colonial legislatures often took the matter into their own hands and naturalized foreigners to promote migration to their colonies. The authority to do so was ambiguous, but the English Parliament did not intervene.[14]

Through the seventeenth century, naturalization was granted through private acts of the legislature. A person who wished to naturalize applied to the English parliament or colonial legislature for an act authorizing his naturalization. Colonial legislative records contain volumes of private acts with the names and circumstances of each individual who had been granted naturalization. Also, collective naturalization or denization of particular groups of foreigners occasionally took place. For example, after 1681, King Charles II granted denizenship to hundreds of French Protestants (Huguenots) who faced persecution in France.[15] Many of them then migrated to the colonies.

In Maryland, for example, a general naturalization statute was proposed as early as 1669. Such a statute would have allowed individuals who met predetermined criteria to naturalize through a standardized process. If it had passed, it would have been the first general naturalization law of any colony. In 1671 the Upper House of that Assembly passed an "Act for the Naturalization of Foreigners", which did not pass the Lower House. The law stipulated that people who were born in the territory with at least one English parent were citizens by birth, while those without such a parent were not citizens even if born in the territory.[16] English lineage was considered the most important criteria of citizenship. In 1692, the Assembly finally passed a general naturalization law.

Colonies also granted denization. In Maryland, a 1649 act by Lord Baltimore authorized the Governor to grant land to "any person or persons of French, Dutch, or Italian discent [sic]… in as ample manner as a Planter of British or Irish discent".[17] The provision distinguishes between people from Britain or Ireland and people from other European nations. People from Britain or Ireland were treated as if they were moving within the same country and entitled to all benefits of members in the colonies from the time they arrived. On the other hand, people from other countries in Europe were

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[14] James H. Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill, NC: University of North Carolina Press, 1978), 78-81.

[15] Kettner, *The Development of American Citizenship*, 68-69.

[16] Bernard C. Steiner, *Citizenship and Suffrage in Maryland* (Baltimore: Cushing, 1895), 10.

[17] Ibid., 7.

considered as aliens who were moving into England. Soon after the enactment of this law, aliens—meaning those not from Britain or Ireland—began to apply for Letters of Denization. As already noted, denization could be granted by the King or a proprietor, while naturalization had to be obtained from the Parliament. It was easier for a person to be granted denizenship. Steiner has found 46 patents of denization between 1661 and 68, mostly going to Swedes, Dutch, and French persons.

Under English law, denizens were allowed to own, but inherit land, and were not eligible for land grants from the King. Land was considered to descend only through the blood line of Englishmen. Land owned by aliens could not be inherited by his descendants and escheated to the crown after the death of the owner. Thus, one of the main benefits of naturalization was that the person's title to land was made secure by becoming an English subject.[18] On the other hand, denizenship was like retaining the blood of a foreigner but being granted some of the rights that were in principle reserved to English subjects.

Issuance of letters of denization soon ceased because of the "growing ease with which the greater privilege of naturalization could be obtained from the Assembly."[19] Colonial legislatures began to *naturalize* foreigners on its own. Some colonies could refer to their original charters for the authority to naturalize foreigners. For example, the Virginia Company charter of 1612 gave it the power to admit "any Person or Persons, as well Strangers and Aliens… as any our natural Liege Subjects born in any our Realms and Dominions."[20] In the Carolinas, the Articles of Agreement between the proprietors and the expedition of 1665 gave the local assembly the power to "give unto all strangers as to them shall seeme meete a Naturalizion [*sic*]."[21]

Conflicts between the states over effects of naturalization and denization

The colonies, however, did know that only the English Parliament could officially naturalize foreigners and make them English subjects. Thus, when a colony naturalized foreigners, it took care to note that it was naturalizing the person as a citizen of the *colony*, and not of Great Britain.

This relationship between the colonies and the English government regarding naturalization may be seen as a precedent of later conflicts between the federal and state governments over citizenship. What rights did a person who was naturalized in Maryland have in contrast to those who were naturalized by the English parliament? This question was not so important as long as a person remained in Maryland, since within that colony this person was treated as an English subject. But if that person tried to move outside of Maryland, the question immediately arose: what rights did a person who was naturalized in one of the British colonies have in other colonies?

For example, in 1697, the ship of a French person who had received a patent of Denization from the Governor of New York was seized in Maryland. At the time only English subjects had the right to engage in trade among the different English colonies.

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18 Kettner, *The Development of American Citizenship*, 117-118.
19 Steiner, *Citizenship and Suffrage in Maryland*, 9.
20 Kettner, *The Development of American Citizenship*, 79.
21 Ibid., 85.

Maryland did not think that denization by New York gave the person the right to engage in this kind of trade. The issue went from the Maryland courts to the Lords of Trade in England, where the Lords took this opportunity to question the validity of colonial denization in the first place. The lords denied that the governors of the colonies had the power to "endenize foreigners", and condemned such actions as "not only grounded on no authority but… directly contrary to the intent of the Acts of Trade." Soon after, in 1700, an order that forbade governors to issue letters of denization was issued.[22]

But by the mid-eighteenth century, the English Parliament came to recognize that colonial naturalization was going on as a matter of fact and that it was better to authorize the practice then trying to stop it. The Parliament then enacted an "Act for naturalizing such foreign Protestants and others therein… in any of His Majesty's Colonies in America", setting conditions for naturalization beginning in 1740.[23] This act required the person to have resided in the colony for at least seven years. He was to take an oath of allegiance before a local judge. Naturalization under this Act was valid throughout all the colonies.[24]

What were the rights of people who were naturalized? This varied from colony to colony. Under the 1740 Act of the English Parliament described above, naturalized subjects were not eligible to sit in the Privy Council or either House of Parliament. But some colonies did not place such limitations. For example, the Pennsylvania law of 1706 explicitly gave persons "naturalized in England or in this province" the right to elect as well as to be elected.[25] In Maryland, a 1716 law stipulated that naturalized subjects did not have a right to run for a seat in the colonial assembly. But in 1771, electors of Frederick County elected Jonathan Hagar, a German immigrant who founded Hagerstown and became a successful developer, to the Maryland legislature. The legislature divided on his qualifications under existing law and refused to seat him only by a margin of 24-23. This refusal was a formality, though, since both houses of the legislature within a week passed a bill granting naturalized citizens a right to be seated in the legislature. Hagar was then seated according to the new law.[26]

Naturalization in the states after Independence

After the colonies declared independence from Great Britain, individual states naturalized aliens under state constitutions or state naturalization laws. For example, the Pennsylvania state constitution of 1776 gave every foreign settler of good character the right to acquire real estate. A foreigner was deemed to be a "denizen" after a one-year residence in the state, and became eligible for political office after two-years of residence.[27]

Virginia enacted a law that allowed immigrants to become citizens of the state if they proved their intent to reside in the state. An act of 1783 clarified the conditions for naturalization by specifying that a person had to reside in the state for two years and "evince a permanent attachment to the state by having intermarried with a citizen of the

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[22] Ibid., 94-95.
[23] 13 George II, Ch.VII.
[24] Kettner, *The Development of American Citizenship*, 103.
[25] Ibid., 123.
[26] Steiner, *Citizenship and Suffrage in Maryland*, 14.
[27] Kettner, *The Development of American Citizenship*, 214.

commonwealth, or a citizen of any other of the United States", or by purchase of lands within the state.[28] The language of this provision shows that the notion of citizenship was attached to a particular *state* (Virginia, or any other state) and not to the United States as a single unit.

In Maryland, the naturalization act of July 1779 cited the need to induce foreign immigration to the state and allowed foreigners to be treated as a "natural born subject of this state" if he declared belief in the Christian religion and took an oath of allegiance. The provisions were generous because no specific period of residence was required before naturalization. It also allowed not only Protestants, but Catholics to naturalize, unlike other colonies. The act even included a provision exempting naturalized citizens from taxes for two years as a further incentive for immigration and naturalization. Further, it made naturalization easier by allowing local venues to administer the procedure. In addition to going in front of the Governor and Council, a prospective citizen could go to the General Court, or one of its judges, or any County Court to seek naturalization.[29]

The U.S. Constitution gave Congress the power to set uniform rules of naturalization. Under this power, the basic requirements for naturalization were set by naturalization laws enacted by Congress. But state courts continued to administer naturalization alongside the federal courts, and the applications of the laws varied according to the local climate.[30]

Black citizenship

One issue that would later lead to intense debates over the relationship between federal and state citizenship was the status of blacks.[31] Could blacks become citizens either at the federal level or at the state level? If they became citizens at either level, how would that affect citizenship at the other level?

Qualifications for citizenship were not explicitly based on race in either the U.S. Constitution or the state constitutions. Under the Articles of Confederation (1781), a person who was a "free inhabitant" in one state had the same rights as "free inhabitants" in any other state to which he migrated. During the Philadelphia Convention, South Carolina attempted to amend this clause and insert the word "white" so that only "*white* free inhabitants" gained this right under the Articles of Confederation. However, all states but South Carolina and Georgia opposed this amendment. Some argue that since the people who wrote the document considered and rejected qualifying this right on the basis of race, blacks must have been counted as "free inhabitants" with rights that could be asserted in any state.[32] Further, after the Articles of Confederation was adopted, Virginia *eliminated*

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[28] Ibid., 215.

[29] Steiner, *Citizenship and Suffrage in Maryland*, 15.

[30] Even in the late 19th century, some courts chose to naturalize Chinese and Japanese immigrants while others held them ineligible for naturalization. A uniform administration of naturalization was pursued since the turn of that century. See Chapter XIII of this study.

[31] See Chapter V of this study.

[32] Sherman, "Emancipation and Citizenship," 267. However, it has been noted that the rejection of this amendment "was part of a wholesale rejection of all amendments" and that a firm conclusion regarding black citizenship cannot be derived from this fact alone. See Stuart Streichler, *Justice Curtis in the Civil War Era: At the Crossroads of American*

the "white" qualification from its law regarding citizenship and implicitly gave blacks the ability to gain citizenship there. In that state, a 1779 Act limited citizenship to "all white persons", but the legislature changed this to "all free persons" in 1783.[33]

Whether a person has the right to vote has frequently been considered a measure of whether that person is a citizen. This, however, sounds backwards. We should first determine whether someone is a citizen, and grant rights accordingly. But if we adopt this criterion (to decide whether a person is a citizen based on whether he had exercised the right to vote) for the sake of argument, the outcome is ambiguous for blacks. Some states initially gave blacks the right to vote, but later disenfranchised them in the context of the growing conflict over slavery and black citizenship.

For example, the Maryland Constitution of 1776 did not contain any racial qualifications regarding suffrage. But in 1802 the suffrage provision was amended to exclude blacks, while simultaneously abolishing the property qualifications and enfranchising all whites who met the age and residency requirements.[34] The state's second Constitution, ratified after a constitutional convention in 1850-51, gave suffrage to every "free white male citizen".

In New York, the Council of Revision (which had the authority to review the laws passed by the legislature) in 1785 rejected a law that would have denied blacks the right to vote. The bill was meant to achieve a gradual abolition of slavery, but only after disenfranchising blacks so that they would not threaten the status quo in politics. But the Council was opposed to attaching such conditions. According to the Council, free blacks had exercised the right to vote until then, and to disenfranchise them now was philosophically unacceptable:

> …the creation of an order of citizens who are to have no legislative or representative share in the government, necessarily lays the foundation of an aristocracy…[35]

In the New York state constitution, blacks had the right to vote but were subject to different qualifications compared with whites. Like Maryland, the original state constitution granted suffrage regardless of race, but with property qualifications. Later, the property qualifications were eliminated in principle, enfranchising all whites regardless of property ownership. But a separate provision determined suffrage for blacks, and property qualifications were retained for that race. This dual system continued through the Civil War.[36]

While blacks were denied suffrage because of their skin color, being white did not necessarily qualify a person for suffrage. Some European immigrants, although they were

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Constitutionalism (Charlottesville: University of Virginia Press, 2005), 127.

[33] Sherman, "Emancipation and Citizenship," 268.

[34] Steiner, *Citizenship and Suffrage in Maryland*, 31.

[35] *Veto message by the Council of Revision of New York* (1785), David. N. Gellman and David Quigley, eds., *Jim Crow New York: A Documentary History of Race and Citizenship, 1777-1877* (New York: New York University Press, 2003), 30-32.

[36] See Chapter IV of this study.

white[37], became targets of disenfranchisement. For example, the Irish, although they were white, had an ambiguous status. In response to the drastic increase of immigration from Ireland in the late-1840s, a strong anti-foreign sentiment emerged and led to the rise of the "Know-Nothing Party", which advocated policies hostile to immigrants. During Maryland's constitutional convention in 1850-51, there was a proposal to deny suffrage to immigrants until they had been residents of the state for ten years after they declared the intent to naturalize.[38]

If we are to judge who had been considered citizens by looking at who had the right to vote, citizens during the colonial era and early statehood in Maryland were those who had property and wealth, while increasingly in the nineteenth century, race and ethnicity became a central distinction. Blacks, who used to be able to vote as long as they met the property and residence requirements applicable to people regardless of race, were increasingly disenfranchised on account of their race. If voting rights are central to citizenship, then, the citizenship status of blacks *declined* in the decades following the ratification of the U.S. Constitution.

Black citizenship and the U.S. Constitution

What did the U.S. Constitution say about black citizenship? The provision regarding privileges and immunities of "free inhabitants" of each state was copied nearly verbatim into the U.S. Constitution, except that the word "free inhabitants" was changed to "citizens of each state". One way to read this clause is that some persons were no to be counted as *citizens* of the state even if they were "free inhabitants". This could have meant free blacks. But in the context of the debate over the rights of naturalized foreigners, delegates to the Philadelphia Convention had opposed the idea of "second-class citizenship", or distinctions among citizens. There, they maintained that people had to be *either citizens or aliens*, not something in-between. Was this the same for free blacks, or could they be relegated to a quasi-citizenship status?

Blacks who were not slaves were *free*, but whether they could exercise the same rights as *citizens* depended on the state. In some states they exercised suffrage and voted in the ratification process of the Constitution. In other states free blacks were denied the rights that other citizens enjoyed. For example, free blacks in Virginia at the beginning of the 19th century were denied the right of suffrage as well as the right to bear arms except when they were serving in the militia. They could not stand witness against a white person in a trial and may be sold to pay off the debts of their former master. Their children could be taken away by the overseers of the poor to be bound out for labor.[39] Free blacks also had

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[37] Recent studies suggest that "whiteness" was not determined by skin color alone, but has also been a matter of social construction. See, for example, David R. Roediger, *Working Toward Whiteness: How America's Immigrants Became White* (New York: Basic Books, 2005).

[38] Steiner, *Citizenship and Suffrage in Maryland*, 35. One of the reasons for this proposal was that political parties were paying naturalization fees to naturalize foreigners during the elections to gain their votes.

[39] St. George Tucker, "Blackstone's Commentaries-- 1803, On the State of Slavery in Virginia," (Volume 2, Note H), Neil H. Cogan, ed., *Contexts of the Constitution: A Documentary Collection on Principles of American Constitutional Law* (New York:

to register with the town in which they resided or worked. Free blacks from outside of the state were prohibited entry into the state, and could be sent back if found within its borders. At the boundaries of a state, free blacks were treated as if they were aliens from other nations. State laws controlled their admission to and exclusion from the state and continuously monitored their movements.

Even those who favored abolition had ambiguous attitudes about granting equal rights of citizenship to blacks. St. George Tucker was one such figure. He was in favor of abolition, but could not come to terms about equality between whites and blacks. At the same time, he did not think that "colonization" was feasible. The colonization scheme would banish emancipated blacks to colonies constructed overseas, and was promoted as a solution to the dilemma that abolitionists had about blacks.[40] Tucker asked why blacks could not be fully incorporated "here", and came to the conclusion that it was impossible as a matter of common sense. He wrote that even Thomas Jefferson was against the idea of full equality between blacks and whites.[41] Tucker proposed a plan for gradual emancipation, but only after placing various limitations on the rights of emancipated blacks.

Answering the question of whether blacks were citizens is difficult because there is no agreed upon standard for finding the answer. If the question is to be answered by looking at whether they had political rights, then they started out as citizens in some states but gradually lost that status in the conflicts that led to the Civil War. If we adopt a dichotomy between citizens and aliens, or citizens and slaves, and hold that those who were neither aliens (nor slaves) were citizens, then free blacks were citizens. But even if we attributed citizenship to blacks in this manner, it does not correspond with the fact that free blacks were treated differently from white citizens by the states. Further, under the naturalization law that was enacted by Congress, only "free whites" could naturalize while blacks were denied even the opportunity to do so. Congress, then, thought that blacks were unworthy of citizenship.

At the minimum, it was clear that free blacks did not have the status and rights of citizenship across the nation. They varied widely between the states. Each state, as well as the federal government, was engaging in the process of formulating the concept of citizenship and applying it to people residing within their borders. There was no uniformity, and a quest for such uniformity arising from the states in the ensuing decades would lead to intense conflicts between the states.

Foundation Press, 1999).

[40] This idea was put into practice by colonization societies which were established with state funding. This led to the establishment of Liberia and other colonies of emancipated slaves from the United States.

[41] Tucker cites a passage from Jefferson's *Notes on Virginia*, where Jefferson wrote: "… why not retain the blacks among us, and incorporate them into the state? Deep rooted prejudices entertained by the whites; ten thousand recollections by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made… which will probably never end but in the extermination of one or the other race." Cogan, *supra* note 39, 641.

Poor laws and the rights of state citizens

Settlement and local poor laws

Another group of people consistently faced physical, social and political exclusion from the states. They were paupers, or people who were poor to the extent that they required public assistance. Poor laws that were enacted by individual states strictly regulated the presence and movement of these people. Provisions that were meant to keep out paupers from the community show a striking resemblance to modern immigration law. In fact, poor laws became a template for passenger laws that regulated the migration of people who came by water, which in turn became a model for federal immigration laws. Thus, this is another instance where individual states controlled who could become its citizens and assert rights within their borders.

The origin of poor laws extends back to medieval England. These laws sought to preserve limited local resources by excluding strangers, and forcefully removing them if necessary. The American colonies adopted such laws intact. This power was assumed by individual communities in the early colonial era, and over time was expanded and used by the colonies as a whole. After Independence, states retained this power, although the states often granted communities the authority to exercise powers of exclusion.

Under the English poor laws, each individual had a settlement in a particular town. This settlement was usually gained by birth or long-term residence in the town. The town was responsible for individuals who had settlement. If the person fell destitute or became sick, the town was obligated to support that person.[42] The highly personalized, local character of such support is seen in the practice of "boarding round the town", practiced in Massachusetts in the late-17th century. People who fell destitute were boarded out with neighbors, and in some cases a person was sent from house to house, each of whom took care of that person from one to three weeks at town expense.[43]

However, problems arose when a person migrated outside of the town where he had settlement or when the person's place of settlement was unclear. Towns wanted to reduce their burden by minimizing the number of people that could make claims for support.[44] Towns might even try to "dump" a poor person on neighboring towns to evade the responsibility for providing support.

Poor laws provided a system of exclusion in which local constables could "warn out" persons who did not have legal settlement. Since settlement could be gained in part by an extended stay[45], officials were induced to take action to prevent poor people from remaining in the town. Poor laws limited the length of stay that a resident could allow to

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[42] Charles R. Lee, "Public Poor Relief and the Massachusetts Community, 1620-1715," *The New England Quarterly*, Volume 55, Issue 4 (Dec., 1982), 566-567.

[43] Albert Deutsch, "The Sick Poor in Colonial Times," *The American Historical Review*, Volume 46, Issue 3 (Apr., 1941), 566-567.

[44] John Cummings, "Poor-Laws of Massachusetts and New York: With Appendices Containing the United States Immigration and Contract-Labor Laws," *Publications of the American Economic Association*, Volume 10, Issue 4 (Jul., 1895), 22.

[45] For example, a Massachusetts law of 1659 granted settlement to persons who had resided for three months in a town without being ordered to leave (ibid., 24).

guests, and gave local officials the power to order guests to leave the town. For example, a 1655 Massachusetts law cited the need for a law to prevent "strangers pressing in without consent and approbation of inhabitants" and authorized towns to refuse admission to persons from other towns. It also gave towns the power to require security from those who were bringing in outside guests and relieved the towns of the responsibility to support such persons if they fell in need.[46]

Under the Massachusetts law of 1692, persons who failed to leave within fourteen days of being warned to do so could be forcefully removed. In such a case, constables would hand over the unwanted guest to the constable in the next town. The person was then carried from constable-to-constable until he was back in the town where he had legal settlement.[47] By the mid-17th century, towns in Massachusetts, such as Boston and Cambridge, issued certificates to its legal residents. Holders of the certificates could prove that they could be returned to the town that issued the certificate if they fell in need. With this proof, people were able to move around and gain entry to neighboring towns to "test their prospects".[48] Having a proof of settlement paradoxically meant that the person had the security to move around.

Many disputes occurred regarding the location of settlement. The requirements for settlement often included long-term residence, stable employment, payment of taxes, and the ownership of property. Interpretation of what constituted valid employment or ownership of property for the purposes of settlement could vary, leading to disputes over whether the person had acquired settlement in a new town—in other words, which town had to pay for that person's support. During such disputes, constables of neighboring towns might send people back and forth, each arguing that the person did not have settlement in the town.

States courts frequently had to resolve such disputes. In Massachusetts, the general court and local magistrates were given the "power to dispose of all unsetled [*sic*] persons into such townes as they shall judge to bee most fit for the maintenance of such persons and families and the most ease of the country" in 1639.[49] Testifying to the amount and extent of cases, law books well into the 20th century carried extensive annotation of laws, cases and precedents on the topic of "paupers".[50]

When the location of a person's settlement could not be determined, Massachusetts treated this person as a "state pauper". Support for "state paupers" was paid out of state funds through reimbursements to the town that took care of them. This bred its own problems, though. Towns cheated the state and demanded more reimbursements than were warranted, such as charging the state for dead and non-existent paupers or for a longer

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46 Ibid., 23.

47 Ibid., 28.

48 Lee, *supra* note 42, 579.

49 Ibid., 579-580. See also, Martha Branscombe, *The Courts and the Poor Laws in New York State, 1784-1929* (Chicago: University of Chicago Press, 1943), for a detailed review of judicial decisions in that state.

50 Today, this topic has been discontinued in most annotations and has been dispersed to various topics including "aliens" (for the rights of foreigners), "immigration" (for entry and exit to the U.S.), "citizenship" (for naturalization, expatriation, etc.), and "social welfare" (for the care of the poor within the country).

period of aid than was actually given. For example, an 1835 investigation by the attorney general of Massachusetts found that the town of Cambridge had long been cheating the state, leading the latter to sue the town to recover the funds. Similar corruption surfaced periodically through the 1830s and 1840s. This resulted in calls for increased policing of transactions between the state and the towns as well as increased central control and supervision over the administration of poor relief.[51]

State paupers and the police power of the states under the U.S. Constitution

Just like the movement of poor persons across town borders caused disputes over which locality was responsible for them, movement across *state* borders led to disputes between states. State poor laws included provisions for sending state paupers out of the state when it was deemed that his/her origin was another state, but in some cases the origin was unknown.

The colonial framework for poor relief remained in place after the ratification of the U.S. Constitution. People had settlement in a particular town of a particular state, and the town had primary responsibility to take care of that person, with the county and the state as a backup in cases of conflict over the location of settlement. For example, a Massachusetts law of 1794 redefined the conditions for local settlement. This law simultaneously tightened the requirement for acquiring settlement while making it easier to retain it. In principle, a person had to reside in the state for ten years, and pay all state, county, and town taxes during five of those ten years in order to gain settlement. This was a conservative response to increased movement of people. Instead of allowing flexibility of personal status, it made it difficult to either gain or lose settlement in a Massachusetts town. A short-term residence there would not qualify a person for change of settlement.

New York also passed a law regarding settlement and the poor in 1788, which remained in effect under the U.S. Constitution. This law declared that a person who had "rented and occupied a tenement of the yearly value of twelve pounds or upwards for two years" gained settlement in that town or city. People who held a public office for a year, or had paid city or town taxes for two years, or had been apprenticed for two years were also given settlement.[52] Newcomers could gain settlement if they first registered with local officials (overseers of the poor) and resided for twelve months without being removed.

Local officials continued to have power to remove strangers who were unwelcome. Overseers of the poor could report any person who was likely to become a burden for the town to justices of the peace. The justices, acting on their own initiative or based on such information, could issue warrants to constables, ordering that the person in question be brought before him. After inquiring into "the abilities and last place of legal settlement", the justice could order that person to return to the place of former settlement by a set date. If he did not comply, the justice could issue another warrant to a constable to forcibly hand over that person to the constable of the neighboring town. The excluded person was then

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[51] Kunal M. Parker, "State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts", *Law and History Review*, Vol. 19, No. 3 (Fall 2001), 618-621.

[52] Cummings, *supra* note 44, 84.

passed on from constable to constable until he reached the place of his legal settlement.[53]

Under the U.S. Constitution, state laws continued to determine who had settlement and could make claims to the town or the state. For example, in Massachusetts during the 1850s, a state administrative board was charged with investigating disputes over settlements (which town was responsible for poor or sick individuals), removing unsettled paupers (those without a settlement within the state), and supervising charitable institutions such as hospitals and workhouses. This board was called the Board of Alien Commissioners, reflecting the fact that more than four-fifths of state paupers (who were under the charge of the state because no town or city would claim responsibility) were foreigners or of foreign parentage.[54] In 1863 the state created a Board of State Charities. The Board consisted of four departments—the departments of immigration; of settlement and bastardy; of transportation (which was in charge of removing paupers to their homes or outside of the state); and of boarding officers (charged with inspecting arriving passengers).[55] Poor relief and control of the population were managed together as two sides of the same coin.

The U.S. Supreme Court initially upheld such exercise of state power. In 1837, it cited the removal of paupers and criminals as an example of practices that were clearly *constitutional* under the police power of the states.[56] It was not until 1875 that the Court declared that all state laws regulating the immigration of foreigners were unconstitutional.[57]

States exercised this power against persons who came from other *states*, not only from other nations. Citizenship in the United States did *not* give a person a right to reside in any state. Those who were not citizens of that *state* were subject to the same regulations regarding settlement and the same sanctions removal as if they were from foreign nations. To give an example, the New York law of 1788 contained the following provision:

> …all mariners coming into this state and having no settlement in this state, or in any other of the United States of America; and any other able-bodied person coming directly from some foreign port or place into this state, shall be deemed and adjudged to be legally settled in the city or town in which he or she shall have first resided for the space of one year [emphasis added].[58]

This meant that settlement in New York would not be granted to citizens of other states or other nations until they had resided in the state for a year without being subject to removal.

A foreigner who came to the state of New York went through a gradual transition of status from a foreigner with few rights to a citizen with all the rights. After a *one-year*

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[53] Ibid., 85-87. Cummings cites an 1809 law that provided for the maintenance of paupers at county expense as "one of the first general provisions for relief of the unsettled poor, where the applicant could not be removed to place of settlement or out of the state" (p.92). In addition, an 1821 law directed that if the pauper came in through New York City and had acquired no settlement, that person should be returned to that city (p.87, footnote 2).

[54] Ibid., 50-51.

[55] Ibid., 54.

[56] *City of New York v. Miln*, 36 U.S. 102 (1837), discussed in Chapter VI of this study.

[57] *Chy Lung v. Freeman*, 92 U.S. 275 (1875).

[58] Cummings, *supra* note 44, 85.

residence, he gained settlement in a local town or city that would be responsible for his welfare. After another year, this person would be eligible for naturalization. This was because under the federal naturalization law, a person could naturalize after residing in the United States for *two years* and within a particular state for a year.[59] Once a person was naturalized, political rights were gradually given—he became eligible to serve in the U.S. House *seven years* after naturalization and to serve in the U.S. Senate after *nine years*. In the area of economic rights, many states granted foreigners the right to own real property by state law, but naturalization made that right secure and less vulnerable to the whims of the legislature. In this manner, social, political, and economic rights were granted piece-by-piece, so that at last the foreigner became a full-status citizen.

Chapter conclusion

When the U.S. Constitution was ratified, states did not suddenly break away from the colonial traditions. As colonies, each of them had decided who had the right to enter and stay in their colony. Despite the existence of a formal process of naturalization by the English parliament, colonies granted naturalization and defined the status of immigrants from other countries on their own.

While the power of granting citizenship to aliens was officially conceded to the federal government under the U.S. Constitution, states kept determining the status and rights of persons residing within their borders. This was true especially in the case of blacks. Also, through the system of poor laws and local settlement that continued from the colonial era, states continued to exclude or evict persons who they did not desire to retain.

At this point "citizenship" was a rudimentary concept. Although state constitutions began to use this term, it was only in a haphazard manner. The term competed with other status descriptions such as inhabitants and freeholders. Rights depended on the various distinctions made by individual *states* instead of flowing from either state or federal citizenship. The concept of federal citizenship was yet to be established when the colonies gained independence. The U.S. Constitution had to start from a point where individual states controlled the status and rights of persons. We turn next to how federal citizenship was conceived under this condition.

[59] Act of Mar. 26, 1790, 1 Stat. 103. In 1795, the law was amended to require five years of residence in the United States (Act of Jan. 29, 1795, 1 Stat. 414).

III. Federal citizenship under the U.S. Constitution

> Are the 'People of the United States' the people in each of the states that are being united, or are they the people of all of the states as united, or both? …The citizens of this new union clearly identified more strongly with their states than they did with the new 'superstate'.[60]

This chapter examines how the status and rights of citizenship were defined in the U.S. Constitution when it was ratified in 1787. First, I explore the acquisition of federal citizenship. Who were to be considered federal citizens and who had the power to grant this citizenship? Second, I look at what kind of rights a person gained by acquiring federal citizenship. In the previous chapter we have seen that states used various personal status distinctions to determine the rights of a person. Did federal citizenship give a new right to a person in the context of these pre-existing statuses? Finally, I look at the political context behind the manner in which federal citizenship was defined in the U.S. Constitution. The intertwined conflicts over slavery, migration and federalism affected the debate over federal citizenship. Slavery was a factor that influenced the Founder's minds when they considered the conditions for acquisition of citizenship or the allocation of power between the federal and state governments regarding citizenship and migration. In order to maintain slavery, it was important for the states to *not* give the federal government exclusive power over citizenship. Thus, a complex balance between the powers of the federal and state governments emerged.

Admission to Citizenship under the U.S. Constitution

As we saw in the previous chapter, citizenship was a concept that was not in common use when the Constitution was ratified. The word "citizens of the United States" appears in the text of the Constitution, but its meaning is not defined in that document. The Constitution does not say how citizenship of the United States can be acquired, nor does it explain what rights attached to that status.

A further complication is that the U.S. Constitution assumed the existence of both *state* citizenship (citizenship of individual states) and *federal* citizenship (citizenship of the United States). Conflicting ideas emerged over the relationship between state and federal citizenship and the nature of each status. Was federal citizenship a prerequisite of state citizenship, or was it the other way around? Could states independently grant citizenship to those who did not have federal citizenship?

The co-existence of state citizenship along with federal citizenship led to interstate conflicts over the rights of those who traveled across state boundaries. This is called the issue of *comity*. What rights did a person have as a state citizen? How much of those rights would carry over if that person traveled to another state? Would states that refused to grant citizenship to blacks in their own state have to pay respect to blacks who were citizens of another state? What rights citizens of other states have in a state?

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[60] Wayne Norman, *Nation-building, Federalism, and Secession in the Multinational State* (New York: Oxford University Press, 2006), 127.

The issue of citizenship came up in two inter-related debates during the Philadelphia Convention. One was the naturalization of foreigners and the other was qualifications for voting and for holding office.

Congressional power over naturalization and expatriation

Citizenship in the United States can be acquired through birth or through naturalization. In most countries, people acquire citizenship by birth based on one of two principles—by being born in its territory (the *jus soli* principle), or by being born to parents who are citizens (the *jus sanguinis* principle). The U.S. Constitution did not explicitly address who gained federal citizenship by birth. One recent study, based on case law, argues that at the time of the ratification, both the parent's quality of affiliation with the United States, along with birth within the U.S. territory, decided whether the child gained citizenship by birth.[61] Later, the Fourteenth Amendment (1868) explicitly adopted the *jus soli* principle, providing that all persons born in the United States were citizens of the United States as well as of the state in which they reside.

In contrast to acquisition of citizenship by birth, naturalization is a process through which a foreigner consciously applies for citizenship of another nation and the latter considers whether or not to grant it. The government has broad discretion over whether or not to grant naturalization, and its decision could reflect the policy priorities of the time. Such decisions are usually not reviewable by the courts.

The U.S. Constitution granted the power to enact uniform rules for naturalization to Congress.[62] Based on this authority, Congress enacted the first law establishing a uniform rule for naturalization in 1790.[63] This law allowed "any alien, being a free white person" to naturalize after residing in the United States for two years. During the ratification debate, Alexander Hamilton emphasized the exclusivity of the power of Congress on this subject, writing that "if each State had power to prescribe a distinct rule [for naturalization], there could not be a uniform rule."[64]

But uncertainty remained over whether the states were *absolutely* precluded from legislating in that area, or were allowed to legislate so long as it did not conflict with Congressional policy. Some courts took the position that the power to naturalize was concurrent. According to this view, while Congress sets basic standards that all states had to comply with, states could set their own standards so long as it did not conflict with Congressional policy. For example, the federal circuit court of Pennsylvania opined that the general spirit of the Constitution was that of welcoming foreign immigrants to the United States, so that states were free to naturalize aliens more *liberally* than the Congressional standard.[65] On the other hand, states could not *refuse* to naturalize aliens who were eligible for naturalization under federal law.

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61 William T. Mayton, "Birthright Citizenship & The Civic Minimum," *Public Law & Legal Theory Research Paper Series, Research Paper No. 07-11, Emory University School of Law*.

62 U.S. Constitution, Art. I, Sec. 8.

63 1 Stat. 103.

64 Alexander Hamilton, James Madison, John Jay, *The Federalist Papers* (New York: New American Library, 1999) [hereinafter *The Federalist Papers*], No.32, at 167.

65 *Collett v. Collett*, 2 Dall. 294 (1792).

Congress strengthened control over naturalization when the political turmoil in Europe following the French Revolution aroused suspicion towards foreigners in the United States. In 1795, Congress amended the naturalization law and extended the required length of residence before a person became eligible for naturalization to five years.[66] This law prohibited naturalization except under the conditions it specified, which meant that naturalization under separate state laws was no longer allowed.[67] Hostility to foreigners peaked with the passage of the Alien and Sedition Acts in 1798.[68] This law further extended the length of residence required before naturalization to *fourteen* years, and required all aliens living in the United States to register with the local court. But as the temporary excitement of the times faded, criticism of the excesses of the Alien and Sedition Acts spread, and the laws were left to expire in 1800. But through these enactments, Congress secured its exclusive authority on the subject of naturalization.[69]

Another context in which the power of the federal and state governments over citizenship became an issue was expatriation, which is the act of voluntarily relinquishing existing citizenship. A precondition of naturalization is to renounce allegiance to any other nation, based on the idea that allegiance is indivisible and that a person cannot be a citizen or subject of more than one sovereign nation.[70] This means that, in order to naturalize, a person seeking naturalization has to be able to renounce his current citizenship.

In the U.S., it has been taken for granted that individuals have the right of expatriation. In *Talbot v. Jansen*, a 1795 case that involved the validity of expatriation, Justice Iredell contrasted the possession of this right with a slave who is bound to one location:

> That a man ought not to be a slave; that he should not be confined against his will to a particular spot, because he happened to draw his first breath upon it; that he should not be compelled to continue in a society to which he is accidentally attached, when he can better his situation elsewhere…[71]

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66 1 Stat. 414.

67 James H. Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill: University of North Carolina Press, 1978), 243.

68 1 Stat. 570.

69 The Supreme Court affirmed the exclusive power of Congress over naturalization in *Chirac v. Chirac*, 15 U.S. 259 (1817). Congress has also granted federal citizenship when the United States acquired foreign territories. For example, in 1848 the United States acquired territories from Mexico as a result of war. The peace treaty (Treaty of Guadalupe Hidalgo) between the two nations stipulated that Mexicans remaining in that territory could elect to retain their Mexican citizenship or become citizens of the United States. Similarly, when Louisiana was incorporated into U.S. territory, people residing in that territory, including persons of color, were considered to have become U.S. citizens.

70 However, a person may be born with multiple citizenships due to conflict of laws between nations. The U.S. Supreme Court has limited the ability of the government to expatriate U.S. citizens who hold multiple citizenships. *The Heritage Guide to the Constitution* (Washington D.C.: Regnery Publishing, 2005), 110-111.

71 *Talbot v. Jansen*, 3 U.S. 133 (1795), 162. See also, Kettner, *The Development of American Citizenship*, 279-280.

But can a person expatriate himself from *state* citizenship? If he can, did this also mean that he was no longer a citizen of the United States? It was possible to make this argument because the Constitution seemed to base federal citizenship on the fact that a person had state citizenship. As discussed earlier, the Constitution said that citizens of any state had the right of citizens in any other state. Being a citizen of one of the *states* was the basis for asserting the rights of citizens throughout the United States.

In this case, a person from Virginia was sued in a federal court for engaging in illegal privateering expeditions (using private ships to engage in warfare). But he claimed that the court did not have jurisdiction since he had expatriated himself from Virginia and had become a French citizen. It was assumed in his claim that federal citizenship was derived from having citizenship in one of the *states*, so that when he was expatriated from Virginia citizenship, he also lost U.S. citizenship.

The Court did not reach a conclusive answer about expatriation, because the judges delivered their opinions seriatim and did not always answer the question of expatriation. Justice Paterson held that Ballard (one of the defendants whose citizenship was at issue) was a citizen of the United States, although he had properly renounced his Virginia citizenship.[72] Paterson expressed doubt that renunciation of state citizenship automatically meant that the person had also renounced U.S. citizenship:

> If the act of Virginia affects Ballard's citizenship, so far as respects that state, can it touch his citizenship so far as it regards the United States? Allegiance to a particular state, is one thing; allegiance to the United States is another. Will it be said, that the renunciation of allegiance to the former implies or draws after it a renunciation of allegiance to the latter?[73]

But it is notable that expatriation from state citizenship and its effects was an open question as of 1795. If federal citizenship depended on whether or not a person had state citizenship, it would cause problems in other areas. For example, residents of the District of Columbia or territories that were not yet organized as states would not be able to claim federal citizenship because they were not citizens of a state. But the text of the Constitution (especially the Privileges and Immunities Clause of Article IV) made it possible for people to make this argument. At the same time, the Constitution gave Congress the power to establish uniform rules for naturalization. Congress immediately exercised this power and enacted naturalization laws, setting conditions for the acquisition of U.S. citizenship through naturalization. When a foreigner was naturalized, federal citizenship was not conditioned on having state citizenship and was unilaterally granted by Congress. The Constitution thus sent confusing signals about whether federal citizenship or state citizenship came first.

Power to regulate international and domestic migration

The power to regulate migration of people is the crucial first step in controlling citizenship, since physical presence is a basic requirement for acquiring citizenship. The

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[72] 3 U.S. 133, at 152.

[73] Ibid., at 153-154.

U.S. Constitution does not have a clause that explicitly gives Congress such power. While today, it is taken for granted that Congress has "plenary power" over this subject, its constitutional basis is not clear. The lack of an explicit grant is particularly significant in the case of the U.S. Constitution, because the basic idea behind it was that there needed to be an *affirmative* grant of power to Congress for it to exercise authority, and that power over all other areas were reserved to the states.[74]

In looking for the basis of Congressional power to regulate immigration, people have enlisted the Commerce Clause, the Naturalization Clause, the Migration Clause, and so on.[75] Others have made an argument that the power is inherent in a sovereign nation.[76] But this does not resolve the question of whether Congress should have *exclusive* power over immigration or whether states could share that power and enact their own regulations.[77]

Delegates at the Philadelphia Convention did not seem to think that immigration should be limited, except in regards to further importation of slaves. The assumption throughout the debates was that immigration from Europe was necessary to strengthen the United States and that it should be encouraged. Some delegates raised the concern that the Migration Clause (Art I., Sec. 9) could be interpreted as giving authority to Congress to regulate immigration from Europe. This Clause stated that:

> The Migration of Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by Congress prior to the Year one thousand eight hundred and eight…

But the main purpose of that Clause was to restrict the slave trade in the future. James Madison flatly denied that immigration from Europe would be limited under the Constitution:

> Attempts have been made to pervert this clause into an objection against the Constitution… as calculated to prevent voluntary and beneficial emigrations from Europe to America. I mention these misconstructions, not with a view to give them an answer, for they deserve none…[78]

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74 This principle is confirmed in the Tenth Amendment of the U.S. Constitution.

75 Thomas Alexander Aleinikoff, David A. Martin, Hiroshi Motomura, *Immigration and Citizenship: Process and Policy* [Fourth Edition] (St. Paul, Minn.: West Group, 1998), 185-191.

76 Ibid., 191-192.

77 For reference, in Canada, immigration has been one of the areas in which the federal government and the provincial governments have shared powers. It continues to be a subject over which negotiation and consultation between the federal government and the provincial governments continue to take place. See, Kevin Tessier, "Immigration and the Crisis in Federalism: A Comparison of the United States and Canada," *Indiana Journal of Global Legal Studies*, Vol. 3 (Fall, 1995), 211-244; Scott A. Hanna, "Shared Powers: The Effects of the Shared Canadian Federal and Quebec Provincial Immigration Powers on Immigrants," *Georgetown Immigration Law Journal*, Vol. 9 (Winter, 1995), 75-103.

78 *The Federalist Papers*, No. 42.

The Constitution did not give explicit authority to Congress nor did it prohibit the states from exercising authority over immigration. The Founders may have been content with existing practices, which allowed individual states to reject undesirable people (whether from other nations or other *states*) through the use of its police powers. Although they were not called "immigration laws", state laws such as poor laws, passenger laws, health and quarantine laws were used to exclude undesirable persons. Poor laws defined who had legal settlement in a locality and provided mechanisms to exclude those who did not have settlement should they become a public burden. Passenger laws regulated the number of passengers that could be brought in by passenger boats, requiring vessel owners to report the name, occupation, etc. of each passenger, and post bonds and securities in case a passenger became a public burden These laws operated equally on citizens from other states as well as from other nations.[79]

Modern immigration laws combined these diverse fields of regulation that were under the control of individual states into a comprehensive regulation of immigration by the federal government. Like the concept of citizenship, federal regulation of immigration gradually evolved from the practices of the colonies and states.

In sum, on the issue of acquiring citizenship, the Constitution gave both the federal and state governments some room for control. Congress acquired the formal power to set the rules for naturalization or acquisition of U.S. citizenship by foreigners after birth. But it did not touch upon the pre-existing notion of *state* citizenship, and the Privileges and Immunities Clause of Art. IV granted rights to people based on state citizenship. Further, immigration was in practice controlled by individual states, and Congressional authority on that matter was unclear.

Citizenship and rights under the U.S. Constitution

What kind of rights could a person claim by virtue of having federal citizenship? What was not fully recognized at the time of the Philadelphia Convention was the distinction between rights attached to *federal* citizenship as opposed to *state* citizenship. If there are rights attached to federal citizenship, a person with that status should be able to claim them in any state regardless of whether he or she was a citizen of that state. A person in this case should have rights by virtue of federal citizenship. On the other hand, rights attached to state citizenship should be granted to citizens of that state but not necessarily to citizens of other states.

When discussion of rights took place during the Convention and the ratification process, it was in the context of preventing the *federal* government from encroaching upon the rights that had been traditionally guaranteed to Englishmen.[80] The federal government had to be restrained, while the *states* were entrusted with the protection of the rights of the people.

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[79] See Chapter II of this study about poor laws, and Chapter VI about passenger laws.

[80] This is in contrast to later ideas that would give Congress the power to intervene with the states in order to protect the rights of federal citizens from being encroached upon by state authorities.

One of the major demands of the opponents of the Constitution was the inclusion of a Bill of Rights that would explicitly prohibit the federal government from encroaching upon those rights.[81] Proponents of the Constitution argued that the Bill of Rights was unnecessary, because the federal government could only exercise powers expressly delegated to them by the Constitution. Any other exercise of power was unconstitutional, so "why declare that things shall not be done which there is no power to do?" wrote Alexander Hamilton.[82] Nonetheless, during the ratification of the Constitution, a Bill of Rights was proposed as a series of amendments to alleviate the opposition. They were ratified soon after the Constitution itself was ratified, and became the first ten amendments.

Still, it was not clear to whom such rights were guaranteed. The text of the Bill of Rights prohibits the deprivation of those rights by Congress, without a declaration of the beneficiaries of the guarantee. Were those rights to be guaranteed to federal citizens? Or to anyone who was a citizen of one of the states? What was the relationship between federal citizenship and state citizenship? If a state gave a black person state citizenship, was this person entitled to certain rights in all other states, or could each state determine whether to treat this person as a citizen?

The Privileges and Immunities Clause and state citizenship

One provision in the U.S. Constitution that reflected this ambiguity in the meaning of citizenship was the Privileges and Immunities Clause of Article IV (which is different from the Privileges and Immunities Clause in the Fourteenth Amendment).[83] The Clause in Article IV said that "[t*he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*" This meant in the abstract that a citizen of any state could claim the rights of citizens in all other states. A Virginia citizen could travel to Maryland and be treated in the same manner as a citizen of Maryland. The purpose of this provision, along with a similar provision found in the Articles of Confederation "was to form a close bond of union and comity by the abolition of interstate alienage."[84]

While the Constitution settled the question of who had the authority to naturalize foreigners and grant federal citizenship, it did not touch upon who could acquire state citizenship. But since the Privileges and Immunities Clause gave citizens of each *state* certain rights, qualifications for state citizenship became an issue. One position was that each state should be left to make their own judgment in granting state citizenship and should also be respectful of other states' judgments. Another position was that states

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[81] For example, the Massachusetts Convention (Feb. 7, 1788) and the Virginia Convention (June 27, 1788) which considered the ratification of the U.S. Constitution demanded the inclusion of a Bill of Rights. Ralph Ketcham, ed., *The Anti-Federalist Papers and the Constitutional Convention Debates* (New York: New American Library, 2003), 217-226.

[82] *Federalist Papers*, No. 84.

[83] After the Civil War, a different version of the Privileges and Immunities Clause was enacted as part of the Fourteenth Amendment. Although the language is similar, the Privileges and Immunities Clause in the Fourteenth Amendment guaranteed the rights of citizens of the *United States*. Article IV, on the other hand, was based on *state* citizenship.

[84] "Fundamental Privileges and Discrimination under Article Four, Section Two, of the United States Constitution", *Columbia Law Review*, Vol. 8, No. 2 (Feb., 1908), 132-134.

should not independently grant citizenship, especially to people from foreign countries. Under the Privileges and Immunities Clause, a person who has state citizenship would have rights of citizens in all other states. It would lead to confusion if each state could impose upon other states people who they did not wish to treat as citizens.

James Madison pointed out that the same problem existed under the Articles of Confederation. At the time, individual states could grant state citizenship to aliens, while the Articles of Confederation provided that citizens of any state should be treated as citizens in all other states. This meant that an alien could go to a state with a lenient citizenship policy, become a citizen there, and assert the rights of citizens in other states:

> In one State, residence for a short term confirms all the rights of citizenship; in another, qualifications of greater importance are required. An alien, therefore, legally incapacitated for certain rights in the latter, may by previous residence only in the former, elude his incapacity…[85]

The U.S. Supreme Court resolved this quandary by denying the ability of the states to naturalize foreigners and reducing the impact of the Privileges and Immunities Clause by allowing each state to decide the scope of rights it would grant to citizens from other states.

Status and Rights of Foreigners

The power to determine the rights of citizens entails the power to determine the rights of foreigners. Though the U.S. Constitution gave Congress the power to enact uniform rules for naturalization, differences of opinions remained regarding what *rights* should be given to foreigners as well as naturalized citizens (whom some Delegates treated with the same suspicion they displayed towards foreigners), and whether Congress or the states should be able to decide these questions.[86]

Arguing in favor of limiting the rights of naturalized citizens, Roger Sherman said that the federal government was "at liberty to make any discriminations" because it was not the United States that naturalized them in the first place, but individual *states* (therefore the United States had not promised naturalized citizens anything).[87] His point was based on the premise that it was still the individual *states* that naturalized and conferred citizenship on foreigners, although Congress could set uniform rules that the states should follow.

James Madison criticized Sherman's argument as a "subtilty [sic] by which every national engagement might be evaded", while another delegate pointed out that "when foreigners are naturalized, it would seem as if they stand on an equal footing with natives…"[88] James Wilson explained how the Constitution of Pennsylvania gave all the

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[85] *The Federalist Papers*, No.42.

[86] This continues to be debated today. For example, California's Proposition 187 (1994) denied various public benefits, including welfare, medical care, and public education to undocumented immigrants. These provisions were struck down by the federal court as an interference with the exclusive power of Congress over immigration.

[87] Adrienne Koch, ed., *Notes of Debates in the Federal Convention of 1787, Reported By James Madison* (New York and London: W.W. Norton & Company, 1987) [hereinafter *Notes of Debates*], 440 (Aug. 13, 1787).

[88] Ibid.

rights of citizens to foreigners after two years of residence and how the denial of such rights would lead to the discouragement of European immigrants.[89] Wilson considered the treatment of foreigners and naturalized citizens was an issue that would affect whether European people would be willing to immigrate to the United States. The rights of these people were a part of an overall immigration policy.

Although today there is little distinction between native-born citizens and naturalized citizens, this was not the case when the Constitution was drafted. Maintaining a "Republican form of government" was an important consideration under the Constitution, and some delegates were suspicious of foreigners who grew up under different forms of government. Most delegates agreed that there should be some restrictions on the political rights of naturalized citizens. They differed in the degree to which they would restrict the right, depending on the level of suspicion they held against foreigners.

The initial proposal was to require naturalized citizens to wait for four years after naturalization, in addition to the period of residency required before it, before a person could run for the House of Representatives. Delegates to the Convention divided over this proposal. Some argued against any distinction among citizens, pointing out that creating different classes of citizenship was detrimental to the Republican form of government. Others asked for *longer* period of restriction, proposing a limitation on political rights for as long as 14 years after naturalization. Some even argued that naturalized citizens should *never* be allowed to run for office. Elbridge Gerry of Massachusetts took this position, warning that "persons having foreign attachment will be sent among us and insinuated into our councils…"[90]

Alexander Hamilton argued that Congress can deal with the matter by adjusting the naturalization law.[91] Others argued that the matter should be left to the states in the same manner as they were left to decide the eligibility to *vote*. The Constitution stipulated that the Electors of each state were to elect the representatives to the House, and that the qualification to become an Elector in this case were to be the same as the "Electors of the most numerous branch" of the state legislature (Art. I, Sec. 2).[92] This meant that if a state allowed a foreigner to be an Elector for state elections, this person could also vote in the election of House members.

The delegation from Pennsylvania took the lead against restricting the rights of foreign-born people and emphasized the merits of an open immigration policy. James Wilson pointed out that three of Pennsylvania's delegates to the Convention were not natives, including him. He also said that during the war for Independence, "most all the general officers" of Pennsylvania's army were foreigners. Madison also expressed sympathy for open immigration, arguing that "[t]hat part of America which had encouraged [immigration] most had advanced most rapidly in population, agriculture, and the arts."

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89 Arthur Taylor Prescott, *Drafting the Federal Constitution* (Baton Rouge: Louisiana State University Press, 1941), 226.

90 Ibid.,222.

91 Ibid.,223.

92 State legislatures were to choose Senators to represent the state (Art. I, Sec.3). The Seventeenth Amendment (1913) changed this so that Senators were also to be elected by the electorate of each state.

He would trust the judgment of electors instead of restricting the candidacy itself.[93]

When the Convention debated the eligibility of naturalized citizens to become a Senator, the debate grew tense. Some delegates argued for a lengthy period of disenfranchisement for foreign-born persons even after naturalization because of the Senate's extra role in foreign relations.[94] The initial proposal was a disqualification of four years after naturalization. Morris proposed a disqualification of fourteen years after naturalization in addition to the period required before a person could naturalize. Wilson made an emotional plea against this proposal, arguing that he himself would be disqualified as a result of the Constitution he has taken part in drafting. Morris responded that prudence should take precedence over emotions and emphasized the danger of foreign attachment. Benjamin Franklin opposed such restrictions, citing friendly relations with people in Europe and arguing that the U.S. should welcome European immigrants. Madison was concerned that such a restriction would "discourage the most desirable class of people from emigrating to the United States."[95]

In the end, the Convention agreed on a gradation of restrictions for foreign-born people, making it progressively restrictive for higher offices. For the House, the Convention settled on a restriction of seven years after naturalization. For the Senate, the restriction was nine years. Finally, the Presidency was limited to citizens by birth, and naturalized citizens were permanently barred from eligibility for office.[96]

For people of foreign birth, attaining the rights of citizenship became more difficult in the years following ratification. Naturalization law was tightened so that it took more years just to naturalize. Initially, naturalization required only two years of residency within the United States. Soon, this was expanded to five years, with a two-step process that required a declaration of the intent to naturalize after at least two years of residence in the United States, and an application for naturalization at least three years after this declaration. Combined with restrictions on eligibility of office *after* naturalization, foreigners who immigrated to the United States could not become a Delegate to the House for at least twelve years after arrival, and for the Senate, fourteen years.

Through debating the rights of foreigners and of naturalized citizens, the Founders began to think about the meaning of citizenship of the United States (federal citizenship). A probationary period before naturalized citizens could run for office was one of the first concrete distinctions made between citizens of the United States and foreigners. This restriction applied to all naturalized citizens, even if a state wanted to elect a naturalized person to Congress. The federal government determined eligibility to run for federal office on the basis of federal citizenship. Here, federal citizenship was beginning to emerge as a status with consequences in terms of rights.

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93 Prescott, *Drafting the Federal Constitution*, 223-224.

94 The Senate was given the power to provide consent to the President to make treaties or to appointment ambassadors, Ministers and Consuls (Art. II, Sec.2).

95 Prescott, *Drafting the Federal Constitution*, 267-269.

96 The prominence of Governor Arnold Schwarzenegger of California (elected 2003), who is a native of Austria, has led to a renewed debate over this restriction.

Traditional personal status distinctions and political rights

At the Philadelphia Convention, various other personal status distinctions based on colonial practice, such as "residents", "inhabitants", and "freeholders", were discussed by the delegates. When the Convention debated qualifications for political office, delegates argued over which personal status distinctions were relevant. In its final form, the Constitution set the following qualification for House of Representatives:

> No Person shall be a Representative who shall have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.[97]

But during the debate, Roger Sherman of Connecticut argued that the person should be an "inhabitant" rather than "resident", saying that the former term was less liable to misconstruction. "Inhabitants" meant those who were physically present. Meanwhile, "residency" did not necessarily coincide with physical presence, but was determined by a demonstrated attachment to the state. Physical absence did not necessarily mean the relinquishment of residency, and physical presence did not necessarily mean that the person had residency. Whether or not a person was a resident could thus lead to political controversies over the qualifications of candidates for office. Thus, Madison pointed out that "great disputes had been raised in Virginia concerning the meaning of residence as a qualification of representatives", while John Mercer of Maryland mentioned that there were "violent disputes raised in Maryland concerning the term 'residence'."[98]

But other delegates were reluctant to grant political rights to all inhabitants, fearing the intrusion of newcomers who would disturb the political stability of the state. John Rutledge from South Carolina proposed that a person should be required to have resided in the state for seven years before running for a Congressional seat. He argued that an emigrant from New England to South Carolina "would know little of its affairs and could not be supposed to acquire a thorough knowledge in less time". The same kind of argument was made against letting naturalized citizens run for office. Just before Rutledge spoke, George Mason moved for a longer wait period before naturalized citizens could run, arguing that "citizenship for three years was not enough for ensuring that local knowledge which ought to be possessed by the Representative." As a result, this requirement was extended to seven years.

Though the Delegates agreed about requiring foreigners to wait a certain amount of time before they can run for office, they disagreed over treating citizens of other *states* in the same manner. Some explicitly objected to the notion of distinct state citizenship. George Read of Delaware opposed Rutledge's proposal, pointing out that the Convention was forming a national government and that "such a regulation would correspond little with the idea that we were one people."[99]

Gouverneur Morris of Pennsylvania proposed using the *freehold* status as a qualification for office. This status was based on freehold tenure, under which a person

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[97] U.S. Constitution, Art. I, Sec. 2.

[98] Prescott, *Drafting the Federal Constitution*, 220-221.

[99] *Notes of Debates*, 407 (August 8, 1787).

possessed real property in perpetuity (and could dispose or pass it on to his descendants at will). The freehold was considered a basis of economic security, self-reliance, and prosperity. The freeholder had no obligation to others that would corrupt his judgment, and was considered to have the independence necessary for judging on the basis of the common interests of the community.[100] Among other prominent thinkers, the English jurist Blackstone expressed the desire "to exclude such persons as are in so mean a situation as to be esteemed to have no will of their own," with reference to the urban working-class population that was dependent on its employers.[101]

But basing qualification for office on freeholder status could give disproportionate power to wealthy absentee landlords. Expecting such criticism Morris noted that "people rarely choose a non-resident". He also pointed out that there were "great disputes in New York" over the terms residence and inhabitance, and that these terms were susceptible to "the arbitrary will of the majority". In the New York constitution of 1777, for reference, a person had to be a male *inhabitant* who was also a *freeholder* to be eligible to vote. Also, tenants who rented property over a certain value could also vote:

> VII. … every male inhabitant of full age, who shall have personally resided within one of the counties of this State, for six months immediately preceding the day of election, shall, at such election, be entitled to vote for representatives of such county in assembly; if during the time aforesaid, he shall have been a Freeholder, possessing a Freehold of the value of twenty pounds, within the said county, or have rented a tenement therein of the yearly value of forty shillings, and have been rated and actually paid taxes to this State…[102]

It was significant that the Philadelphia Convention chose *citizenship* as a basis of determining political rights, instead of traditional personal status distinctions based on personal wealth. In fact, until the last stages of the Convention, the draft of the Constitution contained a Clause that would have allowed Congress to impose uniform property qualifications across the nation:

> The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient.[103]

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[100] Chester E. Eisinger, The Freehold Concept in Eighteenth-Century American Letters, *The William and Mary Quarterly*, 3rd. Series, Vol. 4, No. 1 (Jan., 1947), 44-45. Eisinger notes that this notion was a myth and describes the reality of indebtedness among farmers. See also, Chilton Williamson, *American Suffrage from Property to Democracy: 1760-1860* (Princeton, New Jersey: Princeton University Press, 1968), Chapter 1.

[101] Ibid., 11.

[102] David. N. Gellman and David Quigley, eds., *Jim Crow New York: A Documentary History of Race and Citizenship, 1777-1877* (New York: New York University Press, 2003), 27.

[103] Article VI, Section 2, printed in the Report of the Committee of Detail and delivered to the Convention on Aug. 6, 1787 (*Notes of Debates*, 387).

Qualifications based on ownership of land or payment of tax met opposition because they would advantage a particular class of people. Land qualifications may be easily met by plantation owners but not by those who made a living from commerce. Tax qualifications may advantage commercial interests over landed wealth. A delegate argued that it was impractical to set a uniform standard for these qualifications across the nation. "Make them so high as to be useful in the southern states and they will be inapplicable to the eastern [New England] states. Suit them to the latter and they will serve no purpose in the former", he said.[104]

There were also philosophical objections to property qualifications. A delegate expressed doubts of "interweaving into a republican constitution a veneration for wealth." Benjamin Franklin pointed out that "some of the greatest rogues he was ever acquainted with were the richest rogues." Madison feared that a "republic may be converted into an aristocracy or oligarchy" by adopting such qualifications for office.[105]

Only three states agreed to include property restrictions in the Constitution while seven opposed. The final draft of the Constitution contained no property qualifications for members of Congress. Instead, it determined the eligibility to run for federal office using three elements: age, federal citizenship, and inhabitancy in the state from which the member was elected (Art. I, Sec. 2).

Slavery, migration and citizenship

Slavery was an important issue behind the debates over how to define citizenship in the U.S. Constitution. Despite the avoidance of the word "slavery" in the document, it was a consideration that always existed in the background. Several clauses in the Constitution are related to slavery. The Three-Fifth Clause (Art. I, Sec. 2) counted slaves as three fifths of a person for the purpose of apportioning the number of seats in the House of Representatives. The Migration Clause (Art. I, Sec. 9) provided that Congress may not regulate the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit" prior to 1808. What kind of regulation Congress can impose *after* 1808 was an open question, as will be discussed below. The Fugitive Slaves Clause (Article IV, Section 2) provided that "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another…" could be discharged, but had to be returned to their masters. Together, these provisions protected the institution of slavery and the interests of slaveowners in the South.

The Three-Fifth Clause was a compromise between the Northern states and Southern states. The Constitution allocated the number of seats in the House according to the population of each state. And the population of each state was to be calculated based on the number of free persons and three-fifths of "all other Persons". The real issue behind this provision was whether slaves should be counted when allocating the number of seats in the House of Representatives. Southern states, which sustained slavery, ironically wanted to count slaves as full persons, while Northern states inclined to abolition thought that it did not make sense to give additional representation to slaveholders by counting slaves in the

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104 Prescott, *Drafting the Federal Constitution*, 234.
105 Ibid., 233-235.

calculation. For example, according to the 1790 census, the population of South Carolina was 249,073, of which 107,094 (43%) were slaves. In Georgia, the population was 82,548, of which 29,264 (35%) were slaves.[106] Whether or not slaves were included in the population had a significant effect on the apportionment of seats to Southern states.

Counting slaves as "three-fifths" was a compromise that allowed the South to increase its representation but not as much as if slaves were counted in full. This is the manner in which the Philadelphia Convention compromised on items related to slavery. They were politically expedient solutions that avoided attempts at fundamental resolution of the conflicts. As another example, the Migration Clause allowed the slave trade to continue for two decades and left the question of what should happen afterwards unresolved.

Migration Clause

The major purpose of the Migration Clause was to allow the slave trade to continue uninhibited until 1808 and implicitly to allow its prohibition after 1808. But there was no consensus over whether this Clause gave Congress the power to regulate *voluntary* migration from Europe or migration of slaves *inside* the United States. The Clause said that Congress could not prohibit "The Migration or Importation" of persons that states wanted to admit. The controversy stems from a disagreement over why two distinct terms ("migration" and "importation") were used.

Some have argued that the word "migration" referred to voluntary migration (general immigration) while "importation" referred to the slave trade. For example, in 1824 Chief Justice John Marshall adopted this interpretation to justify a regulation by Congress of vessels that transported voluntary migrants.[107] Marshall thought that the Framers must have intended different meanings for different words. So Congress, after 1808, had the power to regulate not only the slave trade, but also voluntary migration.

Wilson, who was Pennsylvania's delegate to the Philadelphia Convention, encountered criticisms from his state that the clause would allow Congress to "prohibit the introduction of white people from Europe". Wilson denied that Congress would have such power, pointing out that the second half of the Migration Clause said only that "a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." Wilson meant to say that the slave trade would be discouraged through taxation, but migration in general would continue uninhibited.[108] Yet, in so making the distinction between the terms, he seemed to acknowledge that "migration" referred to voluntary migration from Europe, and that Congress could therefore regulate it.

Others have attempted to interpret the meaning of the Clause from its location in the Constitution. The Migration Clause was located in Article I, Section 9 of the Constitution, which was a list of powers that were *not* granted to Congress.[109] According to this

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[106] Department of Commerce and Labor, Bureau of the Census, *Heads of Families at the First Census of the United States Taken in the Year 1790: South Carolina* (Washington: Government Printing Office, 1908), 8.

[107] *Gibbons v. Ogden*, 9 Wheat. 206, 230 (1824).

[108] Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Vol. II, 452-453.

[109] The Section prohibits the suspension of the Writ of Habeas Corpus except under narrow

interpretation, it would be inappropriate to interpret an item in this section as a basis for an expansive reading of Congressional power. The Constitutional basis for regulation of immigration, if any, should be found somewhere else, such as Article I, Section 8, which was a list of powers that were *positively granted* to Congress.[110]

Yet another way of reading the Migration Clause was to interpret "migration" as the domestic movement of slaves and "importation" as the international slave trade.[111] Abolitionists preferred this interpretation, since it was illogical to allow the spread of slavery through domestic trade while trying to limit the slave trade. According to this interpretation, Congress could restrict domestic marketing of slaves after 1808. Slavery would be confined to a limited area and would be eventually extinguished. Support for this reading came from the usage of the phrase "states now existing". Some thought that this implicitly allowed Congress to prohibit slavery immediately for states admitted to the Union afterwards.[112]

The debate at the Philadelphia Convention focused on the slave trade. Delegates from Georgia and South Carolina opposed uniform restrictions on the trade. C. Pinckney from South Carolina argued that his state might voluntarily abolish slavery if left to its own, but that an attempt to force abolishment would "produce serious objections to the Constitution". C.C. Pinckney (who was a cousin of C. Pinckney) argued that without guarantee for slavery, the constituents of that state would not agree to the Constitution. But Wilson of Pennsylvania argued that if the South was inclined to abolish the slave trade, they should have no reason to oppose the Clause. George Mason argued that the efforts of other states to abolish slavery would "be in vain, if South Carolina and Georgia be at liberty to import [slaves]". He feared that because there was a demand for slaves by "[t]he western people", those lands would also be filled with slaves if the slave trade was allowed to continue.[113]

A compromise that was worked out by a committee gave Congress the power to regulate the slave trade, but only after 1800. Congress would also have the power to impose duties on the slave trade. This would alleviate criticism by the North that the South was gaining a "bounty" on the slave trade. Once this proposal was back in Convention, the year in which Congress could begin to regulate the slave trade was delayed to 1808. Madison acutely predicted that another twenty years "will produce all the

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circumstances, prohibits *ex post facto* law, prohibits tax on articles exported from any state, etc.

110 Later, the Interstate Commerce Clause in Article I, Section 8, would become a basis of power for the Congress to regulate migration while suppressing interference by the states. See Chapter VI of this study for the use of this Clause to limit the power of the states to regulate immigration.

111 Walter Berns, "The Constitution and the Migration of Slaves," *The Yale Law Journal*, Vol. 78, No. 2 (Dec., 1968), 198-228 at 214. Berns points out that although some delegates to the Convention later argued that the Clause allowed Congress to prohibit the domestic trade in slaves, this was not a position they made explicit during the Convention.

112 George Livermore, *An Historical Research Respecting the Opinions of the Founders of the Republic on Negroes as Slaves as Citizens, and as Soldiers* (1863) (University of Michigan Library, 2006 reprint), 64.

113 *Notes of Debates*, 698-701 (Aug.21-22, 1787).

mischief that can be apprehended from the liberty to import slaves."[114] But the intent behind the usage of distinct terms was never made clear in the process, which set the stage for future conflicts over the Congressional power to regulate slavery (beyond prohibiting the international slave trade).

Migration Clause in the state conventions

The Migration Clause also became a focus of controversy in the state conventions that ratified the Constitution. In Virginia, the two delegates to the Philadelphia Convention disagreed with each other about the implications of the Clause. George Mason called the clause "a fatal section, which has created more dangers than any other." He criticized the clause both for permitting another 20 years of slavery, and for not protecting existing property in slaves. The abolition of the slave trade, according to Mason, was "a principal object of this state, and most of the states in the Union" when it sought independence from Great Britain. He would rather not admit the Southern states than to allow this trade for twenty more years. However, Mason thought that the existing property rights in slaves should be protected, and criticized the clause for allowing a tax on slaves because this could potentially allow Congress to lay a heavy enough tax that would force manumission.[115]

James Madison argued that the South would not have agreed to the Constitution "without the temporary permission of that trade", and that the Fugitive Slaves Clause would provide a protection for the owners of slaves who ran away. He said that previously, slaves who fled to free states could be emancipated by the laws of those states, but the new Constitution with the Fugitive Slaves Clause would "enable owners to reclaim them."[116]

The debate in Pennsylvania followed a similar pattern, where some criticized the Migration Clause for allowing the continuance of the slave trade, while others defended it as laying the groundwork for the prohibition of slavery. Wilson, who as a delegate to the Philadelphia Convention had opposed the clause himself, now had to defend the product. He argued that under the Articles of Confederation, "the states may admit the importation of slaves as long as they please", but under the proposed Constitution "Congress will have power to prohibit such importation, notwithstanding the disposition of any state to the contrary." He predicted (wrongly) that Congress would not allow slavery in any new state formed in the future:

> "… I think there is reason to hope, that yet a few years, and it will be prohibited altogether; and in the mean time, the new states which are to be formed will be under the control of Congress in this particular, and slaves will never be introduced amongst them.[117]

Regulation of movement of slaves after 1808

Importation of slaves was prohibited by several states even before the U.S.

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114 Ibid., 703.

115 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Vol. III, 452-453.

116 Ibid., Vol. III, 453.

117 Ibid., Vol. II, 452.

Constitution was ratified. For example, New York and Virginia prohibited the introduction of slaves from abroad as well as from other states within the union.[118] Acting according to the Migration Clause, Congress in March 1807 passed a law prohibiting the importation of slaves after 1808. While the enforcement of this law was weak and its provisions tended to be ignored by shipmasters, merchants, and planters alike[119], it was a step towards the containment of slavery.

After the international slave trade was prohibited, the conflict over retention of slavery inside the United States and the *domestic* movement of slaves divided the country. A central provision in this issue was the Fugitive Slaves Clause (Article IV, Section 2). This Clause followed a clause in this section which provided that criminals who fled from one state to another had to "be delivered up, to be removed to the State having Jurisdiction of the Crime." This is based on the assumption that criminal laws would vary state-by-state, and that there may be instances where the laws of different states would conflict each other (conflict of laws). The Constitution included this provision to command the states to respect the laws of other states, so that a criminal could not flee from the laws of one state by moving to another state. The Fugitive Slaves Clause extended this idea to laws regarding slavery:

> No Person held to Service of Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered upon Claim of the Party to whom such Service of Labour may be due.

This provision was inserted near the end of the Philadelphia Convention in response to the demand by delegates from South Carolina. The idea of requiring states to return runaway slaves from other states had precedents in the colonial period. For example, when the New England Confederation of Plymouth, Massachusetts, Connecticut, and New Haven was established in 1643, its Articles of Confederation included a provision regarding runaway servants. Runaway servants had to be returned to the master or his agent if the master had obtained a certificate from a magistrate in his colony proving that the runaway was his servant.[120] Congress included a similar provision when it enacted the Northwest Ordinance in 1787, under which slaves who escaped to the Northwest Territories could be reclaimed by their masters.[121]

In 1793, Congress passed the first Fugitive Slave Act, providing procedures for the return of slaves who escaped from a state to another. The act allowed slave-owners to bypass standard legal protections that were offered to people who were detained. Instead, it allowed slave-owners to forcefully capture and bring back their slaves if they had

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118 Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: The University of North Carolina Press, 1981), 41.

119 John Hope Franklin and Alfred A. Moss, Jr., *From Slavery to Freedom: A History of African Americans* (New York: Alfred A. Knopf, 2006), 104-105.

120 C. W. A. David, "The Fugitive Slave Law of 1793 and its Antecedents," *The Journal of Negro History*, Vol. 9, No. 1 (Jan., 1924), 19.

121 Ibid., 21.

received a certificate proving ownership of the slaves from a federal judge or local magistrate. It was for the slave-owner "a kind of vigilante's license to enforce his rights himself with a minimum of formality."[122]

Northern states, afraid that the Fugitive Slaves Act was being used to capture slaves as well as free blacks, enacted anti-kidnapping laws to protect *their citizens* (free blacks). Southern states considered such laws as an interference with the slaveowners' rights. Despite their general aversion to the expansion of federal power, Southern states even demanded a mechanism that would allow intervention by the federal government to recapture fugitive slaves in Northern states. When Northern states asserted their power as a sovereign state to protect its citizens (free blacks), Southern states attempted to suppress that assertion using federal power.

Chapter conclusion

Both in terms of the power of the federal government to grant the status of citizenship or in the range of rights that attached to that status, federal citizenship was a weak concept compared to status distinctions made by individual states when the U.S. Constitution was ratified.

The U.S. Constitution gave Congress the power to naturalize foreigners, establishing the concept of federal citizenship that could be granted by the federal government. But this power was constrained, since slavery existed in the Union and the Constitution allowed the states to continue to deprive citizenship from this group and constrained the ability of the federal government to interfere with slavery. Congress could not grant federal citizenship to blacks nor guarantee their rights by doing so.

The rights that people held by virtue of having federal citizenship was not clearly defined in the Constitution. The Privileges and Immunities Clause of Article IV (not the Fourteenth Amendment) stipulated that citizens of each *state* should have the rights of citizens in all other states, thereby conditioning rights on the possession of *state* citizenship. Further, the Court allowed each state to decide what those rights were and refused to set a national standard. In the states, many important rights, such as the right to vote or eligibility to make claims for public assistance, continued to be based on traditional personal status distinctions defined by ownership of property or having local settlement. The only context in which federal citizenship clearly mattered was federal elections, where the Constitution limited the eligibility of naturalized citizens to run for federal office.

The federal government lacked control over another crucial dimension of citizenship—the power to regulate the migration of persons. The power of Congress to do so was explicitly constrained in the case of migration of slaves, and was unclear in the case of other forms of migration. The Migration Clause gave Congress the power to regulate the international slave trade, but only after 1808. Whether the Migration Clause gave Congress the power to regulate *voluntary* migration from abroad or even the domestic slave

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[122] Don E. Fehrenbacher, *The Dred Scott Case* (New York: Oxford University Press, 2001), 41. The law also dealt with the extradition of criminals and was enacted in the aftermath of controversies between Virginia and Pennsylvania. See, William R. Leslie, "A Study in the Origins of Interstate Rendition: The Big Beaver Creek Murders," *The American Historical Review*, Vol. 57, No. 1 (Oct., 1951), 63-76.

trade was an unanswered question. It may be said that no one at the Philadelphia Convention advocated explicitly giving Congress such powers.

The weakness of federal citizenship and the predominance of personal status distinctions made by individual states would lead to conflicts between the states in the decades following the ratification of the Constitution. The movement of blacks across state boundaries in particular led to conflicts between Northern states and Southern states. The next chapter looks at these conflicts and how it led to a reconsideration of the powers of the federal and state governments over citizenship.

IV. Interstate conflicts over the status of blacks

The issue of states' power to define who citizens were and what rights they had grew in significance due to the increased migration of blacks across state borders. Different states had different laws regarding the status of blacks and rights that attached to the status. The differences were most pronounced between the free states of the North and the slave states of the South. Disputes over which of these laws would prevail occurred especially in the border states of Maryland, Virginia, and Pennsylvania, where crossing the state border could have meant the difference between treated as a slave or as a citizen. Northern and Southern states clashed over the status of blacks as each side insisted on defining the status themselves. Southern states imposed restrictions on free blacks while Northern states complained that free blacks who were citizens of their state should be treated respectfully by the South. On the other hand, when Southern slaves fled to the North, the latter often refused to turn them over to the South.

The role of the federal government was intensely contested, with the North and the South trying to tailor the federal government's role so that it was favorable to their definition of the status of blacks. Austin Allen has noted that slavery's "intersection with questions concerning the scope of federal power generated passions that highlighted the stakes of both issues".[1] Earl Maltz has written about how the U.S. Supreme Court justices maneuvered through the "complicated interaction between questions of federalism… and the issue of slavery".[2] Paul Finkelman has written about the erosion of the doctrine of comity in the area of slave transit.[3]

Initially, the North and the South accepted each other's position on the treatment of slaves that moved across state borders. The North accepted their status as slaves from a Southern state so long as they were only traveling temporarily. The South accepted the North's position, which held that a slave who resided permanently in a free state became free. But through the 1830s and 40s, positions over slavery hardened, and state courts began to take mutually exclusive positions on the status of blacks. The *Dred Scott* decision (1857) was a culmination of this long-standing dispute over the right of states to define and control citizenship and the role of the federal government regarding the status of blacks.

In this chapter, I examine the actions of various government actors in the debate over the status of blacks. I will look at records of Maryland, where the issue frequently arose due to Maryland's position as a border state between the North and the South. I also focus on several controversies between the states regarding this topic, especially the long-running correspondence between the Governors of New York and Virginia. How did different states treat blacks (both free and slaves)? What were the dynamics between governmental actors in each state? How did states interact with each other? The U.S. Constitution retained the notion of state citizenship and did not allow the federal government to assert a

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[1] Austin Allen, *Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court: 1837-1857* (Athens and London: The University of Georgia Press, 2006), 80.

[2] Earl M. Maltz, "Slavery, Federalism, and the Structure of the Constitution," *The American Journal of Legal History*, Vol. 36, No. 4 (Oct., 1992), 466-498.

[3] Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity*.

strong control over the status and rights of citizenship. I would like to examine how this arrangement broke down between the 1830s and 1850s.

The status of blacks in the states in the early 19th century

Constitutional context

The Privileges and Immunities Clause in Article IV of the Constitution (not the Fourteenth Amendment) declared that the citizens of each *state* should be entitled to the privileges and immunities of the citizens in other states. The principle of this clause was easy to understand- when a citizen of one state traveled into another, he should not have to suffer discrimination because of the lack of state citizenship. This provision was meant to enable a friendly intercourse among the citizens of different states and to promote the cause of the Union. However, in its application there were many problems. What rights should count as privileges and immunities of citizens of each state? What if the rights of state citizens differed among the states?

A frequently cited decision regarding the content of privileges and immunities that was guaranteed by this clause is *Corfield v. Coryell* (1823), in which a state's attempt to restrict the harvesting of oysters by citizens of other *states* was challenged as a violation of this clause.[4] Judge Bushrod Washington denied this claim, holding that natural resources were the common property of *state citizens*, who held it as tenants in common. The state, as a sovereign, had the ability to limit the use of such property by foreigners, including *citizens of other states*. Washington cited writings on international law by Grotius as a support for his position:

> The sovereign… who has dominion over the land, or waters, in which the fish are, may prohibit foreigners (by which expression we understand him to mean others than subjects or citizens of the state) from taking them.[5]

Washington added that the privileges and immunities protected under the Privileges and Immunities Clause were those that were "in there nature, fundamental" and have always been enjoyed by citizens in the several states. He listed among them the right to pass through or reside in any other state, the right to property, the right to sue, an exemption from higher taxes than are paid by citizens of a state, and the right to habeas corpus. He also cited the elective franchise, subject to the laws of the state. According to this reading, those rights would have to be guaranteed to anyone who resided in a state, regardless of whether they had citizenship of that state.

But other judges interpreted the clause more narrowly. They thought that states themselves had the power to define what kind of rights they granted to state citizens, and by extension, to citizens of other states who traveled to that state. According to this reading, the Privileges and Immunities Clause did not guarantee *specific* rights like those described by Judge Washington, but functioned more like the modern Equal Protection Clause. An equal denial of rights was acceptable under this view, so long as they were denied to both

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[4] *Corfield v. Coryell*, 6 F. Cas. 546 (1823).

[5] Ibid., at 552.

state citizens and citizens of other states.

The *Corfield* case is an example of the legal significance of state citizenship at the time. The judges emphasized the sovereignty of the states and their power to exclude citizens of other states from certain rights. Even Judge Washington, who held that the Privileges and Immunities Clause guaranteed citizens of each state a specific set of rights in every other state, agreed that natural resources should be reserved to citizens of that state only. The possession of federal citizenship could not override such limitations.

This became a volatile political issue when the question of race was mixed in. The Constitution was structured in a manner that allowed states to maintain slavery if they wished. But many Northern states abolished slavery or provided for a gradual abolition of slavery. The black population there became "free". Were the free black population *citizens* of those states? And if so, would the Privileges and Immunities Clause give the free black population the rights of *citizens* in every other state? For pro-slavery judges, the list of rights that Judge Washington thought was protected by the Privileges and Immunities Clause would be problematic if free blacks could assert them. The ability to travel across state boundaries and live in another state, the ability to bring *habeas corpus* actions, and the right to sue could all undermine the states' control over the black population.[6]

Status of free blacks in the states

Prior to the Civil War, free blacks were treated as having an intermediate status between citizens and foreigners-- they were deemed as residents of the state, but not as co-equal citizens. They were targets of frequent legislation, and their rights and obligations were limited and adjusted according to the exigencies of the time.[7] A good example of such fluctuation could be seen in Maryland, where the rapid increase in the proportion of free blacks in some cities and counties during the 1830s incited fear among the whites that they would be outnumbered in the near future. Here, the state policy went from leniency towards free blacks, even allowing them the right to vote in state elections; to a distinction between "historically free blacks" and "newly free blacks", under which blacks who were freed after a certain date would be denied rights that were enjoyed by free blacks until then; to the extreme policy of prohibition of entry, removal from the state, and colonization in Africa.

Even in Pennsylvania, where abolitionist sentiments ran strong, the status of free blacks was not equal to that of white citizens. In fact, like Maryland, the rights of free blacks were diminished as they increased in their numbers and were perceived as a threat by the white population. In 1839 a committee of the Pennsylvania state legislature, in rebuking petitions seeking abolition and equal rights for blacks, cited the fact that while free blacks had previously been allowed to vote in some parts of the state, a recent amendment to the Pennsylvania state constitution specifically limited the electoral franchise to *white* freemen of the state.[8]

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6 Allen, *Origins of the Dred Scott Case*, 120.

7 Don E. Fehrenbacher, *The Dred Scott Case: Its Significance an American Law and Politics* (New York: Oxford University Press, 1978), 61-64.

8 "Report relative to the abolition of slavery in the District of Columbia, and in relation to

Another colorful example is New York. From the late 1830s, New York took a strong abolitionist stance and engaged in intensive conflicts with Virginia over the treatment of slaves who fled from Virginia to New York. But its own treatment of blacks was that of ambiguity towards granting them equal treatment as citizens. In 1821, a constitutional convention to revise the state's constitution was held in New York.[9] One of the proposals that emerged as a major point of conflict was the disenfranchisement of the black population. Until then, there was no qualification regarding race in that state's elections. Instead, property was the most important requirement. However, property requirements were increasingly seen as undemocratic since the beginning of the nineteenth century, and many other states revised or eliminated such requirements. A proposal that was debated at the New York convention would eliminate the property requirements and enfranchise a larger portion of the adult male population, but with a newly added qualification that disenfranchised people according to their race.

This proposal generated a strong opposition from a portion of the convention. Delegates wondered what reason there was to disenfranchise free blacks, who until that point had been able to vote just like whites. For example, Peter Jay asked:

> Why, sir, are these men to be excluded from rights which they possess in common with their countrymen? What crime have they committed for which they are to be punished? Why are they, who were born as free as ourselves, natives of the same country… now to be deprived of all those rights, and doomed to remain forever as aliens among us?[10]

He also pointed out that New York had opposed the admission of Missouri based on its disenfranchisement of blacks, and that it would contradict its own actions by disenfranchising blacks. Another delegate cited the Declaration of Independence and argued that disenfranchisement of "people of colour" was against the fundamental principles of that document.[11]

Several delegates argued that the disenfranchisement of blacks was against the Privileges and Immunities Clause of the U.S. Constitution.[12] They argued that the Clause required the states to grant to citizens of other states the same rights as citizens of New York if they came to the state. If black citizens of other states came to New York, disenfranchising them would be a violation of the Clause.

Proponents of disenfranchisement, including the Chief Justice of the state, responded

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the colored population of the country", June 1, 1839. *Pennsylvania House Journal*, 1838-39, Vol. 2, 991-1003. The provision that was cited was Article III, Section I of the *Pennsylvania Constitution of 1838*, which limited the franchise to "white freeman of the age of twenty-one years, having resided in this State one year…"

9 "Extended Excerpts from the Convention of 1821," in David N. Gellman and David Quigley, *Jim Crow New York: A Documentary History of Race and Citizenship, 1777-1877* (2003), 90- 200.

10 Ibid., 112.

11 Ibid., 117-118 (Statement by Robert Clarke).

12 Ibid., 112 (Statement by Peter Jay); Ibid., 124-125 (Chancellor James Kent); Ibid., 129 (Abraham Van Vechten).

that the Clause was only meant to protect civil rights and not political rights such as voting rights. He argued that a "person of colour coming from another state, would have the privileges as one of the same class here."[13] In other words, the disenfranchisement of blacks did not violate the Privileges and Immunities Clause because it was not a discrimination against citizens of other states, but an "equal" disenfranchisement of all blacks, whether they were from New York or another state.

The New York convention reached a compromise over black suffrage, in which the proposal to limit suffrage to whites was rejected, but a different qualification for suffrage applied to blacks. While the convention eliminated property qualifications for white, it retained the qualifications for blacks. This was the condition of free blacks even in a state that was opposed to slavery like New York. Emancipation did not mean that blacks had equal rights with whites. Their status was a matter that was to be decided by white citizens, and whether blacks were even to be considered citizens was up for debate.

Controversies over free blacks and interstate migration

The status of blacks seemed to be neatly compartmentalized under the Constitution—slavery was allowed to continue, but after 1808 Congress could regulate importation of slaves. The role of the federal government was small, and states were left to themselves to abolish or maintain slavery. Yet, it was not enough for each state to decide the status of blacks. For several reasons, the Constitutional compromise was destabilized.

First, when the United States began to acquire new territories, it generated conflicts over whether slavery should be permitted there. In a message to the Pennsylvania state legislature regarding the dispute over fugitive slaves, the governor of Pennsylvania observed that "the institution of slavery has assumed a new position and importance, by the successful attempt to extend it beyond its original limits."[14] The state legislature, in response to the governor's message, passed a resolution in 1819 requesting its representatives in Congress to vote against the admission of a new state unless slavery was prohibited there.[15] Southern states opposed such restrictions, and from the 1820s to the 1850s, the conflict between the North and South over the extension of slavery became one of the most divisive issues in national politics.[16]

Second, the increased channels of transportation and commerce among the states meant that states could no longer ignore the status of blacks in other states. With increased frequency the northern states had to deal with the status of blacks coming to their

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[13] Ibid., 131-132 (Statement by Ambrose Spencer).

[14] "Message from the Governor of Pennsylvania [Johnston], transmitting Resolutions relative to Slavery, passed by the Legislatures of Virginia and Georgia," *Pennsylvania Senate Journal*, 1850, Vol. 2, 419-433 (March 22, 1850).

[15] Pennsylvania governor Joseph Ritner's "Annual Message to the Assembly –1836," in *Pennsylvania Archives, Fourth Series*, Vol. 6, 290-292.

[16] Among the high points in this conflict were the Missouri Compromise of 1820, which drew a geographical line to divide areas where slavery was to be prohibited and admitted in the future; and the Kansas-Nebraska Act of 1850, which provided that the status of slavery in those territories should be decided by popular vote. The latter led to a bloody conflict between abolitionists and slaveowners who fought to gain support for their positions.

territories from southern states. In a case involving slave transit—of slaveowners traveling through another state with their slaves, an Illinois judge cited the fact of westward expansion. He said that "Thousands from Kentucky, Virginia, Maryland, Tennessee, and the Carolinas" have sought free and safe passage through Illinois, and argued that if the slaveowners' right to do so were denied "it would be productive of great and irremediable evils of discord".[17]

Industrialization contributed to the increase in the number of free blacks. By the mid-nineteenth century, many slaves were hired out to factories in large cities such as Baltimore, instead of being tied to plantations. Working alongside free blacks and whites, these slaves often accumulated their wages and purchased their own freedom. Some factory owners thought that it was better to free the slaves and enter into a wage contract rather than spending money capturing runaway slaves and restraining unwilling workers.

Southern states felt that the increased presence of free blacks had a detrimental effect on the slave population and enacted laws that regulated various aspects of the lives of free blacks. One of the most significant restrictions imposed on free blacks was the limitation on movement both inside a state and across state borders, and the constant requirement for blacks to prove their status. In many states free blacks had to carry a certificate proving their status in order to move around. Not only government officials, but private citizens could also demand a black person to show the certificate and prove his status. Free blacks were not coequal citizens in this relationship.

Limitations were placed on interstate movement of free blacks from both sides—the sending state and the receiving state. Maryland, for example, limited its free black population from traveling outside of the state for more than 30 days. If a free black wanted to travel outside for longer than that, he needed a special permit, and without it, he was barred from re-entering. In essence, Maryland was waiting for a moment to "disclaim" the free black as its member. Once a free black person showed an intention of leaving the state for a prolonged time, he was thrown out forever. Southern states often prohibited the migration of free blacks into their states for fear that the slave population will increase their aspiration for freedom.

Georgia prohibited the immigration of free blacks into the state, with the punishment being "sale into perpetual bondage".[18] Similarly, Virginia passed a law in 1841 which made it unlawful for "any free negro or mulatto, not registered according to law, or not otherwise entitled to a residence, to come within this commonwealth from any foreign country, or from any state or territory of this Union, or from the District of Columbia…" The act required sheriffs, sergeants and constables to apprehend potential violators and bring them to the justice of the peace. Violators had to provide bond and security payable to the state on the condition that they would leave the state within ten days.[19]

The treatment of free blacks with regard to the right to move across state borders resembled the status of foreigners today. Freedom of movement marks the enduring and most consequential distinction between citizens and foreigners. Foreigners who may be

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17 Finkelman, *An Imperfect Union*, 98.

18 Fehrenbacher, *The Dred Scott Case*, 63.

19 "An Act to amend the act reducing into one the several acts concerning slaves, free negroes, and mulattoes [Virginia]" (Mar. 13, 1841).

indistinguishable from citizens in their daily life are made visible and subject to control at the borders. They need a passport to exit the country legally. A visa, giving specific purposes for the entry, is required in order to enter the country. Vast discretion is granted to border control officers to determine whether a person could enter or leave the country. A violation of immigration law could have grave consequences, including lengthy or permanent prohibition from reentry.

For free blacks, the physical boundaries of citizenship existed at the level of individual *states* prior to the Civil War. They could be excluded as "undesirable" migrants at the borders of states. In the South they were constantly subject to inspection and had to prove their status in order to continue their stay in the territory.

Defining the status of wives and children of slaves

States also exercised the power of conferring citizenship when they defined the status of women who married blacks, or children born between a slave and a free person. For example, in Pennsylvania, the status of children of fugitive slaves became an issue. While Pennsylvania had reluctantly complied with the rendition of fugitive slaves, the status of their children was found to "turn on different principles". Under Southern law, if the mother was a slave, the child was also a slave. But by the 1840s, Pennsylvania courts refused to extend this principle to children who were born in that state. It was not the child who had escaped into Pennsylvania, so the condition for returning fugitive slaves did not apply. The child may be "conceived in slavery but born in freedom".[20] In one such case, *Commonwealth v. Auld*, a Pennsylvania judge decided that a child born in Pennsylvania six months after his mother escaped from Maryland was free under Pennsylvania law. The status of children born in Pennsylvania was without question "the competency of our legislature to declare".[21]

Some states passed laws criminalizing and invalidating marriage between a white woman and a black man (but not always the other way around, given the frequency with which masters had relationships with slave women). Public condemnation of interracial marriage was strong and vivid. A newspaper article in Maryland linked the fear of such a marriage with abolition:

> On one end of a sofa sits Sambo reading the Emancipator… with his feet in the lap of his white wife on the other end of the sofa, who is nursing a yellow child, the first fruit of the unholy alliance…[22]

Nonetheless, intermingling of the two races occurred and children of mixed races were born. States went into great lengths to define the status of these children depending on the "amount" of white or black blood that existed in the child.

Whether in the attempts to limit the movement of free blacks or to determine the status of mixed blood children, no national definition of the status and rights of blacks prevailed—instead, this remained the prerogative of each state. Free blacks who were

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[20] Finkelman, *An Imperfect Union*, 64-65.

[21] Ibid., 138-139.

[22] *Easton Gazette* [Easton, Md.], Feb. 1, 1840.

citizens in one state were not treated as such in another state. The scope of the Privileges and Immunities Clause was limited by the courts, and states decided the rights they conferred to their own citizens as well as citizens of other states.

Emancipation and colonization schemes in the states

Many white citizens believed that blacks could never be coequal citizens even if they were free. Even abolitionists emphasized that they were against "negro equality" in order to counter the resistance to abolition. They assured that blacks would remain in an inferior status and would not threaten the status quo in race relations.

Among the measures promoted to secure the racial order while also promoting abolition was colonization, under which emancipated slaves would be transported to colonies created outside of the United States instead of gaining citizenship in the states. This was made prominent by an effort of a private organization, the American Colonization Society, which attempted to obtain aid from Congress to implement the scheme. Between 1827 and 1832, at least ten states endorsed this policy.[23] The Delaware state legislature, for example, passed a resolution which declared that it was essential to its safety "that measures should be taken for the removal, from this country, of the free negroes and free mulattoes" and that the colonization scheme "ought to be fostered by the national government, and with national funds."[24]

During the 1830s Maryland took the step of putting this scheme into practice by creating a quasi-state agency to colonize blacks. Maryland was a border state, where among all the states the increase in the number of free blacks was most visible. One historian has said that during the 1830s Maryland had "not only the largest proportion, but actually much the largest number of free colored people, of any State in the Union."[25] The proportion of free blacks to the number of slaves had increased from roughly 1 free against 5 slaves in 1800, to 1 free against 2 slaves in 1830, to almost an equal proportion of free and slave by 1860. During the same period, the number of free blacks increased from roughly 19,587 to 52,938 to 83,718, while the number of slaves decreased from 105,635 to 87,188 according to the censuses. The overall state population roughly doubled during the same time.[26]

The Maryland Colonization Society was overseen by a Board of Trustees that reported to the state legislature and operated under state funds as well as private contributions. It saw free blacks as a threat to society and promoted colonization as a solution that would make both races happy, and engaged in a colonization scheme that transported hundreds of black persons to colonies in Liberia and Monrovia, created on lands purchased with state funds. Participation of free blacks in this scheme was voluntary and was promoted as a humane way of dealing with slavery and its aftermath. But it "succeeded" in sending only a limited portion of the state's black population abroad. Legislators criticized abolitionists who promoted a negative perspective of the colonization scheme. Some argued that the

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[23] Herman V. Ames, ed., *State Documents on Federal Relations* (New York: Da Capo Press, 1970), 209-210.

[24] Passed Feb. 8, 1827, reprinted in ibid., 210.

[25] Thomas J. Scharf, *History of Maryland*, Vol. III (Baltimore: John B. Piet, 1879), 319.

[26] Ibid.

scheme should be made mandatory. This meant deporting all blacks, or at least those that were newly emancipated, from Maryland.

Maryland's official colonization scheme continued into the 1850s, but its results were mixed at best. It was not cost-effective because of the diminishing proportion of blacks who were willing to participate in the scheme and the cost not only of transporting the blacks but also of supporting the colony until it was self-sufficient. The reports of the Colonization Society, which were submitted to the state legislature, often blamed the abolitionists for obstructing the scheme. .

As the slave issue split the union in the late 1850s, Republicans endorsed the colonization scheme to ensure the public that they were not pursuing "negro equality". In response to fear among whites about the intermingling of races if slaves were emancipated, Republican leaders denounced racial amalgamation and publicly endorsed the colonization scheme. Republicans also thought that convincing slaveowners that emancipation would not mean that blacks would become an equal member of the society would allow anti-slavery inclinations within slaveowners themselves to come out.[27]

From the standpoint of citizenship, this experience was significant because there was no intervention by the federal government over the efforts of states to *expel* the free black population from the United States. It was assumed that individual states had the power to deal with the status and treatment of free blacks. The federal government did not have the power to grant them citizenship of the United States, even if it had the power to naturalize foreigners and make them citizens. This combination of states' rights to determine the status of persons (especially blacks) in its territory and the lack of federal power to grant the status of federal citizenship allowed states like Maryland to carry out the colonization scheme.

Slave transit and conflicts over the status of blacks

The power of individual states to define the status of blacks led to conflicts when slaveowners traveled with their slaves across state boundaries (slave transit) into a free state.[28] The North feared that prohibition of slavery in their states would be meaningless if Southerners could bring in slaves and reside in their midst while maintaining the master-slave relationship. Southerners could then spread slavery throughout the country by simply migrating to the North with their slaves.

In order to counter this possibility, Northern states attempted to define the status of black persons themselves. They enacted laws defining the limited circumstances under which slave-owners of the South could travel to their states along with their slaves. If the travel went beyond temporary transit and amounted to residency, the slave automatically became a free person and the owner lost his claim against the former slave. Supporting this claim was the English court's precedent in *Somerset v. Stewart* (1772), which declared that slavery was against natural law and could therefore exist only by positive law.[29]

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[27] Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (New York: Oxford University Press, 1971), 269-271.

[28] Fehrenbacher, *The Dred Scott Case*, 50-61.

[29] Finkelman, *An Imperfect Union*, 38-39.

Northern states relied on this precedent to argue that states were free to reject the status of slaves and make them free by default.

One problem with this approach, however, was how to treat the rights of slave-owners. For them, slaves were property that could be bought and sold. The Constitution also contained the Privileges and Immunities Clause, which guaranteed "free ingress and egress" to and from any state within the union, with security for the person and property. This meant that people were supposed to be free to travel to any state without interference. From the standpoint of slave-owners, the laws of Northern states that freed slaves upon entry to their states interfered with their property rights.

A study of how state courts dealt with the conflicting laws of the North and the South has pointed out the "practical frontier justice", in which there emerged "an accommodation which was satisfactory to a ruling majority of both sides."[30] Under this compromise, the right of a slaveholder was recognized by the courts of a free state while a person that was once recognized as free in any state was recognized as free in every state.[31] However, the degree to which this mutual respect was extended varied over time. Pennsylvania attempted to narrow the circumstances under which slaveowners can retain their slaves within that state. Under the Pennsylvania Act of 1780, slaveowners could retain their slaves only if their travel was within six months. Within this period, the master could also contract and indenture the slave for seven years. If the master stayed beyond six months without entering into contract for indenture with the slave, the slave would become free. In New York, the time limit was nine months. Some states left it to the judiciary to draw the line.[32]

In Pennsylvania, the Abolition Society actively litigated on behalf of slaves to enforce the provisions limiting the ability of slaveowners to bring in slaves. Finkelman has traced an earliest record of such a case to *Pirate v. Dalby*, in 1786. The Abolition Society initiated habeas corpus proceedings on behalf of Pirate, who was accompanying Dalby on his trip to Pennsylvania from Virginia. While the court sided with Dalby in this case, it sparked a communication from George Washington (of Virginia) to Robert Morris (of Pennsylvania) which warned of discontent and resentment that such a law would create.[33]

Pennsylvania tilted towards emancipating slaves by amending the 1780 act in 1788. Under the amended act, a slave who was brought to Pennsylvania by a master "with an intention to reside" was emancipated immediately, instead of after six months (while visitors could still bring in slaves for up to six months). Further, people who were indentured in Pennsylvania could not be forced to move to other states where the laws might be less favorable to them.[34] Owners of slaves or indentured servants who moved into Pennsylvania without knowing the law stood to lose his "property".

In Massachusetts, the chief judge held in an 1823 case that the U.S Constitution was a "compromise" by which all states were bound and that Massachusetts had "entered into an

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30 Kempes Schnell, "Anti-Slavery Influence on the Status of Slaves in a Free State," *The Journal of Negro History*, Vol. 50, No. 4 (Oct., 1965), 257.

31 Ibid., 260.

32 Ibid., 261-262.

33 Finkelman, *An Imperfect Union*, 49-51.

34 Ibid., 48, 59-60.

agreement that slaves should be considered property." In Ohio, Judge McLean (who later became a Justice of the U.S. Supreme Court) of the state Supreme Court ruled in an 1817 slave transit case that although slavery was repugnant, "Ohio was bound to respect as property, to a certain extent, that which is made property by the law of a sister state."[35]

In this manner, up to the 1820s, state officials in the North were willing to keep their position on slavery to themselves and respect the fact that slavery existed in other states and was recognized by the U.S. Constitution.

Decline of comity between the North and the South

Southern state courts initially accepted the position of Northern state courts and upheld the emancipation of slaves under Northern state laws.[36] Thus, slaves who were freed under the laws of Northern states were allowed to remain free even upon return to Southern states. For example, in 1820, a Missouri court decided that a slave who was hired to work for more than a year in Illinois had acquired a residence in Illinois, and was free even after he returned to Missouri.[37] In 1818, a Mississippi court held that "slaves within the limits of the Northwest Territory became free men by virtue of the ordinance of 1787, and can assert their claim to freedom in the courts of this state." Similar acknowledgements of freedom could be found in state court decisions throughout the Southern states, except South Carolina and Georgia.[38]

Roger Taney, who was then Attorney General of the United States, endorsed the idea that slaves could become free by residing in a free state. In 1831 he issued an opinion regarding whether the United States had an obligation to protect the rights of slaveowners whose slaves were employed by British subjects aboard a British vessel. Taney declared that the slaveowner lost his rights if he took his slaves to a free state. Taney pointed out that it was "a fixed principle of the law of England, that a slave becomes free as soon as he touches the shores [of England, which does not admit slavery]" and that if "by the laws of any of the States [in the United States], a slave becomes free as soon as he is brought within the limits of the State… the general government is under no obligation to interfere in behalf of the master".[39] This was a striking contrast to later positions adopted by Southern states, which demanded that the federal government protect the rights of slaveowners to travel to any state with their slaves.

But this mutual respect for the laws of other states declined as the decade progressed. Northern states increasingly declined to extend comity to the South in cases involving slave transit. Finkelman has identified a Massachusetts case in 1836, *Commonwealth v. Aves*, as a turning point in how state courts dealt with the issue.[40] This case involved a slaveowner who brought along a six-year old slave girl to Massachusetts. An abolitionist petitioned for a writ of habeas corpus on behalf of the girl, arguing that while comity "was founded on

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[35] Ibid., 81, 89-90.

[36] Ibid., 187-188; Fehrenbacher, *The Dred Scott Case*, 54-55.

[37] Schnell, *supra* note 30, 264, citing *Vincent v. Duncan*, 2 Houck (Missouri) 139 (1820).

[38] Ibid., 263-265.

[39] Opinion of the United States Attorney General, "Slaves on British vessels trading to the United States," December 6, 1831, 2 U.S. Op. Atty. Gen. 475.

[40] 35 Mass. 193 (1836). See Finkelman, *An Imperfect Union*, 103-114.

the consent of nations, and the need which is felt of reciprocal good office," slavery did not exist in Massachusetts and that comity did not extend to matters that offended the morals or public policy of the state.

Chief Justice Shaw freed the girl, arguing that comity could "apply only to those commodities which are everywhere, and by all nations treated and deemed subject of property." Without this limit, slavery could spread to every location that slaveowners moved into. Thus the master-slave relationship had to be decided by local law—in this case, the law of Massachusetts.

In New York, Justice John W. Edmonds became a target of criticism by Southern states for denying comity and freeing a slave from Georgia. The slave was discovered hiding in the ship and the captain had restrained him under a Georgia law that authorized such detention. Judge Edmonds rejected the application of Georgia law in New York. He also rejected the application of the federal Fugitive Slave Law because the captain was neither the owner of the slave nor the agent of the owner. Further, when the captain recaptured the slave under a New York statute that allowed this when a slave was found hiding in a ship, Judge Edmonds struck down the law arguing that the law was preempted by the federal Fugitive Slave Law.[41]

In the late-1830s, the state of New York and its Governor, William Seward, captured national attention by taking a strong abolitionist stance. Before that New York had a ninth-months law (passed in 1810) that allowed slaveowners to bring slaves to New York within that duration. This law was repealed in 1841 after Seward became its governor. The Pennsylvania legislature also rescinded its six months rule in 1847. In these Northern states, "immediate freedom became the rule" for slaves brought into their midst.[42]

As Northern states tightened their stance against slave transit and applied the law in favor of freeing the slaves, Southern states and courts also began to reject the status of blacks as defined by Northern state laws.[43] Southern states declared that even if a slave was freed under Northern law, his status as a slave would reattach if he returned to Southern territory. On this point, they had a backing from English law. After the celebrated *Somerset* case, the English court narrowed its application in *The Slave Grace* case by refusing to extend freedom to slaves who returned to a slave-holding jurisdiction after being in a non-slave jurisdiction. The English court allowed the status of slavery to reattach to the former slave upon his return.

In Missouri, earlier court decisions had displayed comity towards the North. In an 1824 case, *Winny v. Whitesides*, the Missouri Supreme Court recognized the claim of the slave (Winny) that she had become free when she resided in Illinois.[44] The Court held that if the slaveowner removed to Illinois with the intent to reside, the slave became free.

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41 Ibid., 134-135.

42 Schnell, *supra* note 30, 268.

43 Fehrenbacher argues that the South did not really change their attitudes towards slave transit, but that *cases* brought to Southern courts increasingly involved slaves returning from temporary sojourn outside of the state. Temporary sojourn did not change the status of slaves. The Southern courts were following pre-existing norms, according to this interpretation. See Fehrenbacher, *The Dred Scott Case*, 56-59.

44 1 Mo. 472 (1824).

Once the slaveowner lost the right to property (in the slave), that right would not revive by moving to another slave state.[45] In several cases that followed, the Missouri Supreme Court continued to uphold claims of freedom based on residency in the North, and this remained settled law for the next few decades. But in *Scott v. Emerson* (1852), which led to the *Dred Scott* decision on appeal to the U.S. Supreme Court, the Missouri Supreme Court reversed this precedent. It said that times were "not as they were when the former decisions on this subject was made" and emphasized that no state was "bound to carry into effect enactments conceived in a spirit hostile to that which pervades her own laws." Scott, even though he had resided in a free territory with his master, was still a slave under the laws of Missouri.[46]

The distinct status designations of blacks made by individual states were able to coexist only as long as each state was willing to respect the designations made by other states (interstate comity). But as opposing views over slavery hardened between Northern states and Southern states, state legislatures and courts increasingly insisted on redefining the status of blacks who came into their state from another. The North became inclined to emancipate slaves who came from the South upon arrival and the South refused to recognize their freedom if they returned to the South. Instead of interstate comity, what emerged was a frequent dispute between the states over what the status of black persons should be.

Interstate conflicts over Fugitive Slaves

Controversy between Virginia and New York

The previous section was about conflict between the states in cases where slaveowners travelled with their slaves to another state. This section deals with another type of movement—in which a slave from a Southern state escapes to a Northern state. As discussed earlier, the U.S. Constitution contained a Clause that required that such slaves (fugitive slaves) be returned to their masters through the process of extradition.[47] Also, criminals who fled from one state to another had to be extradited to the former state. The extradition of fugitive slaves and of criminals became intertwined in the following controversy between the Governors of Virginia and New York.

From 1839 to 1841, an intensive exchange of letters took place between successive governors of Virginia and William Seward, Governor of New York, over the latter's refusal to extradite its citizens who allegedly "stole" a slave from Virginia.[48] The case started when, in July 1839, a slave from Virginia fled to New York concealed aboard a ship and

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45 Finkelman, *An Imperfect Union*, 217-218.

46 Ibid., 222-226.

47 See Chapter II of this study.

48 The letters written by Virginia's governors are from *Executive letter books: 1780-1860*, Accession 35358, State government records collection, The Library of Virginia. This was kept by the Governor's office as a record of *outgoing* correspondence by the Executive Department. Records on the New York side were lost in a fire at the state archives according to its archivist. Since the letters from Virginia's governors quoted Seward's letters *in verbatim* at length, I used them to reconstruct Seward's arguments. At the time of this research I could not locate the incoming letters at the Library of Virginia.

was subsequently captured by agents that were sent by the slaveowner.[49] The slaveowner further demanded that people who assisted in this escape should be prosecuted. Virginia's governor wrote to Seward, requesting the extradition of three seamen (Peter Johnson, Edwards Smith, and Isaac Gansey) so that they could be tried under Virginia law for the crime of stealing a slave. Seward refused, starting a prolonged controversy between the two states. Five successive governors and lieutenant governors of Virginia continued writing to Seward demanding the extradition of the seamen. The escalating rhetoric between them exposed irreconcilable views over slavery and the power of the states under the U.S. Constitution.

The U.S. Constitution stated that "a person charged in any state with treason, felony or other crime" had to be delivered to the state having jurisdiction of the crime (Article IV, Sec. 2). But Seward thought that he could not surrender a New York citizen to Virginia for an act that was not a crime in New York. He referred to the law of extradition in international law as well as practices between Cantons in the Swiss Federation, arguing that only when the act was defined as a crime in "all civilized nations" could the executive of a state surrender its citizen to another state for the alleged crime:

> … civil liberty would be very imperfectly secured in any country whose government was bound to surrender its citizens to be tried and condemned, in a foreign jurisdiction, for acts not prohibited by its own laws…[50]

Virginia strongly contested Seward's assertion, arguing that theft was a universal crime. This assumed in the first place that slaves were property and that taking them away was a theft of property and therefore a crime:

> But, sir, is it true that the offense… is not recognized as criminal by 'the universal law of all civilized countries'? They are charged with feloniously stealing from John Y. Colley, a citizen of this state, property, which could not have been worth less than some six or seven hundred dollars. And I understand stealing to be recognized as crime, by all laws, human and divine.[51]

Soon after, Virginia's governor communicated to the state legislature (General Assembly) about the incident and transmitted his correspondence with the governor of New York. In his message to the Assembly, the governor emphasized that the stance adopted by Seward would endanger the institution of slavery throughout the South:

> If the Governor of New York is right, he is bound not only to protect those who steal our slaves, but those who incite and assist them to abscond from their

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[49] *Hopkins to Seward*, Aug. 30, 1839 (demanding an action and report from Seward on the subject).

[50] As quoted in *Hopkins to Seward*, Oct. 4, 1839. Seward's position was also cited in the report of the Maryland state legislature on the controversy between Virginia and New York. "Reports and Resolutions in Relation to the Constitutional Rights of Slaveholders," Maryland State Archives, M3171, Unit 3 (1840-41), 4.

[51] Ibid. The original contains underlines for emphasis but are eliminated here.

> masters… It is impossible that the union can continue long, if the opinion should be generally adopted by the states where there are no slaves, that our laws recognizing the existence of slavery and of property in slaves, are not to be regarded in executing the provision of the Constitution for the surrender of fugitives from justice…[52]

Governor Gilmer, writing to Seward in 1840, thought that Seward's reference to international law was irrelevant. The bond between states in the United States was closer than between nations, and there was a compact—the federal Constitution-- that defined the relationship between states. He argued that the plain language of the Constitution required that a fugitive slave must be delivered to the state from which he fled without any intermeddling by the executives of the destination state. Gilmer cited a decision from New York's state court that supported the rights of southern slave-owners to recover fugitive slaves. The decision held that for the purposes of enforcing the Fugitive Slaves Clause, "slavery may be said still to exist in a state, however effectually it may have been denounced by her constitution and laws."[53]

Gilmer argued that criminals who fled from a state should also be extradited regardless of the laws of the destination state:

> I am unable to discover why your excellency should refuse to surrender fugitives from justice, who are charged with stealing a slave, when the obligation to surrender the slave himself is so emphatically sustained by the highest judicial authorities of your State.[54]

Gilmer sent a quick succession of letters to Seward in which he warned that he would open correspondence with the other slave holding states[55] and criticized Seward for failing to respond to his letters.[56] In November, 1840, Gilmer sent a letter to other slaveholding states, requesting that they take a stand against the position of New York, embroiling other Southern legislatures in the controversy.[57] The Mississippi legislature, for example, took up the cause and passed a resolution criticizing the conduct of both New York and Maine (the latter being embroiled in a similar controversy with Georgia) as a "palpable violation of the constitution [of the United States]" that was "full of danger to all the slave-holding

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[52] Governor Campbell's communication to the General Assembly, Dec. 2, 1839. Virginia Secretary of the Commonwealth, *Executive journal volumes: November 1838- March 1840*, Accession 35185, State government records collection, The Library of Virginia.

[53] *Gilmer to Seward*, Apr. 6, 1840.

[54] Ibid.

[55] *Gilmer to Seward*, Sep. 18, 1840.

[56] *Gilmer to Seward*, Oct. 22, 1840 and Nov. 5, 1840.

[57] *Gilmer to Governors of several states*, Nov. 12, 1840. A few months later, Virginia's legislature asked the governor to send documents related to the controversy to the governors of each state and to request that they be presented to the legislatures. "Resolution for transmitting to the governors of the several states of the Union certain correspondence, reports and act of assembly relative to the controversy between this state and the state of New York," adopted Mar. 16, 1841.

states."[58]

There was a brief moment of respite, when, during this controversy a request was made by Seward on Gilmer to surrender a criminal who had fled from New York to Virginia. Gilmer refused, arguing that unless Seward complied with his request to surrender the fugitives who stole the slaves, Virginia would refuse to comply with Seward's request. The Virginia Assembly censured Gilmer by passing a resolution asking that Gilmer comply with New York's request. Gilmer resigned the same day, submitting a lengthy letter to the legislature that restated his position.[59] Lieutenant Governor Patton took over and wrote to Seward, asking that he return Virginia's favor by extraditing the seamen.[60]

This conflict between the Governors of Virginia and New York escalated into a war between the legislatures of the two states, which passed laws that mutually hardened their positions. In 1840, the New York state legislature passed a law extending the right to trial by jury for those alleged to be fugitive slaves. Virginia Governor Rutherford saw this as a challenge against his demands as he thought that such a procedure would make it nearly impossible for a Virginia slave-owner to recover a fugitive slave. Rutherford wrote a letter protesting this law and demanding its repeal, and followed up with another letter detailing his complaints.[61] He complained that the New York law required the jury to take an oath admitting that no human beings could belong to other human beings, and that the slave-owner had to pay an expensive bond in addition to paying for the cost of the trial and the maintenance of the alleged fugitive through the process.

The Virginia state legislature for its part passed a law entitled "an act to prevent the citizens of New York from carrying slaves out of this Commonwealth" after hearing of the New York law on fugitive slaves.[62] The act singled out vessels that were "commanded or navigated by any citizen or resident of the state of New York" and were destined to "any port in the state of New York" for special inspections before they departed Virginia. Further, it required vessels arriving from New York to post bonds and securities to comply with the act, in particular "to pay and satisfy to the owner of any slave which may be carried away in such vessel." The act imposed penalties on the captain and owner of vessels if slaves or other fugitives were found on board.

Seward called this law a "libel" against the citizens of New York, while the Virginia governor wrote that it was only a preventive measure and that it included provisions that delayed its enforcement and allowed the governor to suspend its operation if the controversy was settled. He argued that if New York followed the "plain intent and meaning" of the federal Constitution and extradited the alleged fugitives, the matter would be settled. But by this time New York had discharged the alleged fugitives. In the end,

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[58] Resolution of Feb. 6, 1841. Ames, ed., *State Documents on Federal Relations*, 236-237. Similar resolutions were passed by the legislatures of Alabama, Louisiana, Maryland, Missouri, and South Carolina (ibid., 233.)

[59] The text of the resolution and Gilmer's resignation letter on the same day (Mar. 20, 1841) is found in Virginia Secretary of the Commonwealth, *Executive journal volumes: March 1840- March 1842*, Accession 35185, State government records collection, The Library of Virginia.

[60] *Patton to Seward*, Mar. 22, 1841.

[61] *Rutherford to Seward*, May 3, 1841; *Rutherford to Seward*, July 24, 1841.

[62] The Act was passed on Mar. 13, 1841.

the communication between the two sides ended when Rutherford declared that further correspondence would not achieve any reconciliation between the two states.[63]

This controversy highlighted how the insistence of each state to define the status of persons on their own had a detrimental effect on the entire union. The governor of Virginia asserted that the when a slaveholding state designated a person a slave, this designation should be upheld in any state. On the other hand, the governor of New York wanted to protect the *citizens of his state* as if a nation would protect its citizens. He insisted on the level of control that a nation-state had over its citizens under international law, arguing that he had the prerogative to decide whether to give up citizens of New York to another state.

The international law regarding extradition figured prominently in Seward's position that he was not bound to extradite citizens of New York. His position was that New York was a sovereign state and as a chief executive of the state he could rightfully refuse extradition unless the act was recognized as a crime by "all civilized nations". He thought that this practice under international law applied to the relationship between the states of the United States.

Referring to international law in discussing the relationship between the states was not unusual at the time. For example, when an Indiana judge decided a slave transit case involving a Virginia slaveowner in 1829, he also cited "the law of nature and of nations" as exposed by Vattel, a prominent author in international law. He stated that a slaveowner had a right to reclaim his slave if "he [the slaveowner] retained the character and rights of a citizen of a slave state". But in this case the slaveowner came to Indiana with the intention of settling, thus he could no longer be considered a citizen of Virginia. In such a case, Indiana law applied, and the slaves were to be set free.[64] In this manner, the "choice of laws" concept which first appeared in international law was brought into state relationships within the United States.

Seward faced a real international case while he was in the midst of the controversy with Virginia. In 1841, the Governor General (chief executive) of Canada made a demand on Seward to extradite a criminal who had fled from Canada to New York. Seward wrote a letter to the U.S. Secretary of State consulting on a proper course of action. The Secretary of State referred the case to Attorney General Legare, who responded that individual states were not authorized to extradite fugitives to a foreign nation and that the matter was to be referred to Congress.[65] This shows that Seward did not necessarily consider New York as sovereign in the context of its relationship with other nations. But in its relationship with other states within the union, he asserted the sovereign power of New York to define the status of persons.

As seen in the controversy between Virginia and New York, the disagreement between the states over the status of blacks was reaching a breaking point. States, left on their own, were only escalating their conflicts with other states. The issue had to be resolved by an agreement at the federal level, through legislative compromise or judicial clarification.

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63 *Rutherford to Seward*, Oct. 28, 1841.

64 Finkelman, *An Imperfect Union*, 94-95.

65 Opinion of the U.S. Attorney General, "Obligation to surrender fugitives from justice," 3 U.S. Op. Atty. Gen. 661 (Oct. 11, 1841).

An occasion for both arose during the controversy between Pennsylvania and Maryland below.

Fugitive slave controversy between Maryland and Pennsylvania

Maryland and Pennsylvania were two states that were primed for controversy over fugitive slaves. Maryland was a slave state with an expanding population of free blacks. Its legislature throughout the 1830s and 1840s was concerned with maintaining slavery while dealing with the free black population. The strength of abolitionists in neighboring Pennsylvania was a threat to Maryland's control over the situation of blacks within its territory. Pennsylvania was a center of abolitionism, with abolitionist societies and the activities of Quakers who had endured religious oppression themselves and considered slavery a moral wrong. Localities in Pennsylvania served as a sanctuary for fugitive slaves and as a major passage route of the "underground railroad", which was a network of abolitionists helping the escape of slaves from Southern states to Northern states and on to Canada.

An early controversy between Pennsylvania and Maryland erupted in 1788—the year the Constitution was ratified. A slave-owner moved with his slave John from Maryland to a land he thought was in Virginia. The boundary lines were unsettled, however, and the land was actually in Pennsylvania. Thus, under Pennsylvania law, John was now *free*. The owner hired him out anyway, but then a group of abolitionists persuaded him to return to Pennsylvania. The owner, in response, printed an advertisement in the newspapers and offered a reward for the capture of John. Three Virginians responded to the ad, found and captured John, and carried him back to Virginia. The Virginians were indicted in Pennsylvania court for kidnapping, but two of the suspects were in Virginia. The Governor of Pennsylvania demanded that the Governor of Virginia extradite these fugitives to Pennsylvania. Virginia refused, arguing that the actions of the "kidnappers" did not amount to felony under Virginia law.[66]

In another case, a conflict arose *within* Pennsylvania over Maryland's request to hand over a free black (Richard Neal) who fled with his family members who were held as slaves in Maryland into Pennsylvania. The governor of Pennsylvania first complied with Maryland's request and had Neal arrested, but the state court and legislature opposed the governor's position. The Supreme Court of Pennsylvania issued a writ of habeas corpus based on a petition from Neal, and the legislature demanded that the governor explain why he had complied with Maryland's request. The governor refused to respond, arguing that the executive was a "co-ordinate and independent branch of government" and was "in no respect amenable to the supervision or control of either the legislative or judicial branches."[67]

The most prominent case involving fugitive slaves who fled from Maryland to

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[66] William R. Leslie, "A Study in the Origins of Interstate Rendition: The Big Beaver Creek Murders," *The American Historical Review*, Vol. 57, No. 1 (Oct., 1951), 63-76, at 66-68.

[67] Governor William Bigler, "To the Senate Concerning the Case of Richard Neal, Claimed by the Governor of Maryland as a Fugitive from Justice, with Certain Documents Relating Thereto," (1853) in *Pennsylvania Archives, Fourth Series*, Vol. 7, 610-615.

Pennsylvania reached the U.S. Supreme Court in the case of *Prigg v. Pennsylvania*.[68] The long string of events started when a slave (Margaret Morgan) escaped from Maryland into Pennsylvania in 1832. The state court refused to hear the claim made by the slaveowner from Maryland that she should be returned. In April 1837, Edward Prigg, who was acting as the agent of the Maryland slaveowner, took Morgan to Maryland by force and returned her to the owner. Prigg and three others were indicted by the grand jury of York Country, Pennsylvania for violating the anti-kidnapping law of that state.[69] This law was passed by the state legislature in 1826 and made it a crime to forcefully carry away "any negro or mulatto" to another state. From the standpoint of the slaveowner, this was an attempt to recover a fugitive slave according to the U.S. Constitution. But under Pennsylvania law, blacks were presumed to be free, so it was the slaveowner who had to prove that Morgan was a fugitive slave. To unilaterally capture a person and forcefully take him away was kidnapping from this perspective.

This case soon developed into a public controversy between the states of Maryland and Pennsylvania. The case was brought to the attention of the Maryland state legislature in the form of a memorial from a lawyer in Virginia who was critical of Pennsylvania's actions. The memorial was taken up by a legislative committee and eventually presented to the entire legislature in the committee report. The legislature, acting on the committee's recommendations, passed a resolution criticizing the charges by Pennsylvania against the agents of the Maryland slaveowner and authorized the use of state funds to defend the agents in the trial.

The Maryland legislature also appointed an agent to visit Harrisburg, the state capitol of Pennsylvania, to officially present its resolution and negotiate a solution of the controversy. The agent was able to meet leaders of both chambers of the Pennsylvania legislature, leading that institution to take up the case officially as well. As a result of the negotiation, the Pennsylvania legislature passed an act to expedite the review of this case through the state courts, and to have the Supreme Court of the United States review the case from the standpoint of the federal Constitution. Thus, the incident was transformed into a test case regarding the power of states under the U.S. Constitution to determine the status of blacks.

The *Prigg* decision and the enforcement of the Fugitive Slaves Clause

Prigg v. Pennsylvania was decided in 1842, with Justice Story writing the majority opinion for the court. Five separate opinions were filed, with the case report running over 130 pages, demonstrating the controversial nature of the case. Chief Justice Taney, who later wrote the majority opinion in the *Dred Scott* case, wrote a concurring opinion that disagreed with critical points of the majority opinion, foreshadowing the conflicts to come.

The Court struck down the Pennsylvania anti-kidnapping law as a violation of the Fugitive Slave Clause.[70] Justice Story held that the subject of fugitive slaves was under

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[68] 41 U.S. 539 (1842).

[69] Ibid., at 543.

[70] Fehrenbacher, *The Dred Scott Case*, 43-47. Fehrenbacher criticizes Justice Story for accepting the presumption of the Southern states that blacks were slaves unless proved otherwise.

the exclusive power of Congress. Any state law that touched upon the issue was therefore unconstitutional. Story said that Congress had a duty to help enforce the Fugitive Slaves Clause. But while this sounded like a victory for the slaveowners, Story also suggested that it may be unconstitutional for Congress to mandate *state* officials to cooperate with federal laws. This meant that the federal government would have to come up with a way to enforce the Fugitive Slaves Clause without the cooperation of state officials, which was a difficult proposition in a state like Pennsylvania.

Chief Justice Taney agreed that the law should be struck down, but he took a different attitude towards state legislation touching upon the fugitive slave issue. Taney thought that while state laws that *interfered* with the Fugitive Slave Clause should be struck down, it should be permitted, and even desirable, for states to enact laws that supported the enforcement of the Fugitive Slave Clause and the rights of the slaveowners. He pointed out that because of the small number of federal officials in each state, the protection of property rights in slaves would become meaningless if slaveowners could not gain cooperation from state officials.

In terms of the power to define the status of blacks, the Court, on its face, took away the power from the states and placed it in the hands of Congress. Congress at the time was likely to uphold the Southern definition of black persons as fugitive slaves and use federal power to return them to slaveowners. But Northern states took advantage of the part of the decision that left room for the states to refuse cooperation in the capturing of fugitive slaves. Pennsylvania, for example, passed an act in 1847 which prohibited judges and local officials of the states from taking cognizance of any case regarding fugitives from labor or issue any certificate or warrant under the federal fugitive slave law. At the same time the law affirmed the power of state judges to issue the writ of habeas corpus "to inquire into the causes and legality of the arrest or imprisonment of any human being within this commonwealth".

Without the cooperation of local and state officials, southern slave-owners faced considerable difficulty in locating and reclaiming fugitive slaves. Another interstate dispute emerged in New York over a fugitive slave from Maryland.[71] Joseph Belt, who was a slave of Thomas Lee, was captured in the streets of New York and detained by agents of Lee. Belt petitioned for a writ of habeas corpus. Judge Edmonds, a local magistrate, inquired into the legality of Belt's detention, and discharged Belt. According to the judge, the capture and subsequent detention of Belt was illegal because it did not follow the procedures spelled out under the federal law. The agent did not take Belt before a magistrate, nor did he have a certificate for the removal of Belt from the state. The judge even claimed that there was no legal proof that Maryland authorized slavery.[72] In response, the Maryland state legislature passed a resolution authorizing the state's attorney general to test before the U.S. Supreme Court whether Judge Edmonds had the power to release Belt.[73]

Southern states, in turn, intensified their demands for a stronger federal mechanism to

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[71] *In re Belt*, 1 Parker Cr. R. (N.Y.) 169 (1848).

[72] *The National Era* [Washington, D.C.], Jan. 11, 1849; *The North Star* [Rochester, New York], Jan. 12, 1849.

[73] *The North Star*, Feb. 8, 1850.

capture fugitive slaves. Of course, such federal intervention was what the northern states wanted the least. They passed resolutions asserting that states had no power to limit slavery and that the federal government had the duty to protect the property rights of slave-owners. In the words of a Virginia resolution in 1849, "the government of the United States has no control, directly or indirectly, mediately or immediately, over the institution of slavery", and "the enactment of any law which should directly, or by its effect prevent the citizens of any State from emigrating with their property" would be a violation of the Constitution.[74] That year, Virginia issued a report that condemned the state of Pennsylvania as having "gone a bowshot beyond all the rest in this new legislative war against the constitutional rights of the slaveholding states" and calling the Pennsylvania anti-kidnapping law a "disgusting and revolting exhibition of faithless and unconstitutional legislation".[75]

In sum, the South took the position that slaves should remain slaves wherever their masters took them, while the North took the position that Congress had no power to extend slavery and that it each state had the power to decide whether to allow slaves to exist in their state.

There were occasional attempts at reconciliation. There was a series of correspondence between a judge in New York and the executive branch of Virginia, in which the judge requested that a New York citizen who was convicted and imprisoned in Virginia for assisting fugitive slaves should be granted a pardon by Virginia's governor. The Secretary of Virginia notified the judge that the Governor had granted a pardon, stating that he expected this to "exert a salutary moral influence on the public feeling in the Northern States on subjects of this kind."[76] Also, a committee in the Pennsylvania state legislature proposed a bill to repeal the 1847 Pennsylvania law that forbade state officials from cooperating in the execution of the federal fugitive slave law "to show that we are willing to make sacrifices for the peace and safety of the union".[77] But such efforts were eclipsed by a broadening division between the North and South over the issue of slavery.

Negro Seamen's Acts, Massachusetts' proposal, and the Ohio-Virginia controversy

The conflict between Northern and Southern state legislatures over slavery emerged in various forms. For example, the two sides fought over the Negro Seamen Acts of South Carolina and Louisiana, while the Massachusetts legislature proposed a federal constitutional amendment to apportion representatives in the House of Representatives according to the number of free persons, to the disadvantage of Southern states.[78]

The Negro Seamen Acts of South Carolina and Louisiana prohibited all black seamen from coming ashore even during the course of their duties. They were to be detained in

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74 "Resolutions of the Legislature of Virginia," (Jan.20, 1849), *Pennsylvania Senate Journal*, 1849, Vol. 2, 147-148.

75 "Report of Virginia on the Rendition of Fugitive Slaves," (Feb. 7, 1849), reprinted in Ames, ed., *State Documents on Federal Relations*, 250-252.

76 *Calendar of State Papers* [Virginia], Vol. XI, 15-18, starting with the letter, *J. W. Edmonds to the Governor* (Jun. 12, 1846).

77 *Pennsylvania House Journal*, 1850, Vol. 1, 495-502 (entry for Mar. 8, 1850).

78 Ames, ed., *State Documents on Federal Relations*, 237-239.

their ships while they were at the ports of the states. These states insisted that the laws were an act of self-preservation and that they were exercising a power inherent in their sovereignty. It feared that blacks from outside the state would spread anti-slavery ideas among the black population of the state. The Negro Seamen Act was "a mere police regulation" to protect order in the state.

These acts led to repeated complaints not only from Northern states but also from Great Britain, which argued that the rights of its citizens were being violated.[79] In 1823, when a number of British subjects were detained in South Carolina under this act, the British Consul complained to the U.S. Secretary of State John Adams and received a response assuring that he will take measures to remove the cause of complaint. Next year when another British subject was detained, the British consul conferred with Justice Johnson of the U.S. Supreme Court, who was at the time sitting as a judge of the Circuit Court in Charleston. Soon, a case challenging the detention of a British subject under South Carolina's act was brought to that court.[80] Justice Johnson, to the surprise of the local community, ruled that South Carolina's act violated the exclusive right of the United States to regulate commerce, though he cushioned the impact by adding that the Judiciary Act did not authorize him to issue a writ of habeas corpus or to provide other remedies against detention.[81] Despite the ruling against it, South Carolina authorities continued to detain British seamen and gained support from other Southern states.

The position of the federal government fluctuated. When another British subject was detained by South Carolina in 1824, the British consul complained to the U.S. Secretary of State. U.S. Attorney General William Wirt then issued an opinion advising that the Negro Seamen Act was void because it was in conflict with the Commerce Clause of the Constitution and the laws and treaties of the United States. But in 1832, a different Attorney General reversed the prior position and upheld the constitutionality of these acts, citing its necessity for the "safety" of the slaveholding states. This time the Attorney General was Taney—who later wrote the Dred Scott decision, denying the citizenship of blacks. Foreshadowing his *Dred Scott* decision, Taney wrote that free blacks did not have claims to federal citizenship, and that the federal government could intervene to protect their rights.[82] Blacks, whether they were slaves or free, were "separate and degraded people to whom the sovereignty of each state might accord or withhold such privileges as they deemed proper."[83]

Northern state legislatures also took action that escalated the conflict over slavery. In 1844 and 1845, the Massachusetts state legislature passed resolutions against the acts and sent agents to the two Southern states to test their constitutionality before the courts. The

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79 The exchanges between the British government, the U.S. government and the state governments are examined in detail in Philip M. Hamer, "Great Britain, the United States, and the Negro Seamen Acts, 1822-1848," *The Journal of Southern History*, Vol. 1, No. 1 (Feb., 1935), 3- 28.

80 Ibid., 4-5.

81 Ibid., 7.

82 Allen, *Origins of the Dred Scott Case*, 80-81.

83 Earl M. Maltz, *Dred Scott and the Politics of Slavery* (Lawrence KS: University Press of Kansas, 2007), 78.

agents were expelled from South Carolina and Louisiana, followed by sharp condemnations by the legislatures of Southern states.

Southern states were infuriated by a Massachusetts proposal the year before (1843). The proposal was to change the formula of representation in Congress. Massachusetts wanted to amend the Three-Fifths Clause (which allowed Southern states to count slaves as three-fifths of a person for the purpose of apportionment) in the U.S. Constitution and replace it with apportionment based on the number of *free persons*. This would be advantageous to the North, where the population of both foreign immigrants and free blacks were increasing, while it would diminish the power of the South by counting out the slave population. Such a change in the balance of power within the federal government would have a powerful effect on slavery, given the debate over the role of federal government in the capture of fugitive slaves.

Southern states responded with resolutions criticizing the proposal, arguing that the basis of representation, including the three-fifth calculation of slaves, was a crucial compromise made during the Philadelphia Convention. The Virginia legislature passed a resolution which said that Massachusetts' proposal would "dissolve the union" and that it should receive "the deepest condemnation of every patriot and friend of the union".[84]

Soon after the *Prigg* case, Virginia was embroiled in another controversy with neighboring states over slaves. The conflict stemmed from an incident that occurred in 1845, involving slaves from Virginia who escaped across a river into the territory of Ohio. Several citizens of Ohio who helped the slaves escape across the river were prosecuted in Virginia. Virginia's position was that it arrested Ohio citizens who were in Virginia territory for violating Virginia law. However, the Governor of Ohio insisted in his letter to the Governor of Virginia that the incident took place in Ohio territory and that Virginia had "kidnapped" Ohio citizens who were being prosecuted.

A Virginia citizen, J. J. Jackson, wrote to the governor described the tension between citizens of Virginia and Ohio at the border region:

> … there has been a strongly excited state of feeling in this section, both of Ohio and of Virginia, growing out of the voluntary threats of a portion of the people of Ohio to rescue by force the prisoners confined in our jail, and also to capture and remove hence our citizens who had arrested the prisoners; these threats produced a state of things of so imminent a character as to render it advisable to keep up for a season nightly patrols, and station a strong guard at the jail…[85]

Jackson then requested the Governor to provide him arms and ammunition to defend the borders of Virginia against Ohio citizens.

Thus, by the mid-1840s, the escalating conflicts between Northern and Southern states over black persons who moved across state borders reached a point where it could not be resolved by interstate negotiations. Instead, all branches of the state governments (the Governors, the legislatures, and courts) took actions that infuriated the other side.

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[84] Resolution passed Feb. 15, 1844, reprinted in Ames ed., *State Documents on Federal Relations*, 239-240.

[85] *J. J. Jackson to the Governor*, Dec. 28, 1845, *Calendar of State Papers* [Virginia], Vol. XI (Jan. 1, 1836- Apr. 15, 1869), Vol. XI, 11-14.

Federal law: The Fugitive Slave Act of 1850

It was in this context that Congress passed the Fugitive Slave Act of 1850 among a set of compromises regarding slavery. The Act, responding to southern demand, expanded the federal enforcement mechanism for capturing and returning fugitive slaves. It allowed federal courts in each state to appoint commissioners who had the power to issue warrants for the capture of a fugitive slave and dictated that the number of such commissioners should be expanded progressively. It further provided that a slaveowner could capture the slave first and afterwards go to a judge or a commissioner to seek retroactive approval. It also declared that a certificate from the state from which the slave had fled should be treated as conclusive proof that this person was a fugitive slave.

A recent study has pointed out significant change that the 1850 Act wrought on citizenship in the United States. The Act gave the federal government the ability to directly command the services of ordinary individuals for the purposes of federal law enforcement.[86] Historically, local law enforcement had the power to compel, as a matter of duty, the services of ordinary citizens in law enforcement. This was called the *posse comitatus* doctrine. For example, a sheriff looking to capture a fleeing criminal or to suppress a local disturbance can summon ordinary citizens who happened to be around to assist him in his duties. But federal officials had trouble doing the same. Individuals did not feel the same obligation as a citizen towards the federal government— the notion that there was a duty as a federal citizen to assist in federal law enforcement was not compelling enough to extract obedience. In the context of slavery, federal officials in charge of capturing fugitive slaves faced obstacles when they tried to compel citizens of Northern states to assist in that duty.[87]

But around the time the Fugitive Slave Act of 1850 was enacted, officials in every branch of the federal government began to echo the notion that each individual had the duty to assist federal enforcement as a citizen, regardless of the content of that action. In 1854, Attorney General Cushing issued an opinion which stated that federal *posse comitatus* had always existed. The opinion emphasized that assisting "the officer of the law in the execution of his duty" (even if this meant the capturing of slaves) was not about aiding a particular individual (such as the Southern slave-owner), but was about aiding the federal government.[88] In other words, the federal *posse comitatus* was the duty of all federal citizens. In Congress, Henry Clay said of the 1850 law that "every man present, whether officer… or private individual, is bound to assist in the execution of the laws of their country." Chief Justice Taney emphasized in 1859 that obedience to the laws was "among his first and highest duties as a citizen," and even Judge Grier of Pennsylvania said that the Constitution and the Fugitive Slave Law were "binding on the conscience of every good citizen."[89]

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[86] Gautham Rao, "The Federal *Posse Comitatus* Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America," *Law and History Review*, Vol. 26, No. 1 (Spring 2008), 1-56.

[87] Ibid., 26-31.

[88] Ibid., 32.

[89] Ibid., 34.

Northerners objected both because of the substance of what was demanded (assistance in capturing slaves) and because of the implications of this power (the federal government having the power to directly command individuals). But the idea that individuals owed a direct duty to the federal government, as a federal citizen, foreshadowed the events to come. In fact, when the North won the Civil War and set about on a program of Reconstruction in the South, it relied on the same doctrine of *federal posse comitatus*. The Civil Rights Acts that were enacted after the Civil War would always contain the provision that gave federal marshals "the authority to summon and call to their aid the bystanders or posse Comitatus." Lyman Trumbull, one of the main authors of these bills, explained that the provisions were "copied from the late fugitive slave act, adopted in 1850."[90]

Chapter conclusion

During the 1830s and 1840s, the lack of federal authority to define the citizenship status of people in the United States grew increasingly untenable. Conflicts between individual states over the citizenship status, especially of blacks, became frequent and acrimonious.

During this period, each state was left to define the citizenship status of blacks. If there was a conflict between the states over the citizenship status of a person, it was supposed to be dealt with under the laws of comity, with mutual respect towards the designation made by other states. But the willingness to respect each other's laws broke down between Northern states and Southern states through repeated conflicts over slave transit and fugitive slaves. Instead, both sides prioritized sustaining their own designation of the status of blacks. Northern states refused to return slaves from the South and practically freed them upon arrival, while Southern states refused to accept free blacks from the North as citizens.

Some blacks, by virtue of being a citizen in a Northern state, theoretically should have been treated as citizens by all other states according to the Privilege and Immunities Clause of Article IV. But the Court interpreted this Clause narrowly so that even if one did have state citizenship, it was up to each state to define what rights they could have in their state. There was no nationally guaranteed set of rights. The Constitution included a Bill of Rights, but nonetheless blacks did not have freedom of speech, freedom of movement, or any other rights when they were in a Southern state. Although born in the United States, they were not treated as U.S. citizens—their status and rights were left for individual states to decide.

The decline in interstate comity coincided with the increase in interstate mobility. If anything, states needed to become even more respectful of each other's law given that people were travelling across state borders with increased frequency. But Northern and Southern states were running in the opposite direction. One was extending citizenship to blacks and the other was intent on a total denial of citizenship. Either the movement of people had to stop or the laws of the states had to be coordinated. Neither happened, and the two sides were on a colliding course.

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[90] Ibid., 47.

V. State policies, *Dred Scott*, and the failure of dual citizenship

> Many state courts had already applied... muddled reasoning to exclude free blacks from state citizenship on the grounds that you could tell a citizen by the fact that he had rights and since blacks did not exercise rights they could not be citizens—all this before 'Catch 22.'[91]

During the 1840s and 1850s there was a movement to amend state constitutions in states across the United States. Reflecting the increasing conflicts over slavery and the status of blacks, state constitutional conventions engaged in extensive debates over who should count as citizens of their state and over what it meant to be a state citizen.

At around the same time, a critical case in the history of citizenship in the United States reached the U.S. Supreme Court. The *Dred Scott* case, which was decided in 1857, involved conflicting status designations of blacks between different states. The Court attempted a solution that would settle the question by thoroughly denying black citizenship at every level, whether it was federal citizenship or citizenship in any of the states. The Court failed to achieve this purpose and instead created a constitutional crisis in which the legitimacy of the political structure under the U.S. Constitution was threatened by the diminishing will of the states to live under that structure.

In this chapter, I will first examine how the states as well as the federal government treated the question of black citizenship during the 1840s and 50s. Then I will look at how the *Dred Scott* decision attempted a *tour de force* by completely denying black citizenship across the nation. Finally, I look at the reactions to that decision, which showed the need for a fundamental revision of how citizenship was structured under the U.S. Constitution.

State constitutional conventions and citizenship

This section will focus on the debates over citizenship at the 1850 Constitutional Convention of Maryland and the 1846 Constitutional Convention of New York. Maryland is an important case study because of its status as a border state and the frequency with which it debated the matter of black citizenship. New York had been engaged in protracted battles with the border states of Virginia and Maryland over slave transit and fugitive slaves. How these two states treated the status of blacks could serve as a barometer of the national trend.

The 1850 Constitutional Convention of Maryland

In Maryland, the original state constitution, framed in 1776, remained in place until a state constitutional convention took place in 1850, resulting in a new state constitution in 1851. An early study cites the rapid growth of population and commercial and industrial development of the State as factors that led to calls for a fundamental revision of the

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[91] Patricia Allan Lucie, *Freedom and Federalism: Congress and Courts, 1861-1866* (New York: Garland, 1986), 135.

constitution.[92]

Several interrelated issues related to citizenship were debated during the convention. Foremost was qualification for suffrage, especially whether to limit naturalized citizens from voting or running for office for a certain time after naturalization. Second was the distinction between federal and state citizenship in light of the proposed restrictions on naturalized citizens. Could foreigners become state citizens without being naturalized (without acquiring federal citizenship), and did state citizenship confer political rights independently of federal citizenship? A third issue was the treatment of the free black population, and how their status should be written into the state constitution.

The first issue reflected the rapid increase in the number of immigrants from Europe and the competition among political parties to gain their votes. It was alleged by some members in the convention that voter fraud was being committed across the state and especially in Baltimore (a port city where many of the immigrants settled). According to the allegation, political parties were paying the naturalization fees of these immigrants in return for their votes. A member of the convention reported that in Baltimore it was a common sight to see party officials waiting at polling stations on the day of the election to exchange votes for naturalization papers. The papers would be prepared beforehand and given along with instructions on how to vote.[93]

The debate on the relationship between federal and state citizenship emerged because of conflicting ideas over who should have political rights in the state. Those who were opposed to discrimination against naturalized citizens preferred to make "citizenship of the *United States*" a qualification for suffrage. That way, there would be no distinction between citizens-by-birth and naturalized citizens. But others preferred to make "citizenship of Maryland" a qualification, which would allow Maryland to distinguish among U.S. citizens by granting state citizenship separately.

Much confusion arose from the idea of state citizenship. Some conventioneers did not understand the distinction between federal and state citizenship in the first place. Others emphasized states' rights and considered the conferral of citizenship as one of the most important powers of a sovereign state. Maryland can confer or deny state citizenship at its will—it may confer state citizenship on those who were not U.S. citizens as well as deny state citizenship to those who were U.S. citizens:

> …an alien may, by State legislation, be authorised to exercise citizenship for State purposes, or within the limits of the State, and yet not being naturalized is not a citizen of the United States…[94]

> …Maryland is a sovereign state, and can apportion political power at discretion, to any or all classes of her inhabitants, to be exercised within her limits. She may grant to an alien all the privileges of a citizen of the State.[95]

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[92] James Warner Harry, *The Maryland Constitution of 1851* (Baltimore: The Johns Hopkins Press, 1902), 9.

[93] Statement by Mr. Dorsey, Proceedings and Debates of the 1850 Constitutional Convention, *Archives of Maryland*, Vol. 101, 26 (Jan. 13, 1851).

[94] Ibid., 73 (Jan. 17, 1851) (Statement by Ridgely).

[95] Ibid., 74 (Statement by Crisfield).

On the other hand, nationalists denied that there could be two levels of citizenship. According to this position, anyone who was a U.S. citizen should automatically be treated as a state citizen:

> …no foreigner could be a citizen of Maryland who had not been naturalized… He can not be a citizen of the State until he has been naturalized; when he is naturalized he then becomes a citizen of the State in which he has been naturalized, and also a citizen of the United States.[96]

Those insisting that Maryland citizenship should be distinct from federal citizenship thought that state citizenship should be based on a *bona fide* intent of permanent residency. Without such intent, a person should not be recognized as a Maryland citizen even if he had been in the state for ten years. Merely being an inhabitant (who might go back to another state) did not qualify a person as a citizen. This distinction between permanent residence and inhabitance was not new to the states, for it had been made in the context of slave transit and fugitive slaves. A slaveowner could take their slaves into Free states, provided that it was a temporary sojourn and not for permanent residence.

The positions can be summarized in the chart below.

Chart 1
Primacy of federal or state citizenship and attitude towards immigrants

	Primacy of federal citizenship	Primacy of state citizenship
Neutral to immigrants	1a: Grant political rights to citizens of the *United States* independently of state citizenship. States *cannot* deny rights to federal citizens.	2a. Grant political rights to citizens of *Maryland* independently of federal citizenship. States *can* deny rights to federal citizens as well as grant rights to persons without federal citizenship (immigrants that have not yet naturalized).
Hostile to immigrants	1b. Grant political rights to citizens of the United States, but with limitations for naturalized citizens.	2b. Grant political rights to citizens of Maryland, but with limitations for foreigners and naturalized citizens.

Delegates at the state convention were pressed to think about state and federal

[96] Ibid. (Statement by Bowie).

citizenship in light of how they thought about migrants from other *states* and other *nations*. The two options on the right emphasize the ability of Maryland to control its borders by granting political rights to *citizens of Maryland*. In [2a], the state can deny rights to citizens of other states in the United States, while at the same time it can grant rights to immigrants who had not yet naturalized. In other words, the state acts as if it were a sovereign nation, so that it could grant or withhold the status and rights of citizenship by itself, regardless of federal citizenship. [2b] is a modification of this position. It still requires state citizenship to exercise rights, but by limiting the rights of foreigners or naturalized citizens, it also takes into consideration federal citizenship. In [1a], the relationship between state and federal citizenship is reversed. In this case, federal citizenship automatically gives the rights of citizens in all the states. States could not deny rights on the basis of state citizenship. [1b] adds a restriction for naturalized citizens.

Before the U.S. Constitution was ratified, the citizenship regime in the United States was [2]. States were in control of citizenship. The U.S. Constitution began to move the regime towards [1], by giving Congress the power to enact uniform rules of naturalization, and also requiring federal citizenship to run for federal offices. But the move was not definitive, and states retained control over the status and rights of people residing in its midst, as we have seen in the previous chapters. Both Congress and state legislatures fluctuated between [a] and [b], depending on the climate of the time towards foreigners.

The state constitutional convention opened up this question of the grand design of citizenship in the process of debating the rights of blacks, foreigners, and naturalized citizens.

Exclusion of free blacks

On Feb. 5, 1851, an intensive debate ensued at the Maryland convention after a member offered an amendment to the proposed Declaration of Rights. The original proposal, guaranteeing due process of law, had declared that "no freeman ought to be taken or imprisoned… outlawed, or exiled… but by the judgment of his peers, or by the law of the land."[97] The amendment would change the term "freeman" to "citizen" and exclude free blacks from the right to due process of law, instead reserving to the legislature the power to expel free blacks at will. The assumption here was that free blacks were not *citizens* of Maryland.

All members who spoke agreed that the state might need to exclude free blacks from its territory. But some disagreed as to whether that power needed to be explicitly reserved by the Constitution. One member thought that by changing the term to "citizen", a white person who was not a citizen may be subject to exclusion. Another member replied that whites were protected in any case "by the common law".[98] Others thought that such an amendment was unnecessary because the power to regulate people within its borders, including the power to exclude outright, was an inherent power of a sovereign state.

The amendment to exclude free blacks from protection was adopted, so a provision in the Declaration of Rights read:

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[97] Ibid., 194 (Feb. 5, 1851).

[98] Ibid., 195 (Exchange between Mr. Prestman and Mr. Brent).

> That no free man ought to be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land; *provided, that nothing in this article shall be so construed as to prevent the Legislature from passing all such laws for the government, regulation and disposition of the free colored population of this state as they may deem necessary* [emphasis added].[99]

The revised state constitution took a half-way course on the primacy of federal and state citizenship, while definitively rejecting black citizenship. In Article 1, Section 1, the constitution defined the "elective franchise" and gave the right to vote to:

> Every free white male person of twenty-one years of age or upwards, who shall have been one year next preceding the election a resident of the State… and being at the time of the election a citizen of the United States.

So the state denied suffrage to citizens from other states during the first year that they resided in Maryland. Maryland could limit the rights of people from other states even if they were federal citizens. At the same time, it recognized the importance of federal citizenship by making it an additional qualification, so no foreigners could vote (even if they had been residing in the state for a long time). Suffrage too was limited explicitly to "free white" males, implicitly rejecting free blacks.

In the case of blacks, the state took for granted that it was free to exclude them from citizenship. There was no notion here of the federal government determining the status of blacks, nor of other states granting citizenship to blacks. Maryland can determine the "regulation and disposition" of this group as it "may deem necessary", and the state constitution permanently barred them from suffrage.

The 1846 Constitutional Convention of New York

The treatment of free blacks was a central issue in the 1846 constitutional convention of New York as well. New York granted black suffrage but adopted different qualifications for white and black voters in its state constitution of 1821. Black voters were subject to property and taxation qualifications, while such qualifications were eliminated in the case of whites. By 1846, property qualifications for suffrage were in further disrepute, and a proposal to eliminate them entirely was considered at the Convention.[100] The Convention bitterly divided over its ramifications. The proposal in effect would increase the number of black voters, since they were the only group that was

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[99] Maryland Constitution of 1851, Declaration of Rights, Art. 21.

[100] New York's Constitutional Convention of 1846 was held in the context of transfer of power from the Whigs (who were of "the older landed aristocracy") to Democrats composed of "radical workingmen, Irish immigrants, farmers, intellectuals, and representatives of the new rising business or small capitalist class." Arthur A. Ekirch, Jr., "Democracy and Laissez Faire: The New York State Constitution of 1846," *Journal of Libertarian Studies*, Vol. 1, No. 4, 319-323. The aversion of this convention to property-based qualifications for suffrage could be understood in this context.

still subject to property qualifications.[101]

In response to the anti-black sentiment, a committee reported out a proposal that would eliminate property qualifications but would then limit suffrage to whites. The article would specifically limit suffrage to "[E]very *white* male citizen of the age of twenty-one years, who shall have been a *citizen for sixty days*, and an inhabitant of this State one year next preceding any election… [italics original]"[102] Thus, suffrage would be restricted by race instead of property. A substitute proposal was made by a delegate that would not restrict suffrage by race. This proposal would take out the term "white" and read "[E]very male citizen, of the age of twenty-one years…"[103]

Delegates clashed over their views about suffrage, citizenship and race. As a preliminary question, a delegate demanded that state citizenship should be defined in the state constitution, arguing that state citizenship should be a prerequisite for claiming rights under the state constitution:

> As the present Constitution now stands, the right of suffrage was conferred upon citizens, but it does not designate whether they shall be citizens of this State or of the U. States…[104]

The debate over black suffrage involved two questions. The first was whether blacks should be treated as citizens, and the second was whether they should be granted suffrage if they were citizens. While some argued that they were citizens and should be granted suffrage, others argued that they were not citizens and that even if they were citizens, suffrage was not a right but a privilege that could be withheld.

Many delegates expressed an aversion to the idea that blacks were citizens with an equal claim to political power with whites. In their view, racial distinction was insurmountable, and the two races could never associate on equal terms:

> St. Lawrence county has no blacks, and never had a slave. Her citizens abhor slavery, and are in no wise responsible for its existence elsewhere. But they consider it a mock philanthropy, which requires them, to share their own dear-bought political privileges with any class of men, who are not intellectually and morally competent to appreciate our institutions, and faithfully sustain them… Gentlemen may denounce such opinions, as prejudice—as resistance to the moral law of the Almighty, but they do not reflect that the same Creator of both races has

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101 Gellman and Quigley, *Jim Crow New York*, 249-259.

102 *Documents of the Convention of the State of New York, 1846, Vol. I: From No. 1 to No. 63 Inclusive* (Albany, 1846), Document No. 51 ("REPORT of Mr. Bouck, from Committee No. 4.")

103 Ibid., "SUBSTITUTE Offered by Mr. Dorlon."

104 Delegate Alvah Worden, in William G. Bishop and William H. Attree, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York* (Albany, 1846), 105. The transcript only gives the last names of the delegates, but their full names and biographical information are contained in *Documents of the Convention of the State of New York, 1846, Vol. II: From No. 64 to No. 136 Inclusive* (Albany, 1846), Document No. 136, 3-8.

himself ordained the mental and moral differences which characterize both.[105]

Several delegates argued that blacks should not be allowed to vote because they had never been "naturalized" under the U.S. Constitution. Because they were denied the eligibility to naturalize under federal law, they should be considered perpetual aliens and excluded from suffrage:

> We hold that no man… who is not a bona fide citizen, shall have any voice in the state… They forget that negroes were aliens—aliens, not by mere accident of foreign birth—not because they spoke a different language—not from any petty distinction that a few years association might obliterate, but by the broad distinction of race—a distinction that neither education, nor intercourse, nor time could remove—a distinction that must separate our children from their children for ever.[106]

> the negroes... were never admitted by the British nation prior to the revolution—they were an alien people on the day New York assumed existence as a sovereign state, and he denied that it could be shown that the state of New York had ever naturalized or consolidated into itself a single negro, while the power to naturalize was continued to be exercised by separate state action, nor had it been done by any other state. It was well known that Congress… expressly provided against their naturalization.[107]

The distinction between rights and privileges helped support the argument for disenfranchising blacks. Under this distinction, blacks may be granted civil rights such as the right to property and right to contract, but suffrage was a different matter. The latter was a privilege that required a higher qualification than merely being a citizen. This distinction applied to whites too, since even white citizens had had their political rights qualified by property or wealth.

Yet there was a widespread association between citizenship and suffrage. While the details varied from time to time, a constant requirement for suffrage was that one had to be a citizen. In some cases aliens who had declared the intent to naturalize could also vote, as they were soon-to-be citizens. Denial of suffrage to citizens required a justification. Some white citizens, such as women and children, were also denied the right to vote. But in their case, their interests as members of a family were considered to be represented by their husbands or fathers. On the other hand, no one would represent a black person if he did not have the right to vote. A delegate pointed out that this amounted to "political slavery" which was "but one remove from civil slavery".[108]

The Convention took a confused path on qualifications for suffrage. Initially, it attempted to eliminate the property qualification (which applied only to blacks) from the

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105 Bishop and Attree, *Debates and Proceedings*, 1019 (Delegate John L. Russell).
106 Ibid.,1030 (Delegate John H. Hunt).
107 Ibid., 1047 (Delegate Benjamin F. Cornell).
108 Ibid., 1035 (Delegate George A. Simmons).

Constitution as an "odious"[109] distinction that was anti-republican and "aristocratic"[110]. But after eliminating this qualification, the Convention considered adding a racial qualification in order to prevent a surge in the black voting population. The result would be that the entire black population would now be disfranchised, backtracking from the 1821 constitution that granted suffrage to at least blacks who had property.

A few delegates spoke in support of black suffrage. One contended that blacks were as intelligent as emigrants from other countries and were "as much entitled" to suffrage.[111] Another pointed out that it was unrealistic to expect blacks to be colonized outside the U.S. and that they "must always make a part of our population".[112]

Finally, the Convention decided to keep the property qualification for blacks in the proposed revision of the state Constitution and to submit a separate proposal to eliminate the property qualification and allow "equal suffrage" of whites and blacks.[113] This would prevent the suffrage issue from affecting the entire proposal. At the ballot, New York voters voted against the "equal suffrage" proposal by a margin of 224,336 to 85,406, and the property qualification for blacks remained in the state constitution.[114]

In conclusion, in New York as well as in Maryland, blacks were not treated as co-equal citizens with whites. At best, they were treated as second-class citizens with reduced rights, and at worst they were considered to be disposable at the will of the state legislature or as perpetual aliens who could never become citizens. Their political rights were limited either by state constitutional provisions that specifically excluded them from suffrage (Maryland) or imposed additional requirements only for this group (New York). States were able to freely discriminate among its residents, especially against blacks. The federal government seemed to have no overriding authority to require that blacks, or any other group, should be given rights as federal citizens.

Federal policy on black citizenship

How did the federal government define the status of blacks? Throughout the first half of the 19th century, the federal government repeatedly adopted policies that denied black citizenship. The debate in 1820-21 over the admission of Missouri as a new state was the precursor of Congressional battles that would take place over the next few decades.[115] The proposed constitution for Missouri included a provision directing the state legislature "to prevent free negroes and mullattoes from coming to and settling in this state under any pretext whatsoever." Opponents of this provision, such as John Quincy Adams, thought that this violated the Privileges and Immunities Clause (of Article IV) of the U.S. Constitution.

Southern members of Congress, defending the rights of states to exclude free blacks,

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109 Ibid., 1027 (Delegate John A. Kennedy).
110 Ibid., 1014 (Delegate Isaac Burr).
111 Ibid., 1031 (Delegate A. W. Young).
112 Ibid., (Delegate David S. Waterbury).
113 Ibid., Document No. 136.
114 Gellman and Quigley, *Jim Crow New York*, 259.
115 Leon F. Litwack, *North of Slavery: The Negro in the Free States, 1790-1860* (Chicago: The University of Chicago Press, 1961), 34-39.

took Northern members to task for the treatment of free blacks in their own states. Charles Pinckney of South Carolina, who was a delegate to the Philadelphia Convention in 1787, claimed that he was the author of the Privileges and Immunities Clause and that he "perfectly knew that there did not then exist such a thing in the Union as a black or colored citizen".[116] Finally, Missouri was admitted as a state on the condition that it would not enact a law that would deprive the privileges and immunities of citizens of other states.[117] But the question of whether blacks were in fact citizens was left open.

The next year (1821) U.S. Attorney General William Wirt issued an opinion stating that "free persons of color in Virginia are not citizens of the United States… so as to be qualified to command vessels." Federal navigation laws required masters of vessels to be citizens, and a question arose over the eligibility of free blacks to serve this position.[118] Wirt pointed out that if a free black qualified as a citizen of the United States, he would be eligible to run for President, Senator, or Representative of the United States under the Constitution. He argued that such a result could not have been contemplated by the Philadelphia Convention; therefore free blacks could not be citizens. A decade later, in 1832, Roger Taney (who would later write the *Dred Scott* decision) echoed this idea in his opinion regarding the Negro Seamen Acts, in which he wrote that blacks, "even when free, are everywhere a degraded class" and that they were "not looked upon as citizens by the contracting parties who formed the Constitution."[119]

In a later instance, the U.S. Department of State in 1856 (the year before the *Dred Scott* decision) refused to issue passports to free blacks in New York, stating in its letter of refusal that a "passport is a certificate that the person to whom it is granted is a citizen of the United States, and it can only be issued upon proof of this fact." The letter further went on to say that if the applicants were "negroes", then "there can be no doubt that they are not citizens of the United States." Among other authorities, the letter cited Wirt's 1821 opinion.[120]

In the discussion over whether blacks were U.S. citizens, some attempted to assign them the ambiguous status of subjects instead of citizens. This innovation had to be made because within the global system of nation-states, each person had to belong to a particular nation. In that context, blacks in the United States did belong to the United States. But if they were not citizens, what were they? Chancellor Kent, a prominent jurist, concluded that "negroes, or other slaves, born within and under the allegiance of the United States, are natural born subjects, but not citizens." In a similar vein, the U.S. Department of State, while refusing to grant passports to blacks, stated that it could "give a certificate that they were born in the United States, are free, and that the government thereof would regard it to be its duty to protect them if wronged by a foreign government".

Thus, when the time the U.S. Supreme Court took up the *Dred Scott* case, the concepts of state citizenship and federal citizenship had been debated in state legislatures, state constitutional conventions, and in Congress. Different ideas of the relationship between

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116 Ibid., 36.
117 Ibid., 38.
118 *Pennsylvania Senate Journal, 1857*, 1024-1025.
119 Fehrenbacher, *The Dred Scott Case*, 70.
120 *Pennsylvania Senate Journal, 1857*, 1025-1026.

federal and state citizenship had been put forward. Thus, Chief Justice Taney's decision to frame the *Dred Scott* case in terms of whether blacks were federal or state citizens was not just his innovation. It was an attempt to resolve the long-standing debates over the status of blacks within the states, between the states, and between the state and federal government.

II. Dred Scott and federal citizenship

The *Dred Scott* decision (1857) by the U.S. Supreme Court was a culmination of long-standing conflicts over the status of blacks. It was an expansive decision that attempted to singlehandedly resolve the longstanding debate over black citizenship and the relationship between state and federal citizenship in the United States.

Dred Scott, who was a slave from Missouri, brought this case to the federal courts seeking freedom from his master. He had accompanied his master to military assignments outside of Missouri, including Illinois, which was a free state. After his owner took him back to Missouri, Scott sued for freedom based on his residence in a free state. Dred Scott brought the case under federal diversity jurisdiction, which gave federal courts the power to hear cases that involve controversies "between Citizens of different States".[121] The preliminary question in such cases is to determine whether the court has jurisdiction—in other words, whether it is indeed a controversy between *citizens of different states*. The defendant claimed that Scott was not a citizen and therefore not entitled to the suit.

The Supreme Court's decision written by Chief Justice Taney made sweeping statements regarding citizenship, in particular as they applied to blacks. Taney argued that regardless of how the states defined the status of blacks, they were not citizens within the meaning of the federal Constitution. He thought that the founding fathers could not have possibly contemplated blacks as citizens:

> ... it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted…[122]

Taney was referring to the fact that some of the signers of the Declaration of Independence themselves owned slaves. Therefore "the African race" could not have been contemplated as citizens under the U.S. Constitution.

Turning his eye to the U.S. Constitution, Taney again contended that blacks could not have been included among "the people of the United States" and "citizens of the several States". While the term citizen was not defined in the document, there were provisions that "point directly and specifically to the negro race as a separate class of persons", which "show clearly that they were not regarded as a portion of the people or citizens of the

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121 U.S. Constitution, Art. III, Sec. 2.
122 60 U.S. 393, 410.

Government then formed."[123] Taney cited the Migration Clause, which allowed the importation of slaves until 1808, and the Fugitive Slaves Clause, which obliged all states to return fugitive slaves found within its midst to their masters.

Taney's decision was striking for its sweeping generalizations about blacks. His discussion made no distinction between slaves and free blacks, and referred to both as the "African race". Perhaps expecting scrutiny on this point, Taney acknowledged that some slaves had been emancipated before the ratification of the Constitution, but refused to see them as citizens:

> …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. It is obvious that they were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.[124]

Taney then referred to the law of Massachusetts that forbid interracial marriage and the law of Connecticut which limited the rights of free blacks. He argued that if these states that were known for their position against slavery had refused to treat blacks as citizens, it was difficult to imagine that any other state would think of blacks as citizens.

Thus, blacks, even if they were free, were neither state citizens nor federal citizens, and could not claim federal diversity jurisdiction which required the parties to be *citizens* of different states. Taney reached this conclusion with the combination of extreme propositions ("if blacks were citizens they would have all rights in all states", partial facts ("their rights were limited even in the free states"), and sweeping logic that would fill in the remainder ("therefore they could not possibly be citizens anywhere").

Taney on state and federal citizenship: a pragmatic reversal of states' rights

Taney displayed a curious disrespect for the prerogative of the states, in contrast to his usual emphasis on states' rights. Instead of considering whether individual states treated blacks as citizens, Taney first asked whether blacks were *federal* citizens. Then, based on the speculation that the founders could not have thought of them as citizens, he held that neither could any state have conferred citizenship. From the way the provision regarding federal diversity jurisdiction was written, the question should have been whether the parties were citizens of different *states*. Asking whether blacks were meant to be citizens of the *United States* went against the plain reading of the text.[125]

Taney also adopted a broad interpretation of the Privileges and Immunities Clause which was also against his usual inclination to protect the states' prerogatives. The broad reading of the Clause allowed him to argue that blacks, if made a citizen in any state, would be able to claim a whole range of rights in every other state. But the Court until then had followed a narrow interpretation of that Clause which limited the range of rights that states

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123 Ibid., at 411.

124 Ibid., at 411-412.

125 Don E. Fehrenbacher, "Roger B. Taney and the Sectional Crisis," *The Journal of Southern History*, Vol. 43, No. 4 (Nov., 1977), 562.

had to grant to citizens of other states. Those insisting on states' rights would have typically endorsed this interpretation. But this time, Taney adopted a broad interpretation in order to exaggerate the consequences of granting black citizenship.

Taney could have recognized black citizenship without making such broad claims. A narrow interpretation of the Privileges and Immunities Clause would have allowed him to recognize state citizenship for blacks while limiting its effects on other states. He also could have made finer distinctions to carve out a room for blacks instead of taking the all or nothing approach that he did. The Court had previously interpreted citizenship differently for different purposes. For example, the Supreme Court during Taney's tenure had expanded the meaning of citizenship to include state-chartered corporations for the purpose of federal diversity jurisdiction. The Taney Court recognized corporations as state "citizens" for this purpose, although they were not citizens in the ordinary sense. The lower court in the *Dred Scott* case had applied this idea and held that Scott was a citizen for the purposes of federal court jurisdiction.[126]

But Taney showed a penchant for an "all-or-nothing" approach when it came to blacks—either they were citizens for all purposes everywhere in the Union or they were not citizens for any purpose anywhere. This was a self-serving dichotomy that led to only one conclusion. Given this approach, even abolitionists would have to conclude that blacks were not citizens. Taney's emphasis on the inferiority of blacks was meant to exclude blacks from state citizenship, while retaining the room to recognize state citizenship for the purposes of diversity jurisdiction to other "quasi-citizens" such as corporations.[127]

Seven judges concurred with Taney. Historians point out that the concurring opinion of Justice Daniel, a strong pro-slavery justice, served as the backbone of Taney's opinion.[128] Daniel argued that emancipation in itself did not confer citizenship on blacks. Rather, the act of conferring citizenship had to come from sovereign will. The sovereign, or the current citizens, had the right to confer or withhold citizenship. Daniel could not accept the notion that individual slaveowners could turn blacks into citizens by the act of manumission. Nor did he think that states should be able to grant citizenship to blacks. Such a power might force the Southern states to extend the privileges and immunities of its citizens to free blacks from Northern states.[129]

Curtis's dissent

Justice Curtis's dissent attracted attention for presenting detailed evidence which he argued as proof that blacks had been treated as citizens in at least several states. Curtis's premise was that federal citizenship derived from state citizenship. In other words, a black person, if he was a citizen in one of the states, should have access to federal courts as well as the protection of the Privileges and Immunities Clause. He then argued that free blacks were considered citizens in at least some of the states when the Articles of Confederation was ratified. In particular, he noted that in New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, free blacks qualified as electors, subject to the

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126 Maltz, *Dred Scott and the Politics of Slavery*, 74-75.
127 Allen, *Origins of the Dred Scott Case*, 126-132.
128 Ibid., 164-165.
129 60 U.S. 393, 480-482.

same conditions as white citizens.[130] Though the electoral franchise was not always tied to citizenship (for example, women and minors were citizens although they did not have the right to vote), it was "one of the chiefest [*sic*] attributes of citizenship" and the "constitutional possession of this right [was] decisive evidence of citizenship."[131]

Curtis referred to a decision of the Supreme Court of North Carolina which held that slaves who were born and emancipated in that state were citizens of North Carolina, and that "all free persons born within the State are born citizens of the State", implying that free blacks could also be citizens by birth.[132] He further pointed out that free blacks in North Carolina had "claimed and exercised the franchise" until it was taken away when the state constitution was amended.

Justice McLean added that "[u]nder the late treaty with Mexico, we have made citizens of all grades, combinations, and colors" and that the "[s]ame was done in the admission of Louisiana and Florida."[133] These arguments were a powerful counterpoint to Taney's decision, which was probably why Taney had to delay the release of his opinion after he read it from the bench in order to make revisions.[134]

III. Reactions to the *Dred Scott* decision

Public reactions to the Dred Scott decision

Public reactions to the *Dred Scott* decision was swift. Newspapers printed the opinions of the Justices as they became available and provided extensive commentaries. For example, *The Sun*, a Maryland newspaper, published a detailed report about the decision on its front page on Mar. 10, 1857, and printed a summary again the next day, emphasizing the "profound sensation" that the decision would create. The paper summarized the propositions of the case as "1. That no negro… can, even though he be born within the limits of a free State, be recognized by the law as a citizen of the United States…; 2. That any of the States of this confederacy may, if they see proper, confer upon a free negro the rights of citizenship within that particular State… but the free negro upon whom this right is conferred does not for that reason become a citizen of the United States…; 3. That Congress has no power under the constitution to say that citizens of the United States shall not hold slaves as property in any territory of the United States in which the said citizens may reside…" The paper emphasized the significance of these propositions:

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130 60 U.S. 393, 572-573.

131 Ibid., at 581.

132 Ibid., at 573 (citing State v. Manuel, 4 Dev. and Bat. 20).

133 Ibid., at 533.

134 The published version of the Court's opinion was not the same as the one that was delivered orally in the court. Parts of it have been rewritten in response to the dissenting opinion after it was announced. *The Sun* [Baltimore, MD], Mar.12, 1857, and Mar.17, 1857, reported that there was a motion in the Senate to print and distribute the Court's opinion in the *Dred Scott* case, but that the Senate had failed to act. *The Sun*, Mar. 30, 1857 reported that Chief Justice Taney had not filed his opinion in the clerk's office, while the dissenting opinions had been "spread before the public through the newspapers of Boston and New York, and before they were filed."

> Such are the main questions decided by a judgment which is destined to become a point of support and attack in the political controversies which will be, we fear, hereafter urged with acrimony in the halls of Congress…[135]

The Maryland paper observed that the opponents of the decision were attempting "to appeal from the decisions of the judiciary to the political club rooms, where other considerations than calm reason and sober judgment are expected to prevail." The paper also criticized the clergy for getting involved, writing that the decision had "already got into the pulpit, and for the future will be a great hobby, no doubt, for many clergymen who love to mingle in politics to the detriment of religion."[136]

Justice Curtis's opinion was widely cited by abortionists and critics of the Taney Court. Lincoln said that the evidence provided by Curtis was "with so much particularity as to leave no doubt" that blacks were considered the people of the United States.[137] Abolitionist newspapers relied on Curtis's argument to criticize Taney's position. In the state of Maine—which had been battling with Southern states over fugitive slaves, the highest court used Curtis's evidence to confirm that blacks were citizens of that state.[138]

The publicity that the dissenting opinions received created further tension between the Supreme Court justices. Taney criticized Curtis for providing the press with copies of his dissenting opinion before the official reports came out. Meanwhile, he refused to provide copies of his own opinion and continued to revise it after he rendered the decision.[139] When Curtis demanded to see the revised version, Taney refused to do so. Justice Curtis soon resigned from the Court.

The *Dred Scott* decision received much attention because it took such a clear-cut stance on a matter of national controversy. Both the majority and dissenting judges were playing to the public ear instead of seeking a middle ground or a decision with some room for maneuver later on. In fact, the earlier version of the decision was a modest one that would have left each state to define the status of blacks instead of attempting a national solution. But the assignment for writing the majority opinion was changed from Justice Nelson to Justice Taney, after which the judges broadened the scope of their opinions to resolve the issue of slavery and citizenship in the United States in the broadest manner.[140] With such a decision, the public reaction also split into extremes. One side praised it for finally settling the question and giving a complete victory to pro-slavery forces, while the other criticized it as a gross misinterpretation of history and an abuse of power by the Court.

Reaction by state legislatures

State legislatures also reacted quickly to the *Dred Scott* decision. The Pennsylvania

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135 *The Sun*, Mar. 11, 1857.
136 *The Sun*, Mar. 17, 1857.
137 Stuart Streichler, *Justice Curtis in the Civil War Era: At the Crossroads of American Constitutionalism* (Charlottesville and London: University of Virginia Press, 2005), 120.
138 Ibid., 127. The case cited was 44 Me. 505 (1857).
139 Ibid., 145-149. Also see Maltz, *Dred Scott and the Politics of Slavery*, 140-141.
140 Allen, *Origins of the Dred Scott Case*, 152-153.

state legislature debated a resolution condemning the decision. However, a committee in the state Senate produced two conflicting reports about the case. The majority report severely criticized the *Dred Scott* decision. It argued that Jefferson's writings treated blacks as citizens and pointed out that even the Supreme Court of North Carolina once recognized blacks as citizens. It also cited the fact that in the earlier days, slave states recognized that slaves who resided in a free state became free. It also argued that Congress had the power to act as both the federal and state government in the territories, and that Dred Scott had been legitimately freed under the acts of Congress by residing in a free territory.[141]

The minority report took the opposite position, arguing that even free blacks were part of the slave population. It cited both federal and state court decisions which denied black citizenship, including a Pennsylvania Supreme Court decision that denied black suffrage, and a subsequent state constitutional amendment that explicitly limited suffrage to whites. It also pointed out that former Chief Justice Story had written favorably about the English court decision in the case of slave Grace.[142] In that decision the English court limited the scope of the *Somerset* case by holding that the status of slavery reattached to a former slave who returned to a slaveholding territory. If this was applied to the *Dred Scott* case, Dred Scott had reverted to his former status as a slave when he returned to Missouri.[143]

In Massachusetts, a select committee of the legislature proposed a bill that would defy the decision. The bill would free slaves who were voluntarily brought into the state and grant them state citizenship. The first section of the bill stipulated that "All persons mentioned in this section and not excepted are and shall be deemed to be citizens of this Commonwealth…" Subsequent sections declared that slavery "cannot exist within this commonwealth" and that "Any person having been held to service as a slave in any other State or country [except fugitive slaves] coming into this Commonwealth, or now being therein, shall forthwith be and become free."[144] The state legislature also authorized the state's Secretary of State to grant passports to any citizen of Massachusetts "whatever his color may be".[145] Soon after, the Lincoln administration also began issuing federal passports to blacks.

The New York state legislature, which was expecting a Supreme Court decision on its controversy over fugitive slaves with Virginia, reacted strongly. It enacted a law that extended to blacks all the political and civil rights enjoyed by white citizens of the state. It also enacted a law stipulating that all slaves brought into the state, even on a temporary visit, would be freed immediately.

The actions of these legislatures defied the *Dred Scott* decision and challenged Taney's

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141 "Majority Report of the Select Committee of the Senate of Pennsylvania, upon the decision in the case of Dred Scott vs. John F. A. Sanford," *Daily Legislative Record* [Pennsylvania], May 2, 1857.

142 Justice Story was in correspondence with the English judge who wrote the *Slave Grace* decision (Lord Stowell) and commented in a letter that he had never heard "any other opinion but that of approbation of it [the *Grace* decision] expressed among the profession of the law." The letter is reprinted in *Pennsylvania Senate Journal, 1857*, 1032-33.

143 *Pennsylvania Senate Journal, 1857*, 1020-1036 (entry of May 11, 1857).

144 *The Sun*, Apr. 21, 1857.

145 Litwack, *North of Slavery*, 57.

denial of black citizenship by enacting laws that explicitly granted state citizenship to blacks.

The Sun, the Maryland paper which supported the *Dred Scott* decision, criticized the "malediction proposed in the New York Assembly to be hurled against the Supreme Court, on account of the late decision…" and expected that "New York will herself, no doubt, expunge the resolution from her legislative records as soon as she shall recover her reason."[146]

Despite Taney's attempt to settle the controversies over black citizenship, the *Dred Scott* decision only ramped up the conflict. Because of Taney's extreme reasoning, the conflict was turned into a irreconcilable choice over whether blacks should have all the rights of citizenship everywhere or none of the rights anywhere. The decision only served to expose the sharp divisions along sectional lines (between the North and the South) as well as party lines (Democrats and Republicans) within the states.

In 1858, Congress debated whether or not to admit Oregon as a state. The proposed state constitution discriminated against free blacks, depriving them of the right to own property, enter into contracts, or file suit in state court. Opponents of these provisions argued that this violated the Privileges and Immunities Clause of the U.S. Constitution. John Bingham asserted that citizens of each state were *ipso facto* citizens of the United States, and that the Privileges and Immunities Clause would be a mockery "if it does not limit state sovereignty and restrain each and every State from closing its territory and courts of justice against citizens of the United States."[147] A Senator from Maine mentioned that "under the constitution of the state of Maine, free Negroes are citizens… just as much citizens of the state of Maine as white men" and opposed the admission of any state "with a constitution which prohibits any portion of my fellow citizens of my own state from the enjoyment of the privileges which other citizens of the state have."[148]

The New York state court defies *Dred Scott*

In *Lemmon v. People* (1860)[149], the highest court of the state of New York held that the power to define the status of people remained with the states, and upheld the actions of the lower courts that freed a slave who was travelling through the port of New York. It was a direct challenge to the *Dred Scott* decision, and a reassertion of New York's position that had been strengthened throughout Governor Seward's tenure. The court split 4-3 on the decision, with a dissent suggesting that the only manner in which this conflict could be resolved would be a war between the states (a year later, the Civil War erupted.)

The case involved a Virginia slaveowner who was traveling to Texas along with his slaves—one man, two women, and five children, and stopped at the port of New York on his way. There he boarded his slaves in a house, presumably to wait for the next ship to Texas. Louis Napoleon, "a colored citizen" of New York heard of this and filed a writ of habeas corpus on behalf of the slaves. The judge found that they were being detained

146 *The Sun*, Apr. 15, 1857.
147 Ibid.
148 Rebecca Zietlow, "Civil Rights and Bingham's Theory of Citizenship," *Akron Law Review*, Vol. 36 (2003), 717-769, at 726-728.
149 20 N.Y. 562 (1860).

illegally since slavery was prohibited in New York, and freed the slaves.

The majority opinion held that under the Constitution, individual states retained the power to define the "social status" of persons within its boundaries. It emphasized the sovereign power of individual states to control its borders and to define the status of people who they admitted into their territories:

> Every sovereign State has a right to determine by its laws the condition of all persons who may at any time be within its jurisdiction; to exclude therefrom those whose introduction would contravene its policy, or to declare the conditions upon which they may be received, and what subordination or restraint may lawfully be allowed by one class or description of persons over another…[150]

The New York court also adopted a narrow reading of the Privileges and Immunities Clause of the U.S. Constitution in order to sustain the state law. A broad reading of that Clause, such as guaranteeing the right to property (including slaves) to citizens of any state, would have required the court to nullify the state law. But the majority opinion took the "equal protection" approach to interpretation, under which New York had to grant citizens of other states only those rights it granted to its own citizens. In this case, the state law applied equally to citizens of all states—a New York citizen could not import a slave, and neither could citizens of other states. Thus, the state law did not conflict with the Privileges and Immunities Clause.

In addition to the Privileges and Immunities Clause, the Interstate Commerce Clause had by then become a major point of contention between the federal and state governments. Prior to the *Lemmon* case, the U.S. Supreme Court had nullified New York and Massachusetts laws that imposed bonding requirements for all passengers brought to those states as an interference with the Congressional power to regulate interstate commerce (*Passenger Cases*, 1849).[151]

On this point, the New York court held that the power to regulate interstate commerce under the U.S. Constitution was *concurrent* and that states could legislate on matters that incidentally affected interstate commerce so long as it did not conflict with federal law. The court argued that the state law in this case did not interfere with the powers of Congress because there was no Congressional legislation over the issue of slave transit.[152] It also held that the Fugitive Slave Clause was not applicable to this situation because the slaves in this case had not escaped and were brought along by their owner. Therefore, the slaves were free under the laws of New York.

Chapter conclusion

From the late 1840s to the early 1850s, states tried to redefine the status of free blacks in their state through amendments to their constitutions and through legislation. This clarification of state policies regarding the free black population served to intensify the conflicts between Northern and Southern states.

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150 Ibid., at 602.

151 See Chapter VI of this study.

152 20 N.Y. 562, at 611-614.

The *Dred Scott* decision was a culmination of this conflict. Although the decision has been criticized as a gross abuse of judicial power, the aspiration of Chief Justice Taney to reconcile the state laws and settle the status of blacks was understandable in the context of the prolonged and escalating conflict between the states. However, his decision ended up facilitating the breakup instead of mending divisions.

The decision not only denied Dred Scott's citizenship, but went further and argued that no state could grant citizenship to blacks. It did so with the premise that if one state granted citizenship to a black person, it would require all other states to grant all of the rights of citizenship to this person. Individual states should not be able to make decisions with such a national impact. This was an opportunistic decision for a judge who was otherwise a staunch advocate of states' rights. Southern states hailed the decision for legalizing slavery across the United States, while the Northern states refused to comply, insisting on the states' ability to define the status and rights of people within their borders.

The New York legislature defied the *Dred Scott* decision by declaring that it would free all blacks who arrived in the state and treat them as citizens. In *Lemmon v. People*, New York's highest court freed slaves who arrived at the port of New York and reasserted the power of the state to define the status of blacks. The continued animosity between the North and the South over black citizenship and the mutual denial of comity (the recognition of and respect for each other's laws) showed that the existing constitutional framework for citizenship in the United States had become impossible to maintain.

VI. State control of migration and citizenship

The previous chapters examined how the domestic migration of blacks led to conflicts over citizenship between the states and between the state and federal governments. The dual system of federal and state citizenship was becoming increasingly difficult to sustain. This chapter examines the conflict over citizenship in the context of international migration. It attempts to show that migration of people in various forms (domestic and international, involving slaves, paupers, and immigrants) led to a need for a reconstruction of citizenship in the United States.

Under the U.S. Constitution, international as well as interstate migration of persons was initially a subject of regulation by the states. Foreigners who arrived in one of the states from abroad, as well as anyone who traveled across state borders *within* the U.S. were subject to regulation by individual states, including restriction of physical entry and limitation of rights after entry. But as both international and interstate migration increased in intensity, the extent of the power that states could exercise over this matter came under challenge.

This chapter will examine how the powers of the federal and state governments to regulate international migration evolved during the nineteenth century. First, I will discuss how individual states regulated immigration and how they faced challenges under the provisions of the U.S. Constitution. Then I will look at how international migration emerged as a national issue and how Congress began to enact regulations in this field. I will assess how these developments fit into the larger question of whether the states or the federal government control the status and rights of citizenship in the United States.

State regulation of immigration through passenger laws

State passenger laws in historical context

During the colonial era, people had to obtain legal residence (called "settlement") in a town to remain there without condition, and the town was responsible for taking care of that person if he or she fell in need. Poor laws were enacted by the colonies to govern the system of settlement, and included provisions regarding the entry of people who travelled across town borders. Passenger laws were an extension of this idea, governing the powers and responsibilities of towns in admitting people who arrived by travel on waters.

In 1700-01, the Massachusetts colony enacted a law that required masters of ships entering any port within its territory to submit the names of passengers to officers at the port. The preamble expressed the intent of the law, which was to restrict the immigration of undesirable persons:

> For the better preventing of persons obtruding themselves on any particular town within this province, without orderly admission by the inhabitants of such town… and for the remedying manifold inconveniences and a great charge heretofore occasioned thereby…[1]

[1] John Cummings, "Poor-Laws of Massachusetts and New York: With Appendices Containing the United States Immigration and Contract-Labor Laws," *Publications of the*

Like the poor laws, this law excluded people who might become a burden on local towns from coming to the colony. The shipmaster had to provide security for "lame, impotent, or infirm persons" so that "the town in which they settled would not be charged with their support". In the absence of such security, the shipmaster had to carry the person out of the province.[2] This basic framework would be inherited by the state passenger laws, and eventually federal immigration laws.

While the poor were the most common targets of exclusion, colonies wrote into law their dislike of various other groups of immigrants. Quakers became a target very early on—a study notes that for several years since 1656, the records of all of the New England colonies were filled with legislation to prevent the immigration of Quakers, who instead fled to Pennsylvania and the Jerseys (which later became New Jersey).[3] The Quakers themselves were not free from fear of foreigners, for in 1729, an influx of German migration to Pennsylvania led that colony to enact a law (though short-lived) that included a tax on all foreigners that came into the colony.[4] Catholic migration was discouraged by various means including a duty on Irish Catholic servants, prohibition of Catholic worship, and requirements of a form of oath that precluded Catholics.[5] Colonies also regulated the importation of slaves. For example, a 1759 law of the Virginia colony expressed concern for slaves being brought into the state from Maryland and North Carolina and imposed a duty for the importation of slaves. To this end, the law mandated that importers of slaves provide a list describing their sex and prices to the clerk of a local court.[6]

The enactment of state passenger laws

After the colonies became states under the U.S. Constitution, they continued to regulate the arrival and settlement of immigrants through state passenger laws. Like the state poor laws, these laws were based on the desire to keep out or to minimize the effect of poor and sick persons who came to the community.

State passenger laws regulated two aspects of citizenship that were intertwined. First was the ability of people to enter and reside in the territory. Second was the assignment of responsibility for the cost and maintenance of the migrant in case he or she became a burden. Passenger laws attempted to exclude passengers that might become a burden from entering the state in the first place. Then, it imposed taxes and bonding requirements to indemnify the state in case a person who was admitted later became poor or sick.

During the first half of the nineteenth century, there was no federal regulation that

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American Economic Association, Vol. 10, Issue 4 (Jul., 1895), 30.

[2] Emberson Edward Proper, *Colonial Immigration Laws: A Study of the Regulation of Immigration by the English Colonies in America* (New York: Columbia University Press, 1900), 29-30.

[3] Ibid., 25.

[4] Ibid., 19.

[5] Ibid., 17-18. Maryland initially served as an "asylum" for Catholic migrants, but soon grew hostile towards them (Ibid., 57-61.)

[6] "An Act to oblige the persons bringing in slaves into this colony from Maryland, Carolina, and the West-Indies, for their own use, to pay a duty," Nov. 1759, *Hening's Statutes at Large*, Vol. 7, 338-339.

regulated immigration, except for the regulation of conditions aboard transatlantic vessels which limited the number of immigrants that could be brought on each ship. State laws governed who could land on its shores. Since a certain length of residency within the United States led to eligibility for naturalization, states in effect controlled who might become future citizens of the United States. In other words, states served as initial gate-keepers of U.S. citizenship.

Under the passenger laws, shipmasters had to account for each passenger aboard the ship and report various details about them to state officials at the port of entry. They had to convince state officials at the port that the passengers would not become a burden on the state. Passengers who were old, looked poor or frail, or who had diseases faced scrutiny. Officials in such cases could demand the ship-owner to post a bond or pay security in case public support for the passenger became necessary afterwards. Soon these provisions expanded and payment of a given amount per passenger was made mandatory. Whether this amounted to an unconstitutional "head tax" would become an issue in the courts.

Passenger laws also contained provisions for the outright exclusion of migrants which required shipmasters to carry back passengers that the state did not want to the point of origin. This provision applied regardless of whether the passenger was from another state or another country. Unlike today, U.S. citizenship did not guarantee the person's right to move across state boundaries. States retained the ability to control who could physically enter the state, and by extension, who could make welfare claims on the state. Citizens of *other states* within the United States could be excluded by individual states.

The Massachusetts legislature in 1820 enacted "An Act to prevent the introduction of Paupers from foreign ports or places". This law retained the framework of colonial passenger laws that Massachusetts had enacted since 1700.[7] The law required shipmasters to submit a list naming its passengers and their last place of residence. For any passenger likely to become a financial burden on the community, the shipmaster had to post a bond or pay a fee instead. This was used to indemnify the town and the state for three years after the landing of the passenger. The state was included as a beneficiary of the bond because it was liable for paupers who could not claim settlement in any town.

As the number of immigrants arriving in Massachusetts increased, its passenger law became sophisticated, with provisions establishing offices to administer the process of reporting, selecting, and bonding immigrants and providing further details about the exclusion of undesirable immigrants. For example, a law enacted by that state in 1837 ordered local authorities to appoint a special officer at each port to conduct the examination of all foreign immigrants arriving in vessels. The act required a bond for all "lunatic, idiot, maimed, aged or infirm persons, incompetent in the opinion of the officer so examining, to maintain themselves, or who have been paupers in any other country" before they were landed. The amount of bond and the length of time covered by the bond was increased--$1000 for each person in question, in order to indemnify the town, city, or state for ten years.[8]

The enforcement of this act was strengthened by an 1848 revision that authorized the governor to appoint superintendents of alien passengers in cities and towns as he deemed

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[7] Cummings, *supra* note 1, 38.

[8] Ibid., 39.

necessary. Masters of vessels were required to report further details (name, age, sex, occupation, last place of residence and condition) about each passenger. The bond requirement was tightened so that instead of providing security for two, three, or ten years as in the past, it was now meant to guarantee that the passenger would *never* become a charge on the community.[9] In other words, the person who posted the bond would permanently be responsible for the well-being of the passenger.

Immigration regulation in New York

The 1788 Act of New York regarding poor relief and settlement contained provisions for regulating the arrival of people on vessels as well as on land. Masters of vessels entering New York City had to report the names and occupations of every person he brought to the mayor of the city. If a person was likely to become a public charge, the master of the vessel had to return the person to the place where he came from. The master had to enter into a bond ensuring this obligation.[10]

During the first half of the 19th century, New York became the main port of entry for immigrants arriving in the United States. In the year ending September 1820, 3834 people had been recorded as arriving by sea to the port of New York, the largest number among all ports, followed by the arrival of 2050 people in Philadelphia and 1262 in Baltimore (Maryland).[11] In 1830, the number was 13748 in New York, followed by 3943 in Baltimore and 2287 in New Orleans.[12] By 1840, the number grew to 60609 in New York, followed by 11085 in New Orleans and 7271 in Baltimore.[13] New York received the largest number of foreign immigrants among all ports in the United States.

As immigration grew, New York developed a comprehensive regulation of immigration. This included the landing of immigrants, their settlement in the community, and measures to deal with poor or sick immigrants. A study has noted that from 1820 through 1860, its statute books "were seldom without a new entry each year which bore upon the subject of immigration."[14] In 1820, it enacted a law levying tax on all passengers arriving in New York from a foreign port. This money was to be used to support the Marine Hospital, which was established to quarantine arriving passengers who had diseases. Immigration regulation was in this regard a public health measure to protect the public from diseases and to pay for such protection by a tax on arriving passengers. New York would argue that this was well within the police power of the state and not an infringement of the federal power to regulate immigration.

An 1824 revision of this law tightened the reporting and bonding requirements for people arriving on vessels. It required the masters of vessels to report the name, place of

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9 Ibid., 40.

10 Ibid., 90-91.

11 William J. Bromwell, *History of Immigration to the United States* (New York: Arno Press and the New York Times, 1969), 21.

12 Ibid., 61.

13 Ibid., 105.

14 Richard H. Leach, "The Impact of Immigration Upon New York, 1840-60," *New York History*, Vol. XXXI, No. 1 (Jan., 1950), 15-30, at 16.

birth, last legal settlement, age, and occupation of all its passengers to the Mayor of the City of New York. It also authorized the Mayor to require bonds from the masters of up to three hundred dollars per passenger to "indemnify and keep harmless" the city "from all and every expense or charge... for the maintenance and support" of those passengers. The bonds were effective for two years after the passenger has landed.

The bonding system, however, turned out to be ineffective as the number of immigrants increased, enforcement became difficult, and room for deception and fraud developed. For example, shipmasters would collect a dollar from each passenger to satisfy the bonding requirement, but competing bond brokers took on the liability for less than that amount (as low as ten cents per passenger). Masters earned a windfall from this arrangement, while bond brokers proved elusive or unable to satisfy obligations when those immigrants actually became a public charge.[15]

In the 1830s, the perception that European countries including England, Ireland, and Germany were sending people from poor houses and jails over to the United States so as to relieve their own economic burden spread. "Ours is the only community on the globe… where the public treasury is thrown open to the indigent from other countries", and where foreign emigrants "demand as a right what is often denied to the native poor of the State itself", complained a report to the Senate of Massachusetts.[16]

In New York, the perceived burdens of immigration and the ineffectiveness of its passenger law led to an "ever-increasing volume of protest" calling for a revision of the law and a reconsideration of the general approach to immigration.[17] An amendment to the state passenger law in 1839 tried to remedy the ineffectiveness of the bonding requirement by allowing the Mayor to receive commutation fees directly from the masters instead of leaving the administration of the bonding requirement to corrupt bond brokers. But this system of direct collection was abused too, for the city clerk who took charge of collecting the fees kept no account of what he received, and with no oversight for years. Friedrich Kapp, who became the commissioner of immigration in New York, noted that the administration of bonds and fees had become "a sort of legalized robbery, the headquarters of which was at the City Hall". This lead to an investigation by a committee of the Board of Aldermen in 1842, which found numerous deficiencies between the number of people who were reported to have arrived and the amount of money received for bonding and commuting.[18]

Bonding remained the preferred method of masters, as they could earn the differential between the amount they charged passengers for bonding and the amount they actually paid to bond brokers. Bond brokers, in turn, tried to escape liability by various means. For example, they would alter the description of passengers on the lists submitted to the Mayor so that when they became liable to the city, authorities could not identify them on the list and consequently could not track down the bond broker liable for that passenger. Some

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15 Friedrich Kapp, *Immigration and the Commissioners of Emigration of the State of New York* (New York: The Nation Press, 1870), 45-46.

16 Leach, 18, citing the Senate of Massachusetts, "A Report on the Bill Concerning State Paupers" (March, 1839).

17 Ibid., 17.

18 Kapp, 46-50.

bond brokers took on an excessive amount of liability without financial backing.

Other abuses surrounded immigrants who arrived in New York. When immigrants became sick, bond brokers, instead of sending them to facilities that were operated by the city, transferred them to private facilities established themselves. These facilities were operated with a focus on minimizing the cost to the bond brokers. They left sick immigrants to suffer under horrible conditions, again provoking investigations by city officials. One affidavit submitted to the Board of Assistant Aldermen of the city of New York by immigrants said that the breakfast at one of the hospitals "was composed of a species of meal so black as to be unfit for use and to that was added molasses and made into a pottage" and that the dinner was at times "refuse grease with other mixtures collected from the ships during their trips across the Atlantic". The inmates there were "lying sick and in the most pitiful and wretched condition of suffering."[19]

States that received a large share of immigrants during this period attempted but generally failed to control the quantity and quality of persons arriving at their borders. State passenger laws were not effective against immigration from Europe that kept increasing in volume. The collusion between ship-owners, bond brokers, and corrupt officials also hindered the effective enforcement of the law.

1847 Act of New York and the Commissioners of Emigration

In 1846, a report of a select committee of the Common Council of the city of New York criticized the "unscrupulous conduct of European governments and cities in transferring to our country aged and decrepit paupers" and argued that "some policy should be adopted of a permanent character" regarding the financial burdens of immigration. It should be noted that the federal government was not called upon to act-- concerns were directed toward the city and state government. The report asked that legislation be enacted that "equally regard the interest of the city and the emigrant", and proposed a uniform commutation fee of one dollar for every immigrant instead of bonding. [20] In response to such demands, a new passenger law was passed on May 5, 1847.

This new law strengthened the reporting and commuting requirements for masters of passenger ships. Those who benefited from the previous law-- boarding house agents, bond brokers, and masters of passenger ships-- resisted this change, and it took a special resolution from the Common Council of New York to persuade the state Senate to pass the new law. The opponents resisted the enforcement of the new requirements and brought lawsuits challenging the constitutionality of the state law. This is what came to be called the *Passenger Cases*, an important test of how much power state governments had over regulation of immigration.

The law formalized the mechanism for distributing the funds collected at the ports to the city of New York and also to cities and counties throughout the state. It established the Commissioners of Emigration of the state of New York, which was put in charge of administering the law with significant funding and powers. The act made it the duty of these commissioners to go on board all vessels arriving in the port, examine its passengers, and sort out "any lunatic, idiot, deaf, dumb, blind, maimed, or infirm persons, or persons

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[19] Ibid., 50-51.
[20] Ibid., 86-89.

above the age of sixty years, or widow with a child or children, or any woman without a husband, and with child or children, or any person unable to take care of himself or herself without becoming a public charge, or who, from any attending circumstance, are likely to become a public charge, or who, from sickness or disease… are, or are likely soon to become, a public charge".[21] The owners of vessels were subject to additional reporting and bonding requirements for this group of people.

The Commissioners of Emigration of New York expanded its power and activities. By 1855, they secured an authorization from the state legislature to establish a mandatory landing point for all immigrants arriving from sea.[22] The rationale was that it was impossible for the commissioners to perform their duties if immigrants were arriving all over the state. An old fort at the foot of Manhattan Island, called the Castle Garden, was soon established as the landing point.[23] The commissioners built a permanent facility on that location to inspect arriving ships and passengers and to enforce the reporting, bonding, and commuting requirements. They also built a separate facility (Ward's Island) to quarantine sick immigrants, which was to replace the private hospitals that had been criticized for their abuses.

The centralized facility also made it possible for the commissioners to separate arriving immigrants from the hordes of boarding house agents and transportation agents who had been criticized for defrauding and abusing immigrants as soon as they arrived. Baggage collection and distribution was centralized, information was given to immigrants about the modes of transportation to inland destinations and the rates to be charged, and transportation agents operated under the supervision of the commissioners.

The Commissioners of Emigration hired numerous staff to operate this facility and organized them into distinct departments.[24] The Boarding Department was in charge of inspecting the health of passengers before they arrived at Castle Garden. They would board the ships at quarantine stations located six miles below the city to discharge their roles. Upon arrival at Castle Garden the Landing Department took charge. There the baggage was examined, unloaded and passengers screened again for health and special bonding requirements. The immigrants then proceeded to the Registering Department which took down their names, nationality, former place of residence, and intended destination.

After this inspection process, immigrants could access other departments established on the facility to service their needs. This included the agents of the railroad companies, who provided means of transportation; the city baggage delivery, who delivered baggage to local destinations at a rate approved by the Commission; and exchange brokers, who exchanged currency under the supervision of the Commission. The Letter-Writing Department had clerks who could write letters on behalf of the immigrant in their languages and the Forwarding Department received and held communications and remittances for arriving immigrants.

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[21] Section 3 of the Act of May 5, 1847 [New York].
[22] Act of Apr. 13, 1855 [New York].
[23] Kapp, *supra* note 15, 108. This location was used until 1890 and preceded Ellis Island as the central processing center for immigrants to New York.
[24] Ibid., 111-118.

The Commission operated a "Labor Exchange" to facilitate the employment of immigrants. Immigrants seeking jobs were directed to spaces within the exchange according to their sex, their occupations, the length of time they had been here, and into those with and without references. Kapp wrote that "the demand was much greater than the supply. Not the tenth part of the large orders for railroad laborers could be filled; and only a small part of the orders for farmers (Germans) and common laborers (Irishmen) could be responded to."[25]

As this example shows, in the mid-19th century, the admission, settlement and incorporation of immigrants were led by state governments. Passenger laws and poor laws were enacted with the purpose of excluding undesirable migrants from settling in the state and becoming a burden. Poor laws operated on the land, regulating the movement of people across political boundaries on foot, coaches and canals; and passenger laws operated on the sea, regulating movement on vessels. Individual states carried out the function of choosing who would be admitted to its territory. Citizens of other states, as well as other nations, were subject to this regulation. In other words, being a citizen of the United States did not guarantee that this person could enter a state of his or her choice. The states could select who might become its citizens through this initial screening process.

II. Constitutional conflicts over state passenger laws

The previous section described an era in which the regulation of immigration was primarily the responsibility of the states. It would take nearly half a century before Congress was able to absorb that power and claim it as exclusively its own. This process mirrored the conflict over control of the domestic movement of blacks. Did individual states have the power to define their status and choose whether to admit them or not? Or was a national policy necessary, and did Congress have the power to pursue such a policy through federal law?

Congress started its regulation in the form of federal passenger laws focusing on the condition aboard ships crossing the Atlantic Ocean. When constitutional challenges to state passenger laws emerged, the U.S. Supreme Court had to engage in an act of careful balancing of the relative powers of the federal and state governments, as it did over the power to define the status of blacks.

Federal passenger laws

A federal passenger law was first enacted in 1819 in response to the events in 1817. That year, twice as many immigrants as any previous year arrived in the United States. In December, two shiploads of immigrants were "sold into the slave State Delaware", which "was shocking in the extreme, and created a painful sensation all over the country".[26] Three months later, a Representative from Delaware submitted to Congress a bill "regulating passenger ships and vessels". The bill was passed by Congress at the next session and became the Act of March 2, 1819. This act limited the number of passengers

[25] Ibid., 117.
[26] Ibid., 41.

to two persons per five tons of the ship's measurement.

In the late 1840s, famine and revolution led to a dramatic rise in the number of European immigrants, especially from Ireland and Germany. In response, Congress passed a succession of acts to expand the scope of regulation.[27] Some provisions were meant to help the conditions of those on board, in response to horrific accounts of the transatlantic transportation of migrants. Newspaper articles emphasized the filthy conditions on board the ships, along with the hunger, deprivation and starvation, and disease. Reports of hundreds of passengers dying on board ships during the months-long passage across the Atlantic were widely publicized.

As a result, public health related provisions grew extensive. The 1848 law, in addition to regulating the number of passengers per given amount of space, directed the amount of food and water the ship had to carry per day per passenger; the number and size of ventilators in each compartment, the availability of facilities for passengers to cook their food; and daily sanitation of the deck, even designating the particular disinfectants that had to be used.[28]

The federal passenger laws were able to co-exist with state passenger laws. Though the federal laws limited to a certain extent the quantity of immigration by requiring a certain amount of space for each passenger aboard the ships, they did not qualitatively control who arrived in the United States. They did not provide for the inspection of passengers and did not give federal officials the power to admit or exclude them. Neither did they require the payment of taxes or bonding fees, as the state passenger laws did. But challenges to the state laws emerged from shipmasters who felt that the laws were a burden on their business.

Commerce Clause jurisprudence

The Constitutional debate over passenger laws took place in the context of furious disagreements over the scope of the Interstate Commerce Clause of the U.S. Constitution.[29] This provision gave Congress the power to regulate commerce that crossed state boundaries. Developments in transportation, such as canals and steamships, and increased intercourse among citizens of different states increased the importance of this clause. Attempts by the states to regulate such commerce led to conflicts over the extent of the power of the states in light of the Commerce Clause.

The U.S. Supreme Court had been struggling with varied interpretations of this clause since the early 19th century. First, what was the scope of the term "commerce"? It was clear that this included the trading of goods, but did it also include regulations that incidentally affected commerce? For example, the Court split over whether state regulation of steamboats that passed through rivers within a state was covered by the Commerce Clause. A broad interpretation of Commerce Clause would hold that state regulation that affected the *means* of commerce, even though it did not regulate the products that were carried, would still violate the Clause.

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[27] Bromwell, *History of Immigration to the United States*, 206-207.

[28] "AN ACT to provide for ventilation of passenger-vessels, and for other purposes," May 17, 1848, reprinted in ibid., 211-215.

[29] U.S. Constitution, Art. I, Sec. 8.

Second, was the power exclusive to Congress? If it was exclusive, all state regulations that touched upon "interstate commerce" would be unconstitutional. On the other hand, if it was concurrent, the question was *when* the state laws would have to give way to Congressional regulation. Could states regulate interstate commerce so long as it did not conflict with existing federal law, or did the states have to defer to Congress even if Congress had not legislated? Some would argue that the lack of Congressional regulation meant that Congress wanted the area to remain *unregulated*. Under this interpretation, any state regulation in that field would be against the intent of Congress and a violation of Congressional powers.

Finally, could the "police power" of the states justify a law that would otherwise seem to interfere with interstate commerce? States could enact laws to protect public safety, public health, public morals, etc. under the banner of police power. Could passenger laws be justified as an exercise of this power?

***Passenger cases I*: The Court upholds state power**

The first case involving the constitutionality of New York's passenger law was decided by the Supreme Court in 1837.[30] A ship-owner who was fined for not complying with its taxation requirements brought the constitutional challenge. He argued that the law was a regulation of interstate commerce and violated the exclusive power of Congress over such regulation. In addition, he asserted that the law violated the Migration Clause, which he argued gave Congress the exclusive power to regulate all forms of migration after 1808. He further asserted that the law violated the treaty-making power of the federal government because the law could interfere with the foreign relations of the United States.

The Court upheld the New York law as an exercise of the police power of the states. The Court thought that it was a matter of right for a sovereign polity to police its boundaries and exclude those that it deemed undesirable:

> The sovereign may forbid the entrance of his territory either to foreigners in general or in particular cases or to certain persons or for certain particular purposes, according as he may think it advantageous to the state.[31]

The Court held that states were sovereign entities prior to the ratification of the U.S. Constitution and clearly had this power to exclude until then. The question was whether by the U.S. Constitution this power "was taken from the states and granted to Congress, for if it were not, it yet remains with them." The Court found that the states had not lost this power, and affirmed New York's regulation:

> It is apparent from the whole scope of the law that the object of the legislature was to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries or from any other of the states, and for that purpose a report was required of the names, places of birth, &c., of all passengers, that the necessary steps might be taken by the city authorities to prevent them from

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[30] *City of New York v. Miln*, 36 U.S. 102 (1837).

[31] Ibid., at 132.

becoming chargeable as paupers.[32]

A concurring opinion strongly defended poor laws as an exercise of police power of the states and emphasized that the federal government had no power to touch upon the subject of "pauperism". Such regulation should be under the plenary power of the *states*. Beneath this opinion was the fear that Commerce Clause would threaten traditional state powers. If migration of persons were to be treated as commerce, the Commerce Clause could potentially obliterate all kinds of regulations that states had enacted to control the entry, residence, and exit of people within its borders.

Meanwhile, Justice Story dissented in this case, holding that the New York law was a regulation of commerce and was unconstitutional. He argued that when a state law touched upon interstate commerce it was unconstitutional even if it is was otherwise an exercise of the police power of the state. His position would gain strength in the ensuing decades.

Ongoing conflicts over the power to regulate migration

After the first *Passenger Case*, states such as New York further expanded the scope of regulation under state passenger laws, while the federal government also began to expand the content of federal passenger laws in response to large waves of immigration from Europe. As a result, the constitutional conflict over the power of the states intensified, leading to another showdown in the Supreme Court.

Kapp, the Commissioner of Emigration of New York, suggested that the amount of revenue that New York had been raising from charging commutation had raised the jealousy of Western (inland) states. He observed that Western newspapers and Western members of Congress were demanding a *pro rata* distribution of funds that New York gained from commutation. Those people were also arguing that the federal government should take over the regulation of immigration.

Kapp defended the right of states to regulate immigration as a matter of police power:

> The care of the immigrants, after he lands, is purely a police regulation, in which the people of the State where he lands are so exclusively interested as to have, beyond a doubt, the best right to provide for him.[33]

He also warned that immigration regulation by the federal government would be mired by bureaucratic obstacles because of the distance between Washington and the states that deal with immigrants on a daily basis. His view was that once immigration became a subject not of practical regulation on the ground but of idealistic debate at a distant, national level, it would become a subject of political strife:

> One of the worst consequences (of national control) would be that immigration would speedily become a political question, and as such the subject of strife among demagogues…[34]

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[32] Ibid., at 133.

[33] Kapp, *supra* note 15, 154.

[34] Ibid., 156.

The question over control of migration was entangled with another major constitutional issue of the day. This was in the 1840s, a time when the debate over the power to control the domestic movement of slaves and free blacks was dividing the country. If the judges wanted to place a limit on the power of states to regulate migration, they had to think of the effects that such a precedent will have on controlling the movement of blacks.[35] At the same time that the Court was debating whether the Commerce Clause gave exclusive power to Congress or concurrent power to the states, it was struggling with the same question regarding the Fugitive Slave Clause.[36] Judges could hardly conceal their tension over slavery, as we see below.

***Passenger Cases II*: The Court leaves room for both**

The U.S. Supreme Court decided in 1849 that the passenger laws of New York and Massachusetts were unconstitutional.[37] The laws imposed a uniform fee on each passenger brought to its ports, which ship-owners had to pay to port officials upon arrival. This "head tax" on immigrants led to constitutional challenges by ship-owners who complained of the burden imposed on their business.

Although the case focused on the Commerce Clause, the result of the decision was that it was "almost impossible to say on which side the scale of authority turn[ed]".[38] Five judges held the law unconstitutional, but for different reasons and with different implications for the constitutional debate over federal power. Four dissented and held the law constitutional, emphasizing the right of the states to control their borders.

In fact, a closer look suggests that the majority of the justices *supported* the states' power to regulate migration, although they struck down state laws in this particular case. In addition to the four dissenting justices that upheld the state passenger laws, at least three other judges who were among the majority reserved the power of the states to regulate migration in some instances. Justice Grier struck down the law because he thought that the law was "not a case of a police regulation to repel paupers" but was "founded on the claim of a power in a state to exclude all persons". He emphasized the power of the states to exclude undesirable persons including free blacks, whether they were from foreign countries or from other *states*:

> …the controversy in this case is not with regard to the right claimed by the State of Massachusetts… to repel from her shores lunatics, idiots, criminals, or paupers, which any foreign country, or even one of her sister states, might endeavor to thrust upon her; nor the right of any state, whose domestic security might be endangered by the admission of free negroes, to exclude them from her borders. This right of

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35 Austin Allen, *Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court: 1837-1857* (Athens and London: The University of Georgia Press, 2006), 75-97.

36 *The Passenger Cases* were decided in 1837 and 1849. The *Prigg* decision regarding fugitive slaves was decided in the midst of this development, in 1842.

37 *The Passenger Cases*, 48 U.S. 283 (1849).

38 Kapp, *supra* note 15, 169. Each judge filed an opinion, resulting in nine opinions totaling 300 pages in the reporter. None of them was designated the opinion of the Court.

> the states has its foundation in the sacred law of self-defense, which no power granted to Congress can restrain or annul. [39]

It is only because the law in question taxed all passengers coming to the state that Justice Grier thought it interfered with commerce and went beyond the police powers of the state. Similarly, Justice McLean argued that the law was not a health law that would be within the police power. States could not prohibit the introduction of foreigners "except to guard against diseases and paupers." While this statement limits the power of individual states to regulate immigration, the main targets of poor laws and passenger laws had been the poor and the sick. Justice McLean's opinion would thus let the states retain the power to exclude people whom they had always wanted to exclude.

Finally, Justice Wayne, while generally limiting the power of states to regulate migration, carved out an exception for regulating the movement of blacks. He argued that slavery was given a distinct protection by the Constitution. So while arguing that passenger laws were unconstitutional "if it practically operates in a regulation of commerce", he said that slave states can still prohibit the introduction of free blacks.

Thus, even judges who held this particular case unconstitutional acknowledged that states had some power to control migration. Only Justice Catron held that state laws regulating migration were unconstitutional in all instances. He argued that such regulations interfered with personal intercourse and treaty provisions guaranteeing reciprocal liberty in commercial activities.

The four dissenting judges thought that regulation of migration was entirely within the power of the states. They thought that states had exclusive power to admit or exclude aliens and to decide who they wanted to associate with. Justice Woodbury pointed out that "all governments may exclude foreigners", and that state governments had this power. He cited the strong opposition to Alien and Sedition Acts soon after the ratification of the Constitution as historical precedent. He argued that those acts were considered unconstitutional "because it was believed this right [the power to exclude foreigners] had not been surrendered [to the federal government]."

Chief Justice Taney's dissent stands out for the way he framed the question. According to Taney, the case was about whether states could be compelled to associate with whomever the federal government chose to admit. Taney refused to see the question as involving the Commerce Clause or taxation on importation of goods. Personal intercourse was unlike commerce or importation of goods that were subject to federal power. It was about the states' ability to control its citizens, and was therefore essential to the existence of states. Taney insisted that states could not be compelled to admit persons it did not like. Whether they were aliens, paupers, or slaves, states had complete power to exclude people or attach conditions when allowing them to stay.

Taney was concerned with the impact of the ruling on this case upon the power of the states to regulate the migration of blacks. He thought that regulation of foreign migration and regulation of black migration should be dealt with in the same manner. The power to exclude persons that were "dangerous or injurious to the interests and welfare of its citizens" were inherent in the sovereignty of the states and the determination of who might

[39] 48 U.S. 283, at 457.

be excluded was to be left to the discretion of the states. Limiting this discretion and holding the passenger laws of the North unconstitutional would endanger Southern laws that barred the entry of free blacks.[40]

Concurrent sovereignty and regulation of migration

In the years following the *Passenger Cases*, a consensus emerged on the Court about "concurrent sovereignty", under which both the federal and state governments were considered to be sovereigns with control over their own political communities. Instead of sweeping generalizations about which government could command power, the Court adopted a case-by-case approach that gave some leeway to the states while not trivializing federal powers under the U.S. Constitution.[41]

The Court allowed the states to enact laws regulating the migration of the free black population as an exercise of police power. States could also enact laws to regulate the migration of paupers or sick persons. These were within a sovereign body's inherent right to protect itself. Only when such regulation interfered with general commerce between the states did the Court see it as a violation of federal power under the Interstate Commerce Clause. This approach satisfied both wings of the Court—the nationalist wing that wanted to enhance federal power and the states' rights wing that wanted to preserve the power of the states and along with it the institution of slavery.

A case decided in 1852 (*Moore v. Illinois*) shows this balancing act.[42] The plaintiff in this case challenged an Illinois state law which prohibited the harboring of fugitive slaves as a violation of the Fugitive Slaves Act enacted by Congress. The question was whether Congress had the exclusive authority to legislate in this field or whether states could legislate concurrently. The Court rejected the challenge, pointing out that the state law did not interfere with the federal law or the provision of the Constitution obliging states to return fugitive slaves to their masters. The Court went on to emphasize the general power of the states to regulate the migration of persons, including free blacks, into their territories:

> The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens, and of the public peace, has never been surrendered by the states or restrained by the Constitution of the United States. In the exercise of this power, which has been denominated the police power, a state has a right to make it a penal offense to introduce paupers, criminals, or fugitive slaves within their borders, and punish those who thwart this policy by harboring, concealing, or secreting such persons. Some of the states, coterminous with those who tolerate slavery, have found it necessary to protect themselves against the influx either of liberated or fugitive slaves, and to repel from their soil a population likely to become burdensome and injurious either as paupers or criminals.[43]

This clarified the ambiguity left in the *Passenger Cases*. In *Moore v. Illinois*, the

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40 Allen, *Origins of the Dred Scott* Case, 88-89.

41 Ibid., 92-94.

42 55 U.S. 13 (1852); Allen, 94-95.

43 55 U.S. 13, 18.

Court confirmed that states can validly exercise their police power to limit the entry of "paupers, criminals", as well as "liberated or fugitive slaves". Thus, while the Court had struck down the laws of Massachusetts and New York in the *Passenger Cases*, subsequent decisions showed that it had not altered the general ability of the stats to regulate the migration of persons. Taking this cue, New York slightly modified the tax-related provisions of its passenger laws to allow the option of either posting a bond or paying the commutation tax, and otherwise continued the law as it was before this decision.[44] By providing such an option, the state could avoid being condemned for taxing the migration of persons in violation of the Commerce Clause. New York's Commissioner of Emigration expanded his activities following this modification, as we have seen earlier.

III. The emergence of national debates over immigration

Concurrent power of Congress and the states

While states thus retained their control over migration, Congress was also gradually moving into this area of regulation. In the late-1840s it expanded federal passenger laws to remedy the conditions on transatlantic vessels. This had the effect of limiting the number of immigrants on each ship. In the 1850s Congress began to consider a more direct regulation of immigration in the name of excluding "foreign paupers and criminals". The House of Representatives, for example, created a special committee to discuss the issue of "foreign paupers and criminals". The committee returned a report which focused on the increase in the number of such immigrants and called for action.

From the time the *Passenger Cases* were decided, until the early 1870s when Congress enacted anti-Chinese immigration legislation, the power to regulate immigration was exercised concurrently by Congress and the states. An act of Congress symbolic of this state of affairs was the "Act to encourage Immigration" which was passed by Congress and approved by the President on July 4, 1864.[45] This act, while explicitly refusing to authorize "any contract… creating in any way the relation of slavery or servitude," allowed and made enforceable the use of contract labor, whereby immigrants pledged a portion of their wages in return for the cost of transportation.[46]

The act maintained a careful balance between the emerging federal control of immigration and the existing system of state control. While it established the United States Emigrant Office in New York and created the office of superintendent of immigration there, it explicitly mentioned that "the duties hereby imposed upon the superintendent in the city of New York shall not be held to effect the powers and duties of the commissioner of immigration of the State of New York…"[47] Thus, the federal law took note of the concurrent power of the states to regulate immigration.

Naturalization and national politics

As immigration of foreigners became a national issue, presidential elections became a

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[44] Leach, *supra* note 14, 28.

[45] *U.S. Statutes at Large*, XIII, 385-387.

[46] A decade later this form of immigration was *prohibited* by Congress.

[47] Section 4 of the "Act to Encourage Immigration" (July 4, 1864).

referendum on attitudes towards foreigners and immigration as much as on slavery. By the 1850s, nativist organizations such as the Know-Nothing Party were organized throughout the nation, supporting candidates in state and federal elections. Fueling the resentment against immigrants was their emerging political power. Strengthened by the bonds of common origin as well as the activities of immigrant aid societies, newspapers, and mutual benefit associations, immigrant groups emerged as bloc voters that could sway an election.

This increase in the number and power of immigrant voters was seen as a result of liberal naturalization and citizenship policies. While Congress had enacted naturalization laws since the ratification of the Constitution, they were broad, general rules which left much discretion to the state courts that administered the bulk of naturalization.

The basic framework for naturalization in the United States was established in 1802.[48] The premise of this law was that "any alien, being a free white person" may be naturalized. The law provided a two-step procedure where a person who wanted to naturalize declared his intent to do so at least three years in advance and applied for naturalization after that period.[49] This allowed other citizens to observe for a period of time whether that person was fit for naturalization. In order to naturalize, at least five years of residence in the United States and at least a year of residence in the particular state or territory were required in addition to having declared the intent. The person had to have good moral character and had to renounce all hereditary titles and allegiances to other sovereigns.

Both state courts and federal courts were given jurisdiction to administer naturalization. The 1802 law required people who wanted to naturalize to report to a district court of the United States, but also provided that "every court of record in any individual State having common law jurisdiction… shall be considered as a district court within the meaning of this act".[50] Federal courts were few and in distant locations, so most naturalizations took place in state courts. While subsequent amendments to the federal law clarified some rules such as what could count as evidence of residence, much discretion was left to the state courts that applied the law.

States adopted liberal policies in order to encourage immigration and increase their population as well as representation in Congress. Many states granted political rights to immigrants even before they were naturalized. In those states, foreigners could vote so long as they declared their intent to naturalize.

These liberal policies became the target of anti-immigrant politicians. They criticized the states for condoning naturalization fraud, in which political parties paid the naturalization fees in return for immigrant votes. They also criticized the states for granting suffrage to foreigners while many poor natives were disenfranchised by property and tax requirements. Nativist organizations demanded that long-term residency, religious

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[48] "An Act to establish a uniform rule of naturalization, and to repeal the acts heretofore passed on that subject," April 14, 1802 (reprinted in Bromwell, *History of Immigration to the United States*, 190-193). Prior to this, there was a temporary surge in anti-alien sentiment which resulted in the Alien and Sedition Acts of 1798. The 1802 law was enacted to replace that Act.

[49] This was reduced to two years by the Act of May 26, 1824 (reprinted in ibid., 196-197).

[50] Sec. 3 of the Act of Apr. 14, 1802.

conformity, and an understanding of the republican form of government should be made qualifications for voting. Governor Thomas H. Hicks of Maryland, elected from the Know-Nothing Party, represented this view in his inaugural address in 1858:

> We have seen this swarm of immigrants everywhere elevated, in five short years, to the power and dignity of citizenship: without regard to character or fitness, and ignorant of the habits, laws and languages of their new home. We have seen them hunted up on the eve of an election, whose result they are to determine, with all their principles of monarchy or anarchy about them…[51]

In Massachusetts, the Governor in 1855 proposed a state constitutional amendment that would ban foreigners from voting for twenty-one years after naturalization. The state legislature first adopted the twenty-one year restriction, then reduced the waiting period to fourteen years, and further down to two years before putting the measure on popular ballot. Even Republicans in that state agreed that some kind of restriction was necessary due to the prevailing sentiment in the state.[52] In New York too, the state Republican platform of 1858 called for extending the waiting period before naturalized immigrants could vote.[53]

The Massachusetts measure drew criticism from Republicans outside the state that feared the loss of immigrant votes. This was especially a concern in the Midwestern states, where Germans had become a powerful voting bloc. Republican newspapers in Detroit, Chicago and Ohio urged Massachusetts Republicans to vote down the measure. In the end, the measure was adopted by Massachusetts citizens, but with less than expected support and large sectional disparities. The measure received support from the base of Know-Nothing party around Boston, while the majority of voters in the Republican heavy areas opposed it.[54]

The adoption of a restrictive measure in Massachusetts forced Republican organizations in other states to clarify their positions on immigrants and politics. The Republican state conventions in Ohio and Iowa adopted resolutions affirming equal rights for all citizens, including naturalized citizens. Waiting periods for naturalized immigrants to vote would violate this principle. Throughout the Midwestern states, Republicans made a point of electing or appointing German and Irish immigrants to leadership positions within the state government and state parties.[55]

By 1860, the immigrant-friendly contingent in the Republican Party was exerting strong influence on Republican platforms. Carl Schurz, who was himself of German descent, sat on the committee that drafted the party platforms. He succeeded in including items condemning the waiting period restriction that passed in Massachusetts and calling for "equal rights among citizens, without regard to creed or birthplace".[56] This idea of

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51 "The inaugural address of Thomas H. Hicks, governor of Maryland, delivered in the Senate chamber, at Annapolis, Wednesday, January 13th, 1858" [pamphlet], 4.

52 Eric Foner, *Free Soil, Free Labor, Free Men* (New York: Oxford University Press, 1970), 250-251.

53 Ibid., 253, footnote 59.

54 Ibid., 251-252.

55 Ibid., 253.

56 Conspicuously absent from this list was "race".

equal rights originated from a meeting in Chicago of German leaders from the Northern states. The national convention adopted it over objections by the more conservative wing within the party.[57]

This debate also involved a larger sectional conflict between the North and the South. Most European immigrants headed to the industrial centers of the North, such as New York, Boston, Philadelphia, and Chicago. The increase in Northern population threatened the political power of the South. For the South, the balance of powers was a critical component of the U.S. Constitution. For example, the Three-Fifths Clause had allowed the South to increase their representation in Congress and their share of Electors in the presidential elections. But this balance was unraveling because of the prohibition of the importation of slaves and the emigration of free blacks out of the South, both of which served to limit the increase in Southern population while the North gained population through international and interstate immigration.

Chapter conclusion

During the same era (1830s–1850s) in which conflicts between the states on the question of black citizenship intensified, states fought over another issue that was deeply related with citizenship. This was the ability to control immigration from other states and nations. States had traditionally exercised the discretion to admit or exclude strangers, including both people from other *states* as well as *nations*, through the system of poor laws and passenger laws.

The dramatic rise in the number of immigrants arriving from Europe, especially in the 1840s, led to calls for Congressional regulation. Congress until then had not limited immigration and had left it to the states. Further, it was unclear whether Congress had the power to regulate the migration of persons other than prohibiting the slave trade.

In a series of cases challenging state passenger laws, the U.S. Supreme Court was asked to decide whether the states had the power to regulate immigration. These cases arose because of claims made by merchants and shipping companies that state passenger laws violated the Interstate Commerce Clause. The Supreme Court held, in 1849, that state regulations that interfered with movement of people in general exceeded the power of the states. In this instance the Court struck down the passenger laws of Massachusetts and New York because they imposed a tax on immigrants seeking entry. But at the same time, the majority of the Justices maintained that states did have the power to exclude particular people based on its police powers. The end result was that states could continue to exclude those whom it wanted to exclude.

But during the same time, Congress began to expand the scope of federal passenger laws, backed up by the Court's endorsement of the idea of "concurrent sovereignty" that allowed both the federal and state governments to control their physical boundaries, and by extension, the rights of people within the borders. This ambiguous situation was a result of tensions regarding the citizenship of free blacks. It was difficult to decisively rule in favor of Congressional or state power, since this might affect the debate over the power to regulate the migration of blacks.

Both the issue of black citizenship and immigration in general were framed as a

[57] Ibid., 257-260.

question of whether states could keep out people whom they desired to keep out. The next two chapters will examine how the answer to this question shifted following the Civil War, as Congress and the Court rewrote the rules regarding citizenship.

VII. Reconstruction and extension of federal citizenship

Prior to the Civil War, whether blacks had federal or state citizenship and what kind of rights they had as a result led to intense controversies between Northern and Southern states. The *Dred Scott* opinion took a decisive position against the notion of black citizenship. Blacks were neither federal citizens nor citizens of any of the states. Thus, regardless of whether a right attached to federal citizenship or state citizenship, they could not assert them.

One of the principal aims of post-war Reconstruction was to reverse the position adopted in the *Dred Scott* decision. As Robert Kaczorowski has noted, the "most important question for the framers was whether the national or the state governments possessed primary authority to determine and secure the status and rights of American citizens". Republicans, who were responsible for drafting the various civil rights laws and constitutional amendments during the period of Reconstruction, were committed to the primacy of federal citizenship and the authority of the federal government to protect a broad range of rights that they considered a part of that status.[1]

The Fourteenth Amendment to the U.S. Constitution (1868) granted federal citizenship to all persons born under the jurisdiction of the United States. It was, in the words of a constitutional scholar, "the first authoritative declaration in our history… of what constituted a citizen of the United States".[2] Until then, a person first had to have citizenship in one of the states, and based on that state citizenship, he can claim the "privileges and immunities of a citizen" in other states to which he travelled. But now federal citizenship was granted regardless of state citizenship. Justice Miller, writing in a constitutional treatise, emphasized the significance of this change:

> It was maintained by many statesmen, up to the time of the adoption of the Fourteenth Amendment, that there was no such distinctive character as 'a citizen of the United States;' and that, on the contrary, the designation of 'a citizen of a State' had been long known and understood, and as such, and by virtue of that fact, the person was a citizen of the United States. … [T]he statesmen who lived in the slave-holding States vehemently maintained that it left out as well all the slaves… they also insisted that it left out all the free colored population.[3]
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> … I will therefore turn your attention to the Fourteenth Amendment to the

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1 Robert J. Kaczorowski, "Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction," *New York University Law Review*, Vol. 61 (1986), 863-940, at 866-867. See also, Rebecca E. Zietlow, "Belonging, Protection, and Equality: The Neglected Citizenship Clause and the Limits of Federalism," *University of Pittsburgh Law Review*, Vol. 62 (Winter, 2000), 309. Zietlow points out that even under the revival of federalism (autonomy of the states) under the Rehnquist Court, the rights of federal citizens had been rediscovered as a rationale to protect individual rights against state regulation.

2 Simeon E. Baldwin, "The Citizen of the United States," *Yale Law Journal*, Vol. II, No. 3 (Feb., 1893), 89.

3 Samuel Freeman Miller, *Lectures on the Constitution of the United States* (New York: Banks and Bros., 1891), 277.

> Constitution of the United States, where that term is now clearly defined, and its meaning placed beyond all question. This it was intended to do, as well as to put at rest the question of the civil status of the negro.[4]

The Fourteenth Amendment reversed the relationship between federal and state citizenship. Now, all persons born within the United States acquired citizenship of the *United States*, independently of whether this person was a citizen of a particular state. Federal citizenship now existed *prior to* state citizenship. Further, when that person moved into a state, he automatically acquired citizenship of that state too.

But the crucial question was what citizenship of the United States (federal citizenship) entitled a person to. Did this mean that there were rights as a federal citizen that he could assert in any state in which he resided? What were those rights? Was there any additional requirement that states could impose before a person can assert the full extent of rights, or did states have to grant all rights immediately? In the following sections I examine how the answers to those questions turned out to be following Reconstruction.

I. Legislative expansion of federal citizenship

From slave to citizen: The Civil Rights Act of 1866

The Thirteenth Amendment, by declaring that "neither slavery nor involuntary servitude… shall exist within the United States" institutionalized the victory of the abolitionist North in the Civil War. This much was expected as a result of that war. But in the process of formulating the Amendment two main concerns were raised by opponents. One was the status of blacks after the abolition of slavery and the second was the meaning of giving Congress the power to enforce this provision. What kind of power did it give Congress over the states?

In attempting to persuade Democrats to support the Amendment, Senator Henderson from Missouri said that the Amendment did not grant any rights to blacks other than emancipation from slavery:

> I will not be intimidated by the fears of negro equality… Whether he shall be a citizen of any one of the States is a question for that State to determine… So in passing this amendment we do not confer upon the negro the right to vote. We give him no right except his freedom, and leave the rest to the States. [Emphasis by the author][5]

In other words, abolition did not make black people citizens with equal rights. Their status was the same as free blacks prior to the Civil War. Chief Justice Taney held in the *Dred Scott* decision that they were not citizens. Senator Henderson was correct about what the issue was, but was wrong about the outcome of events that followed. Once the Thirteenth Amendment was ratified, Republicans continued to pursue the question of the

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[4] Ibid., 278. Ironically, Justice Miller, who wrote these words, would eventually decide *The Slaughterhouse Cases* that narrowed the significance of federal citizenship.

[5] Charles Fairman, *Reconstruction and Reunion: 1864-88, Part One* (New York: Macmillan, 1971), 1142.

status of blacks in the South. For them, the mere declaration of abolition was not enough. They deemed it necessary to confer the status of *citizenship* to blacks, with attendant *rights*.

The Thirteenth Amendment laid the groundwork for changes in federal-state relations that followed. This was not an inevitable outcome of the war. Many in the South thought that they could retain the power to govern after the conclusion of the war. Yet, the Thirteenth Amendment, after declaring that slavery shall be abolished throughout the Union, gave *Congress* the power to enforce this provision. Up to that point Amendments to the Constitution were all about restraining the powers of the *federal* government in order to protect the rights of "the people and the states".[6] Now this framework was reversed, so that the federal government was given power to restrain the *states* on behalf of the people.[7]

Among the first enactments of the Thirty-Ninth Congress which was convened after the conclusion of the Civil War was the Civil Rights Act of 1866. The Act did two things: it granted blacks, including the newly emancipated slaves, the status of citizenship, and provided a set of rights that were to be guaranteed as incidents of that citizenship. The law summarily "naturalized" blacks to remove any doubt about their status. While there was a debate over whether Congress had the power to grant citizenship to blacks under the Naturalization Clause, Trumbull cited as precedents the collective naturalization of (Native American) Indians by treaties as well as of foreigners upon annexations of territory.[8]

The Act then proceeded to declare the rights that they had as citizens. Specifically listed among them were the right to hold property, right to contract, and the right to sue, all of which had been denied to slaves and in some cases to free blacks prior to the Civil War. In addition, the language of the Act permitted a broader reading that would encompass various rights that the Courts had previously counted as among the privileges and immunities of citizens of the states.[9]

Senator Lyman Trumbull, who introduced the bill, emphasized the significance not

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[6] The Bill of Rights (The first ten amendments) was initially a restraint on the federal government. Today, most of the provisions apply to the state governments as well as a result of judicial interpretation that incorporates the Bill of Rights into the Fourteenth Amendment (which restrains the state governments).

[7] Fairman, *Reconstruction and Reunion*, 1156. Commenting on the Thirteenth Amendment he says: "never before had there been authority for federal intrusion between the State and its inhabitants in respect of the civil status of the latter."

[8] Irving Berdine Richman, "Citizenship of the United States," *Political Science Quarterly*, Vol. 5, No. 1 (Mar., 1890), 112. See also, Fairman, *Reconstruction and Reunion*, 1176-77.

[9] The first section of the Act provides that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other…"

only of the status of citizenship but also of the range of rights that were attached to it.[10] Commenting on the Civil Rights Act of 1866, he asked:

> …what rights do citizens of the United States have? To be a citizen of the United States carries with it some rights; and what are they? They are those inherent fundamental rights which belong to free citizens or freemen in all countries…

Trumbull meant to include among the rights guaranteed to federal citizens the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. By doing so, states would be prohibited from depriving these rights from blacks, who were among "citizens of the United States". On the other hand, by specifically enumerating the rights to be covered under this law, the drafters hoped to reduce the fear that the law would lead to assertions of social and political equality between whites and blacks. The prospect of black suffrage, black juries, and integrated schools "were the common cues for panic" among whites, and the Republicans had to assure that the law did not extend to those matters.[11]

Trumbull went further by giving the federal government the ability to enforce those rights *within* the states, that is, to intervene if it is deprived in a state. Until then, discrimination *within* a state, among its own citizens, was out of the reach of the comity clause and the federal judiciary.[12] The framers of the Civil Rights Act of 1866 were aware of this limit of the Comity Clause. Representative James Wilson, who was the floor manger of the Act, cited a broad range of rights which he thought was guaranteed by this clause and mentioned that:

> …[If] the States should admit, and practice the admission, that a citizen does not surrender these rights because he may happen to be a citizen of the State which would deprive him of them, we might… leave the whole subject to the several States. But, sir, the practice of the States leaves us no avenue of escape, and we must do our duty by supplying the protection which the States deny.[13]

Republicans were proposing a national standard of rights, guaranteed to all federal citizens, with Congress having the power to define what those rights were and the federal courts having the power to protect those rights. This meant that the federal government should have the power to intervene if a southern state deprived the rights of blacks. John Bingham articulated this position in 1866 when he argued for a constitutional amendment to establish this authority:

> …hereafter there shall not be any disregard of that essential guarantee of your Constitution in any State of the Union… By simply adding an amendment to the Constitution to operate on all the States of this Union alike, giving to Congress the

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10 Richman, *supra* note 8, 104-123.
11 Patricia Allan Lucie, *Freedom and Federalism: Congress and Courts, 1861-1866* (New York: Garland Pub., 1986), 158.
12 Kaczorowski, *supra* note 1, 889.
13 Ibid., 889-890.

> power to pass all laws necessary and proper to secure to all persons—which includes every citizen of every State—their equal personal rights; and if the tribunals of South Carolina will not respect the rights of the citizens of Massachusetts under the Constitution of their common country, I desire to see the Federal judiciary clothed with the power to take cognizance of the question, and assert those rights by solemn judgment, inflicting upon the offenders such penalties as will compel a decent respect for this guarantee to all the citizens of every State.[14]

Bingham emphasized the power of Congress to reach "every citizen of every State" and of the federal judiciary to intervene on behalf of their rights, broadly defined. Such an assertion would have been outrageous from the standpoint of Southern states during the controversies over fugitive slaves. Bingham denied a state's ability to make independent judgments on the status and rights of its population. In the words of historian Earl Waltz, the Civil Rights Act of 1866 would "turn the antebellum theory of federalism on its head, establishing a regime in which the relationship between the citizen and the federal government was paramount and national authorities were to have primary responsibility for defining and enforcing the rights of the citizenry."[15]

If federal citizenship was granted to every person and if important rights were attached to federal citizenship as Bingham proposed, state citizenship would lose its meaning. Democrats could not accept this position.[16] For example, a Senator from Maryland contended that federal citizenship would not automatically lead to citizenship of a state until he was recognized as one by the states. Further, important rights remained attached to state citizenship so that states remained in control of the status and rights of people within its territorial boundaries. Senator Van Winkle denied the power of Congress to grant federal citizenship to blacks by statute. Such an act would require a constitutional amendment according to his view.[17]

President Johnson vetoed the Civil Rights Act, emphasizing in his veto message the changes at stake and his opposition to that change. Johnson asked whether it could be "reasonably supposed that they [blacks] possess the requisite qualifications to the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States". He analogized the status of blacks to immigrants awaiting naturalization, pointing out that they had to "pass through a certain probation, at the end of which… they must give evidence of their fitness to receive and to exercise the rights of citizens". He further argued that the bill would be "a discrimination against large numbers of intelligent, worthy, and patriotic foreigners, and in favor of the negro".[18]

Johnson emphasized the radical change that the first section of the Act, which enumerated the rights of federal citizens, would bring. He raised the fear that the

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[14] Frank J. Scaturro, *The Supreme Court's Retreat from Reconstruction: a distortion of constitutional jurisprudence* (Westport, Conn.: Greenwood Press, 2000), 30-31.

[15] Earl M. Maltz, *Civil Rights, The Constitution, and Congress, 1863-1869* (Lawrence, Kan.: University Press of Kansas, 1990), 64.

[16] Kaczorowski, *supra* note 1, 903-907.

[17] Fairman, *supra* note 5, 1230.

[18] *Journal of the Senate of the United States of America* [hereinafter *Journal of the Senate*], 39th Congress, 1st Session, 280 [Mar. 27, 1866].

provision would force the states to accept political and social equality between whites and blacks:

> [A] perfect equality of the white and colored races is attempted to be fixed by federal law in every State of the Union, over the vast field of State jurisdiction covered by these enumerated rights… If it be granted that Congress can repeal all State laws discriminating between whites and blacks in the subjects covered by this bill, why, it may be asked, may not Congress repeal, in the same way, all State laws discriminating between the two races on the subjects of suffrage and office?[19]

Johnson conceded that blacks might have some rights, such as the right to ownership of property and the right to contract, but pointed out that those could be guaranteed without having to grant citizenship. Aliens had been granted those rights without the benefit of citizenship in many states. In his view, then, blacks were like aliens, whose rights were at the mercy of white citizens.

Johnson's veto was met with a strong rebuke from Congress. On Apr. 6, 1866, the Senate overrode President Johnson's veto by a vote of 33 to 15. The House also did so three days later by a vote of 141-22. In July, Congress also overrode President Johnson's veto and passed the Freedmen's Bureau bill. This extended the life of the Bureau, which the federal government established after the Civil War. Its duty was to protect the rights of "refugees" (newly emancipated slaves without places to go) and blacks in general. It established a special court, transferring many cases involving blacks from hostile state and local courts and generally ruling in their favor.[20] The Bureau provided a means through which blacks could assert rights as a citizen—of the United States.

The Freedmen's Bureau and the Civil Rights Act of 1866 were products of the same idea. The latter made the framework of civil rights enforcement pioneered by the Freedmen's Bureau permanent. It gave the federal government a role in protecting the rights of federal citizens, but instead of maintaining a special institution in the South, it relied on existing federal courts for its enforcement.

Thus, in the immediate aftermath of the Civil War, Republicans overturned the *Dred Scott* decision, granted federal citizenship to blacks, extended the rights pertaining to federal citizenship, and provided a mechanism to protect those rights. These were attempts to fundamentally change the relationship between federal and state citizenship in the United States.

II. Constitutional guarantees of federal citizenship

The Civil Rights Act of 1866 and the power of the federal government to protect the rights of blacks as citizens lacked a firm constitutional grounding. This was an extension of a contest over the interpretation of the Thirteenth Amendment. The Amendment abolished slavery and gave Congress the power to enforce the provision. Radical Republicans thought that this gave Congress the power to protect a broad range of rights of

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[19] Ibid., 281.

[20] Kermit L. Hall, *The Magic Mirror* (New York: Oxford University Press, 1989), 143.

citizens, for that was what abolishment of slavery required. But for Conservatives, the Congressional power to enforce abolition was just that—to ensure that slavery was prohibited across the nation. Protecting the rights of citizens was a separate matter. There was no authority for Congress to enact a law like the Civil Rights Act of 1866.

Some argued that the *Dred Scott* decision, which denied the citizenship of blacks, was still valid as a precedent. In their view, the abolishment of slavery only meant that all blacks now stood on the same ground as free blacks before the War. *Free* did not necessarily mean that they were *citizens*, as Justice Taney had said in the *Dred Scott* case.[21]

This uncertainty surrounding the citizenship of blacks and the power of Congress to protect the rights of citizens led to Republican efforts to enshrine the ideas behind the Civil Rights Act of 1866 through another constitutional amendment. This would give explicit constitutional powers to the federal government to enforce the rights of federal citizens including blacks, especially in the Southern states.[22]

The Fourteenth Amendment was proposed by Congress in June, 1866 and ratified in July, 1868. It was a point-by-point refutation of the Southern position prior to the Civil War. Section one declared that all persons born in the United States were "citizens of the United States and of the State wherein they reside". This reversed the *Dred Scott* decision which held that blacks were neither federal citizens nor citizens of any of the states. Under this section they were federal citizens and a citizen of the state in which they resided. No longer did they have to alternate between citizenship, quasi-citizenship or slavery depending on which state they resided in.

The same section prohibited the states from depriving the privileges or immunities of citizens of the *United States*. This was particularly important for blacks, who acquired the status of citizenship by the first sentence of this section. Together, this meant that blacks now had federal citizenship, with attendant rights, that the states were bound to respect.

Just what rights were protected as "privileges and immunities of citizens of the United States" was a matter of debate. But framers of the Fourteenth Amendment endorsed a broad reading of the term encompassing all the rights included in the Bill of Rights. For example, in explaining the range of rights covered by the term to the Senate, Senator Howard, who represented the committee that drafted the Amendment, recited a list of rights guaranteed by the Bill of Rights.[23] During the course of the debate over ratification, many also referred to the denial of freedom of speech by the South. Abolitionists had been intimidated and expelled, and speeches and publications touching upon abolition were banned and suppressed. From this, too, it was clear that many expected the Amendment to protect freedom of speech from harassment by state and local authorities.[24]

Section two was another provision that represented the triumph of Northern views. This section provided for the apportionment of representatives in the House on the basis of

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[21] Richman, 113; Maltz, 62-63; David S. Bogen, "The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers," *Maryland Law Review*, Vol. 44 (1985), 989.

[22] Bogen, 992-1008.

[23] Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, N.C.: Duke University Press, 1986), 88-89.

[24] Ibid., 131-145.

"the whole number of persons in each State", but with proportionate reduction in the number of representatives if any male over twenty-years old were denied the right to vote in that state. One of the proposals made by the North prior to the Civil War was to reapportion the number of representatives by counting free blacks while counting out slaves. This would have condemned slavery in the South while increasing the political power of the North. While the proposal was unsuccessful then, this section of the Fourteenth Amendment meant that Southern states would have to grant blacks the right to vote or give up some seats in Congress.

Finally, Section five gave Congress the power to enforce the provisions of the Amendment "by appropriate legislation". Thus, the Amendment went further than merely prohibiting the states from depriving the rights of federal citizens, and gave Congress the power to legislate proactively to eradicate discrimination.

A new relationship between state and federal citizenship

The framers of the Fourteenth Amendment were conscious of the distinction between state and federal citizenship. Senator Howard, during the floor debate, added the first sentence which made all persons born in the United States "citizens of the *United States* [emphasis added]." Then, he amended the second section so that states will be punished if they denied suffrage to any male "inhabitants, being citizens of the *United States* [emphasis added]." This made sure that states would not be able to circumvent section two by claiming that blacks were not *state* citizens.[25]

The Amendment was written so that blacks would have all the rights of citizenship regardless of whether they were attached to federal citizenship or state citizenship. The Privileges and Immunities Clause of the Fourteenth Amendment commanded the states to protect the rights attached to *federal* citizenship. As for any rights that remained attached to *state* citizenship, the Equal Protection Clause, which commanded the states to provide equal protection of the law to any person within its jurisdiction, could be utilized. If a state selectively deprived a right from blacks, it would be a violation of this clause.

States recognized the significance of this amendment. For example, a committee in the Texas House said that the amendment "proposes to deprive the States of the right… to determine what shall constitute citizenship of a State", while Florida's governor urged the rejection of the amendment because it would "give Congress the power to legislate in all cases touching the citizenship, life, liberty or property of every individual in the Union, of whatever race or color…"[26]

In the area of citizenship and rights the Fourteenth Amendment reversed the traditional positions of federal and state governments under the Constitution. When the Constitution was first written, the fear raised by opponents was that the *federal* government would usurp the rights of the people and the states. Thus the Bill of Rights was added to limit the powers of Congress, for example, by prohibiting it from enacting laws that violate freedom of speech. The states were trusted to protect the rights of the people. But the Fourteenth Amendment deemed the *states* as potential threats to the rights of *federal* citizens. The

[25] Garrett Epps, *Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America* (New York: H. Holt, 2006), 234.
[26] Ibid., 246-247.

Amendment was directed towards the governance of the states, and gave power to Congress to intervene with the states if they deprived the "privileges and immunities" of federal citizens.

Earlier, President Johnson had vetoed the Civil Rights Act of 1866 because it would alter race relations as well as the relationship between the federal and state government. His administration opposed the Fourteenth Amendment, as it would strengthen the trend towards a federal guarantee of racial equality based on federal citizenship. Orville H. Browning, the Secretary of Interior in Johnson's cabinet, wrote in opposition to the amendment. He thought that a broad range of state laws would be subject to review by the federal courts under the proposed amendment, which would effectively subordinate state governments to the federal government:

> It is to subordinate the State judiciaries to Federal supervision and control; to totally annihilate the independence and sovereignty of State judiciaries in the administration of State laws, and the authority and control of the States over matters of purely domestic and local concern.[27]

The Fourteenth Amendment attempted to change the official principles regarding citizenship and rights. The principles that emerged were, first, that states had to respect the rights of federal citizens (meaning blacks, in context), or else Congress would intervene. Second, could not deny rights to blacks by saying that the rights attached to state citizenship. States could not selectively grant rights to one portion of the population, for that would violate the Equal Protection Clause. This change in principle was an important step towards guaranteeing the rights of all citizens under a national standard.

Citizenship and the right to vote

Another important Constitutional Amendment during the Reconstruction era was the Fifteenth Amendment (ratified in 1870), which prohibited the states from denying the right to vote on account of race.

The association between citizenship and voting rights had been ambiguous during earlier stages of U.S. constitutional history. Property, wealth and residency requirements precluded many citizens from voting. In addition to whether citizenship should be tied to suffrage, the question of *which* citizenship should matter complicated the debate. The states' rights position held that if citizenship was to be a qualification for voting, it should be *state* citizenship that should serve as a prerequisite, not federal citizenship.

Prior to the Civil War, states insisted on deciding voting qualifications on their own. We have already seen that in New York, the state constitutional convention of 1846 chose to leave property qualifications for black voters intact. As another example, during the 1850 Constitutional Convention in Maryland, delegates emphasized that the states had the sovereign power to determine who should have suffrage:

> [It was] the settled opinion of this Convention, that it has the right to preclude naturalized citizens from the exercise of the elective franchise within the State,

[27] Curtis, *supra* note 23, 151-152.

because, by the act of naturalization, no political, but civil rights only are given.[28]

> Naturalization confers only civil and not political rights. Political rights are the fruits of State sovereignty… In Illinois aliens are permitted to vote; and is Illinois more sovereign then Maryland? The power exists in the State…[29]

Here, the debate was over naturalized immigrants. Although they were now citizens of the United States, the delegates insisted that they should be excluded from voting in state and local elections. Voting rights were not a part of the rights of U.S. citizens, but a privilege that states could grant or withhold at its will.

Republicans, although generally in favor of equal rights between blacks and whites, were also divided over the right to vote. Some thought that suffrage was a *privilege* reserved to qualified people, instead of something that was to be guaranteed as a matter of right.[30] Many white citizens had been excluded from suffrage based on property and taxation qualifications. Women were categorically excluded, although the women's movement for suffrage argued that they should have that right as citizens.[31]

Attempts to link federal citizenship and suffrage repeatedly failed in Congress. Among the Republicans, Charles Sumner was the most prominent advocate of the rights of blacks as citizens. In 1864, when the Senate debated a bill providing for a temporary government in the Montana territory, Sumner supported an amendment to grant "every free male citizen of the United States" the right to vote and eligibility for office. The amendment failed. The same year, Sumner attempted to amend the city charter of the District of Columbia so that "there shall be no exclusion of any person from the register on account of color." This too was defeated. The next year, the admission of Louisiana was the issue before the Senate when Sumner proposed an amendment that would require as a "fundamental condition" of admission that "within the State there shall be no denial of the electoral franchise… on account of color." All of these attempts failed to pass.[32] The Republicans also omitted voting rights from the list of rights to be guaranteed under the Civil Rights Act of 1866 despite Sumner's advocacy.

A step towards black suffrage was made only after the Republicans won a sweeping victory in the elections of 1866 and noticed that enfranchising blacks could help Republicans retain power. In 1867, Congress passed a bill that prohibited the denial of the franchise in the territories on account of color or race. It also passed a bill granting

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[28] Proceedings and Debates of the 1850 Constitutional Convention, *Archives of Maryland*, Vol. 101, 73 (Jan. 17, 1851) (Delegate Dorsey).

[29] Ibid., 74 (Delegate Crisfield).

[30] Kaczorowski, *supra* note 1, 881-883.

[31] See, for example, "Declaration of Sentiments and Resolutions of the First Women's Rights Convention" (1848), adopted at the Seneca Falls Convention convened by prominent women's rights advocates. The Declaration complained of the "entire disfranchisement of one-half the people of this country" and demanded "admission to all the rights and privileges which belong to them as citizens of the United States."

[32] Carl M. Frasure, "Charles Sumner and the Rights of the Negro," *The Journal of Negro History*, Vol. 13, No. 2 (Apr., 1928), 132-134.

suffrage to blacks in the District of Columbia that year.[33]

The Fifteenth Amendment was a culmination of the movement towards black suffrage, which associated *federal* citizenship with the right to vote. Since the Fourteenth Amendment had just granted all black persons born in the United States federal citizenship, the effect of this amendment was to make sure that states granted the right to vote to black citizens. The Amendment gave Congress the power to enforce this provision. The federal government could intervene on behalf of *federal* citizens, including blacks, if a state attempted to unconstitutionally deprive them of voting rights.

Congress consciously referred to *federal* citizenship as it finalized this clause. The initial draft of the act read, "No State shall deny or abridge the right of *its* citizens to vote and hold office on account of race, color, or previous condition [emphasis added]." The final draft that was reported from the Senate Judiciary Committee proposed that "The right of *citizens of the United States* to vote and hold office shall not be denied or abridged by the United States or any State… [emphasis added]." [34]

Thus, all citizens of the *United States* now had a constitutional right to vote, not only in federal elections but in state and local elections as well. By virtue of federal citizenship, people could exercise political power within a state. To the states this was a dramatic loss of control over who should decide its affairs. Blacks, who had been excluded from state citizenship and suffrage, now had both as a matter of constitutional right, owing to federal citizenship.

For the opponents, granting voting rights in state elections based on *federal* citizenship was an abrogation of state sovereignty which fundamentally changed the character of the United States from a federation of states to a single nation:

> [If] a 'right to vote' results from the amendment and is vested in 'citizens of the United States' by federal authority, all is changed: we have but one political state; our union is a union of 'citizens of the United States' as co-equal members of a single confederacy of individuals; and the States, and "the United States,"…are things of the past… [emphasis original][35]

Yet, the effect of the Fifteenth Amendment was tempered by a more limited interpretation of its provisions. The Amendment did not mean that federal citizens (including blacks) had voting rights merely by virtue of federal citizenship. Other qualifications, such as residency and property could still apply. The Amendment prohibited *distinctions based on race*—so states could still prescribe voting qualifications so long as it applied equally to both whites and blacks.[36]

This interpretation, which allowed the states to determine the eligibility to vote so long

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[33] See ibid., 139-141 for the gradual acceptance of the political equality principle by Sumner's colleagues in Congress.

[34] See 92 U.S. 214, 246 for a discussion of this report.

[35] William O. Bateman, *Political and Constitutional Law of the United States of America* (St. Louis: G. I. Jones and Company, 1876), 256.

[36] This logic would be abused by Southern states in the early 19th century, which enacted voter qualifications such as literacy tests and poll taxes that technically applied to both races but disproportionately disenfranchised the black voting population.

as it did not overtly discriminate based on race, was accepted by the courts and confirmed in a report submitted to Congress by the Secretary of State in 1906.[37] The report summarized the state of judicial interpretation as follows:

> While some courts have insisted that [the right of suffrage] was one of the distinguishing marks of citizenship, if not of national citizenship, then of citizenship of the State [case omitted], yet the courts almost unanimously have denied that the two had any necessary connection, and that not only might persons who are not citizens exercise the elective franchise [case omitted], but that citizens as such were not entitled to vote, not even within the provisions of the fourteenth amendment.[38]

States enacted laws that continued to obscure the connection between citizenship and voting rights by distinguishing citizens and electors. For example, Section 50 of California's political code provided:

> Sec. 50. Who are the people.—The people, as a political body, consist:
> 1. Of citizens who are electors.
> 2. Of citizens not electors.[39]

In this manner, states insisted upon the authority to determine who were eligible to vote, although the Fifteenth Amendment prohibited disenfranchisement on the basis of race. Naturally, there were conflicts over what amounted to a violation of this provision. It was now the turn of the courts to determine the contours of the Reconstruction Amendments.

III. Judicial tailoring of the scope of federal citizenship

Enforcement of rights and federal courts

Between 1870 and 1872, Congress followed up on the Reconstruction Amendments with a series of enforcement acts designed to utilize federal officials to protect civil rights in the South. Four of those acts were related to elections. The Enforcement Act of May 31, 1870 prohibited the use of threats, intimidation, and other illegal means to obstruct the right to vote, authorized federal officials to supervise elections and make arrests, and gave jurisdiction to federal courts for prosecutions under the act. In 1870, the Department of Justice was created, consolidating the federal government's capacity for the enforcement of federal laws.[40] Finally, in response to violence against blacks in the South by white supremacist groups such as Ku Klux Klan, the Enforcement Act of February 28, 1871 (Ku Klux Klan Act) provided for a punishment of such conspiracies and authorized the

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[37] "Letter from the Secretary of the State submitting Report on the Subject of Citizenship, Expatriation, and Protection Abroad," House Document No. 326, House of Representatives, 59th Congress, 2nd Session (1906).

[38] House Document No. 326 (1906), 46.

[39] House Document No. 326 (1906), 263. This provision was copied verbatim to the laws of some other states, such as Montana and North Dakota. The Report appends the laws of several states regarding citizenship (Ibid., 257-267).

[40] Scaturro, *supra* note 14, 11.

President to mobilize federal military force to suppress violence when states were unwilling to do so.

Kaczorowski found that the federal government was active and successful in prosecuting offenders for a brief period since the civil rights acts were enacted. Between 1870 and 1873, Department of Justice attorneys prosecuted hundreds of Klansmen and others who violated the civil rights of blacks. Using their newly given criminal jurisdiction, the attorneys engaged in a trial-and-error to test what fell under their jurisdiction.[41] Scaturro also notes the success of federal intervention during this time, pointing out that President Grant's suspension of habeas corpus in certain Southern Carolina counties, accompanied by a stringent prosecution effort, "effectively brought about the death of Ku Klux Klan and a dramatic decline of violence in the South."[42]

Federal courts were a key to the enforcement of civil rights laws. At the time, the size of the federal government was small, and it did not have resources to be in charge of enforcement throughout the country. Naturally, reliance was placed on the federal court system, which had local district courts across the country, to hear the claims of rights violations on the ground. The first experiment with this method of enforcement was with the Habeas Corpus Act of 1863, which provided for a removal procedure. Through this procedure, cases pending in state courts could be transferred to federal courts. The law was enacted to protect federal officers in the South who were being harassed and threatened with criminal prosecution in state courts for their activities. The law allowed federal courts to intervene under such a situation. Subsequent efforts by Congress to protect the civil rights of blacks in the states continued to rely on judicial enforcement. In the words of one author, "it became a habit for the Republicans to include the federal courts in the design of laws which attempted to cross state lines and weather possible unpopularity."[43]

Federal courts were initially supportive of the broad reading of the authority of the federal government to protect civil rights. In *United States v. Rhodes* (1866)[44], Supreme Court Justice Swayne sat as a Circuit Court Justice and wrote an opinion that upheld the validity of the Civil Rights Act of 1866. Swayne recognized the changes regarding citizenship that was taking place, noting that before the Thirteenth Amendment, the power to define the status and rights of citizens "belonged entirely to the states" but that this now belonged to the federal government. In his view, the Thirteenth Amendment itself, even without the enforcement provision or the Civil Rights Act of 1866, gave Congress the power to "give full effect to the abolition of slavery", including the protection of rights of citizens.[45]

Despite this prelude, the Supreme Court soon began handing down decisions that narrowed the scope of changes brought under the Reconstruction Amendments. The *Slaughterhouse Cases* in 1873 signaled the change in the Court's attitude.

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[41] Kaczorowski, *supra* note 1, 920-922.

[42] Scaturro, *supra* note 14, 12.

[43] Lucie, *supra* note 11, ii.

[44] 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151).

[45] Kaczorowski, *supra* note 1, 900-902. Kaczorowski notes that Justice Swayne was dispatched to the Circuit Court by U.S. Supreme Court Chief Justice Salmon Chase and had consulted Senator Trumbull (author of the Civil Rights Act) before traveling there.

Limiting the range of rights attached to federal citizenship

In 1873, the Supreme Court decided the *Slaughterhouse Cases*, which threatened to nullify the effects of the Fourteenth Amendment by limiting the range of rights attached to federal citizenship. If the range of rights that attached to federal citizenship was small, the role of the federal government to protect federal citizens would diminish accordingly. Blacks would then have to expect state governments to protect all the rights that remained attached to state citizenship. This was not a good prospect for blacks in the Southern states. Thus the *Slaughterhouse Cases* became a battleground for those who wished to enhance federal power (which also meant protecting the rights of blacks) and those who wished to preserve the power of the states and maintain the *status quo* in race relations.

After the Fourteenth Amendment was ratified, various cases were brought to the courts challenging state laws on the grounds that they abridged the "privileges and immunities of citizens of the United States". The *Slaughterhouse Cases* (1873)[46] emerged from attempts by the state of Louisiana to regulate the locations of slaughterhouses. Such regulations would traditionally have come under the police power of the states to protect public health.[47] But the regulation in this case was problematic because of the form it took. The state granted monopoly of the slaughtering business to a single company, and all other butchers had to pay a fee to use the premises of that company to carry on the trade.[48] The owners of other slaughterhouses thought that the regulation deprived their privileges and immunities as citizens of the United States, which they argued included the right to engage in an occupation of their choice.

Public opinion in New Orleans also sided with the butchers who challenged the monopoly. The injunction against butchers who refused to abide by the regulation had created a food crisis in the city, and this, coupled with perceived corruption in the legislature created a local sentiment favoring a ruling against the monopoly. When the circuit court struck down the legislation, it was welcomed by the city's otherwise conservative white community. The ruling's implications for the federal enforcement of civil rights (of blacks) seemed to have gone unnoticed, although there was a newspaper that criticized the decision for "a vast and indefinite extension of the power and authority of the judicial department of the Government."[49]

The decision was written by Supreme Court Justice Bradley who was sitting on circuit. The Justice clearly understood the choice he was making. After pointing out how the old Privileges and Immunities Clause (Article IV) were read narrowly (it let the states choose

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[46] 83 U.S. 36 (1873).

[47] Whether socio-economic legislation (such as laws regulating minimum wage, working hours and labor conditions) violates economic freedom became a central issue in the decades following the *Slaughterhouse Cases*. The Court eventually adopted a *laissez-faire* ideology, striking down regulatory legislation in favor of economic freedom. This position in turn was reversed during the New Deal era of the 1930s.

[48] Similar legislation giving monopolistic control over the trade had been enacted in New York and Massachusetts. Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866-1876* (Dobbs Ferry, N.Y.: Oceana Publications, 1985), 117.

[49] Ibid., 118.

what counted as such privileges), he said that the new Privileges and Immunities Clause (Fourteenth Amendment) "demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired." If a privilege attached to federal citizenship, no state could interfere with it. In Justice Bradley's opinion, the right to pursue a lawful employment was such a privilege—therefore the act of Louisiana was unconstitutional.[50]

By the time the case was taken up by the U.S. Supreme Court, its significance for federal civil rights enforcement had become evident. Kaczorowski says that the case "appears to have been a masterful political stratagem of the Court enabling it to decide politically explosive legal questions in a seemingly nonpolitical way".[51] While facially the case was about the monopoly of slaughterhouses, the real constitutional issue here was the extent of rights that attached to federal citizenship and how much power the federal government had to protect them. The counsel, referring to this context, argued that the Thirteenth and Fourteenth Amendments incorporated national supremacy into the law. Therefore, the primary authority to secure the natural rights of citizens was with the federal government.[52]

The majority opinion, written by Justice Miller, held that the regulation was not a violation of the privileges and immunities clause, because economic rights could not be counted as among the privileges and immunities of U.S. citizens. Miller took the state-centered view on the relative authority of the federal and state governments over the people. He held that, but with a few exceptions, "the entire domain" of natural rights "lay within the constitutional and legislative powers of the *states*," not the federal government.[53]

There were two main strands of opinions regarding the "privileges and immunities" of citizens.[54] The broad reading is represented by *Corfield v. Coryell*, which held that fundamental rights that by nature should belong to all people were included in this guarantee, prohibiting encroachment by any state. On the other hand, the narrow reading did not require states to guarantee any particular right. Rather, the states could decide for themselves what rights to grant to its citizens, which they had to also give to citizens of other states. Under this reading, a state law equally denying a right to state citizens and non-state citizens did not violate the privileges and immunities clause.[55] Among the precedents that upheld this reading existed Justice Field's opinion in *Paul v. Virginia*[56], and Chancellor Kent's opinion in *Livingston v. Van Ingen*[57], in which he stated that the clause "means only that citizens of other states shall have equal rights with our own citizens".[58]

The majority opinion in the *Slaughterhouse Cases* read the privileges and immunities of federal citizens narrowly and attempted to reinvigorate the importance of *state*

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50 Fairman, *supra* note 5, 1332-33.
51 Kaczorowski, *The Politics of Judicial Interpretation*, 116.
52 Ibid., 119-120.
53 Ibid., 124.
54 Lucie, *supra* note 11, 132-133; Curtis, *supra* note 23, 65-68.
55 Arnold Johnson Lien, *Privileges and Immunities of Citizens of the United States* (New York: Columbia University, 1913 [Honolulu, Hawaii: University Press of the Pacific, 2002 reprint]), 33-35. James H. Kettner, *The Development of American Citizenship*, 256-261.
56 *Paul v. Virginia*, 8 Wall. 168 (1869).
57 *Livingston v. Van Ingen*, 9 Johns. Rep. 507 (1812).
58 Kettner, *The Development of American Citizenship*, 257.

citizenship. According to the Court, the fundamental rights of life, liberty, and property remained attached to *state* citizenship. In contrast, the rights attached to federal citizenship were limited in keeping with the limited authority granted to the federal government by the original Constitution.[59] Justice Miller argued that if a broad interpretation of the Clause was adopted, it would fundamentally alter the federal system of the United States:

> Was it the purpose of the fourteenth amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we mentioned from the states to the federal government?[60]

The dissent thought that this was precisely what the Fourteenth Amendment intended. It criticized the narrow interpretation of Justice Miller for subverting the intentions of the people who framed the Amendment. Justice Bradley argued that "citizenship is not an empty name, but… has connected with it certain rights, privileges, and immunities of greatest importance." Justice Swayne criticized that the limited reading of the Privileges and Immunities Clause by the majority "turns, as it were, what was meant for bread into stone."[61]

Justice Field, who also dissented, promoted a broad interpretation of the Privileges and Immunities Clause that would incorporate the entire Bill of Rights into the Fourteenth Amendment. This meant that all of the rights listed in the first eight amendments as a constraint on *federal* power were now to be counted as "privileges and immunities" of federal citizens that the *states* could not deprive. He argued that state citizenship no longer controlled who had what rights, for a "citizen of a State is now only a citizen of the United States residing in that State". The natural rights of a free citizen were now "under the guardianship of the national authority". If this were not the case, the Fourteenth Amendment "was a vain and idle enactment, which accomplished nothing."[62] He reiterated this view in another case, arguing that:

> [The Fourteenth Amendment] recognized, if it did not create, a national citizenship and made all persons citizens… and declared that their privileges and immunities, which embraced the fundamental rights belonging to the citizens of all free governments, should not be abridged by any State.[63]

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[59] Richman, *supra* note 8, 118.
[60] Ibid., 120.
[61] Ibid., 119-120.
[62] Kaczorowski, *The Politics of Judicial Interpretation*, 129.
[63] Alpheus T. Mason & Gerald Garvey, ed., *American Constitutional History: Essays by Edward S. Corwin* (New York: Harper & Row, 1964), 76. Such a broad reading of rights attached to federal citizenship would later be accomplished by the "incorporation" of Bill of Rights into the Due Process Clause of the Fourteenth Amendment. Beginning in the 1920s, the Court began to hold that many provisions of the Bill of Rights should be considered a part of "liberty" protected by the Due Process Clause against encroachments by the states.

Historians note that this broad interpretation was shared by the framers of the Amendment.[64] John Bingham, who had a central role in drafting the first section of the Fourteenth Amendment, had argued that the Bill of Rights should apply in its entirety to the states.[65] He explained to the House that it was "simply a proposition to arm the Congress of the United States… with the power to enforce the bill of rights as it stands in the Constitution to-day."[66] When the Fourteenth Amendment was brought to the Senate floor, Senator Jacob Howard, who was in charge of explaining the proposal on behalf of the Joint Committee on Reconstruction, said that the "privileges and immunities" mentioned in section one included "the personal rights guaranteed and secured by the first eight amendments of the Constitution."[67]

But the majority of the Supreme Court insisted that rights that attached to federal citizenship were limited to those that had been "already secured by the Constitution against adverse State action, even before the adoption of the Fourteenth Amendment."[68] Justice Miller reconfirmed this narrow interpretation in a constitutional treatise he published later.[69] Referring to the *Slaughterhouse Cases* he wrote:

> It was insisted there that the rights which the Constitution, or this Amendment, conferred on a citizen of the United States, were all those of a fundamental character, which regard the relations of a citizen to the society in which he lives; but the court, after very grave consideration, held that not to be a sound view of the matter; that the State in its relation to its citizens, and the citizens in their relation to the State, were interchangeably bound with regard to those laws which go to make up the rights which are protected by law: the right of marriage; the right of the descent of property; the right to the control of children; the right to sue for property, and to have it protected; and, in general the protection of life, liberty, and the pursuit of happiness,--- these were all founded in the relation between the State and its citizens."[70]

The decision was widely criticized by constitutional scholars for undermining the intent and the effectiveness of the Fourteenth Amendment. In contrast to Miller's treatise, a scholar wrote that the Reconstruction Congress "gave its first attention to the nationalization in constitutional law of the domain of civil liberty…" and wrote of the *Slaughter House Cases*:

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64 John N. Seaman, "Comments," in *Michigan Law Review*, Vol. 38, No. 1 (Nov., 1939), 57-63; Lien, 69-75. Kaczorowski also writes that "it is more reasonable than not to conclude that the framers and supporters of the fourteenth amendment intended the amendment to secure the Bill of Rights." Kaczorowski, *supra* note 1, 934.

65 Curtis, *No State Shall* Abridge, 60-61; Epps, *Democracy Reborn*, 96, 167.

66 John Bingham's statement to the House on Feb. 28, 1866, quoted in Fairman, *Reconstruction and Reunion*, 1280.

67 Epps, *Democracy Reborn*, 231-232.

68 Mason & Garvey, *supra* note 63, 71.

69 Samuel Freeman Miller, *Lectures on the Constitution of the United States* (Albany, New York: Banks and Brothers, 1891).

70 Ibid., 294.

> Great, therefore, was the surprise felt by the scientific students of our political history when, in the December term of 1872, the decision in the Slaughter House Cases was announced, taking the other ground, viz; that still only a part of civil liberty has been nationalized, and that by far the larger and more important part is still subject, without appeal, to the power of the commonwealths."[71]

The treatise concluded that the decision had "set the direction towards the restoration of that particularism [*sic*] in the domain of civil liberty, from which we suffered so severely before 1861…"[72]

Some scholars have defended the Court. Charles Fairman notes how the Court was navigating an uncharted territory with a potentially unlimited range of claims that could be brought to federal courts if a broader interpretation was adopted. The Court had to decide whether to endorse a dramatic change in the role of the federal government and the flow of cases to its docket. Fairman says that the "afterknowledge of Congressional lethargy in acting under the Fourteenth Amendment… should not dull apprehension of the consequences [to federal-state relations] Justice Miller was considering."[73]

Federal civil rights enforcement suffered as a consequence of the decision. Department of Justice officers became less confident in the scope of their enforcement powers, and federal judges continued to narrow down the interpretation of rights of federal citizens. A United States District Judge in Maryland observed that the *Slaughter-House* decision called "the attention of the people of this country to the distinction between rights that belonged to citizens of the states, and the rights which belonged to the citizens of the United States as such." The Supreme Court's guidance was that the former was much larger than the latter. By the spring of 1875, the Department of Justice suspended all prosecutions under the enforcement acts.[74]

Limiting the power of Congress to protect federal citizens

In two successive cases decided in 1876, the Court further weakened the power of Congress to protect the rights of federal citizens. The *Slaughterhouse Cases* limited the kind of rights that were associated with federal citizenship and thus limited the *areas* in which Congress can intervene to protect federal citizens. This time, the Court limited *what Congress can do* to enforce the rights attached to federal citizenship.

In *United States v. Reese*[75], the Court held that portions of the 1870 Enforcement Act exceeded Congressional power under the Fifteenth Amendment. The case arose from a series of actions by local officials in Kentucky that was clearly an attempt to disenfranchise African Americans. Election inspectors in Lexington, Kentucky refused to let African Americans vote unless they proved that they had paid the capitation tax. Not only was such proof required of African Americans only, but the plaintiff, who was an African

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71 John W. Burgess, *Political Science and Comparative Constitutional Law, Volume I: Sovereignty and Liberty* (New York: Baker and Taylor Company, 1890), 226.
72 Ibid., 230.
73 Fairman, *Reconstruction and Reunion*, 1353-1354.
74 Kaczorowski, *The Politics of Judicial Interpretation*, 158-159.
75 92 U.S. 214 (1875).

American, had attempted to pay the tax earlier and was refused by the tax collector.[76]

The majority opinion held that the Fifteenth Amendment only gave Congress the power to prevent *racially-motivated* deprivation of voting rights. But the language of the Enforcement Act, according to the majority opinion, did not limit itself to racially-motivated deprivation and could allow the prosecution of deprivation of voting rights that were not racially-motivated.[77] The majority thus held that the section regarding punishment went beyond the scope of the powers granted to Congress under the Fifteenth Amendment.

The dissenting opinion pointed out that the law was meant to prevent racially-motivated denial of rights and was within Congressional authority.[78] It also criticized the view that Congress did not have authority to enforce constitutional amendments through criminal prosecution. Such a view "brings to an impotent conclusion the vigorous amendments on the subject of slavery… It were as well that the amendments had not passed", said Justice Hunt.[79]

Further, in *United States v. Cruikshank*[80], the Court held that another portion of the 1870 Enforcement Act, which provided for the federal prosecution of lynching, could not be used against the defendants unless a right of federal citizenship was implicated.[81] The case arose out of a state election held in Louisiana in 1872 that resulted in two governments claiming legitimacy. In "a localized civil war in what was perhaps the bloodiest racial conflict in Louisiana history,"[82] Conservatives and the Ku Klux Klan stormed a parish courthouse that was occupied by Republicans and massacred sixty black citizens. The Department of Justice pursued prosecution under the 1870 Act, and the federal grand jury in New Orleans indicted 97 defendants. The U.S. attorneys selected nine of them to stand trial and three of the defendants were held guilty.[83]

Conservatives decided to use this as a test case to challenge the constitutionality of the 1870 Act. If successful, they would be able to eliminate the power of the federal government to prosecute the activities of Ku Klux Klan and others who were intent on suppressing the rights of black citizens.

The U.S. Supreme Court reversed the defendants' conviction, accepting the argument of the defendants that they had not violated any rights of *federal* citizenship. The federal

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[76] Ibid., 241-243. See also, Kaczorowski, *The Politics of Judicial Interpretation*, 162.

[77] Section 4 of the Act (16 Stat. 140) provided for punishment "if any person… shall hinder, delay, prevent, or obstruct… any citizen from doing any act required to be done to qualify him to vote or from voting at any election as aforesaid". The majority argued that this exceeded Congressional authority. The dissent pointed out that earlier sections of the Act specifically prohibited "distinction of race, color, or previous condition of servitude" in voting rights, so that the law was well within Congressional authority (92 U.S. 214, 242).

[78] 92 U.S. 214, 221.

[79] Ibid., 253.

[80] 92 U.S. 542 (1875).

[81] John Hayakawa Torok, "Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws," *Asian Law Journal*, Vol. 3 (May, 1996), 70-71.

[82] Kaczorowski, *The Politics of Judicial Interpretation*, 142.

[83] Ibid., 143.

government had no power to prosecute them. What the Court said in this decision amounted to a reversal of the Fourteenth Amendment. It distinguished federal and state citizenship and argued that almost every significant right of a person remained attached to state citizenship and was therefore under the exclusive jurisdiction of the states. The majority opinion began by citing the *Slaughter-House Cases*, which had set the trend for a narrow interpretation of rights attached to federal citizenship:

> We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other.[84]

Based on this premise, the Court held that almost every significant right attached to *state* citizenship. The Court said that the right to peaceably assemble, which is guaranteed under the First Amendment, existed long before the U.S. Constitution was adopted, and therefore was *not* a right that was created by the U.S. Constitution. The Court then went on to say that for the protection of such rights, "the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States."[85] Under this logic, it would be hard to find a right that attached to federal citizenship. Most of the rights in the Bill of Rights were not established by the Constitution, but predated it. If this meant that those rights therefore did not attach to federal citizenship, there would be no right left for protection by the federal government.

The Court systematically overturned the attempts made during the Reconstruction to secure the rights of blacks in the South. One of the charges the defendants faced was depriving the "lives and liberty of person without due process of law". This right was included in the Fourteenth Amendment, mindful of the deprivation of these rights under slavery. Yet, the Court held that this too was not a right that was attached to *federal* citizenship:

> The rights of life and personal liberty are natural rights of man… The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator.' Sovereignty, for this purpose, rests alone with the States…[86]

The Court ignored the fact that the protection of the federal government was needed because those rights were being deprived by the states. To say that only states could protect rights was equivalent to reversing the clock and say that the Reconstruction did not occur. Stripped of rights and the power of the federal government to protect them, federal

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[84] 92 U.S. 542, 549.
[85] Ibid., 552.
[86] Ibid., 553.

citizenship became meaningless. Blacks in the South were left without recourse. In the wake of the decision, violence against Republicans increased throughout the South, supported by the widespread belief that no one would now be able to prosecute the offenders.[87]

If blacks could not claim rights by virtue of federal citizenship, then the remaining possibility was for them to claim the rights of state citizenship. The Fourteenth Amendment not only granted blacks federal citizenship, but also provided that citizens of the United States residing in a state were citizens of that state. States could not arbitrarily grant or deny citizenship. The formal doctrine, in the words of a constitutional treatise written in 1897, was that:

> … the state cannot withhold the privileges of its citizenship from any person born or naturalized in the United States and subject to the jurisdiction there of who shall choose to dwell within its domain. The most that the state can require is a bona fide intention to become one of its residents.[88]

But state governments in the South were intent on excluding blacks from citizenship. This is why cases asserting rights on the basis of *federal* citizenship arose in the first place. The Court chose to ignore this reality and concluded that blacks had to ask state governments for protection of their rights.

This retreat from Reconstruction and the narrowing of rights of federal citizens was not solely the Court's initiative. Republicans faced a decline in public support for the Reconstruction programs. In Congress, Senator Trumbull, the author of the Civil Rights Act of 1866, now said that the Act as well as the Fourteenth Amendment had only meant to secure equality in state-conferred rights (as opposed to conferral of federal rights that should be secured across the nation), and only in the context of race discrimination. The fundamental rights of citizens remained under the authority of the states.[89]

A severe economic downturn in 1873 had brought a demand for relief from across the nation. Enforcing the rights of blacks in the South could no longer be sustained as a political priority. That summer, the Grant administration ceased new prosecutions under the Enforcement Acts and extended executive clemency and pardons for past offenses.[90]

Many cases were brought to the courts challenging state laws based on the privileges and immunities clause. In case after case, the court refused to grant that the privileges or immunities of the plaintiffs were violated.[91] While the court had to draw the line somewhere, there were cases in which, given the context of the Fourteenth Amendment, the courts should have extended its protection. For example, Southern states used the

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87 Kaczorowski, *The Politics of Judicial Interpretation*, 155-156.

88 Henry Campbell Black, *Handbook of American Constitutional Law, Second Edition* (St. Paul, Minn.: West Publishing Co., 1897), 530. The author added that "perhaps it is within the competence of the state to fix a term of residence within its limits before the rights of citizenship shall attach." This point was clarified a hundred years later, in *Saenz v. Roe*, 526 U.S. 489 (1999).

89 Kaczorowski, *The Politics of Judicial Interpretation*, 137.

90 Ibid., 138.

91 Lien, *Privileges and Immunities of Citizens of the United States*, 61-68.

criminal justice system to indict blacks for being "idle" and turned them over to plantation owners as part of punishment. Also, they took away the children of black parents who were deemed "idle" and forced them into labor, purportedly for their own welfare. This use of criminal law amounted to the reestablishment of slavery under disguise. But the courts refused to recognize the rights of criminal defendants as privileges and immunities of U.S. citizens.[92] By doing so, the courts left the criminal process to the very authorities who were inclined to disrespect those rights.

Despite the intent of the Fourteenth Amendment to protect federal citizens from abuses by state and local officials, all three branches of the federal government backtracked on their efforts to enforce the rights of federal citizens. They were willing to give back that authority to the states. As a result, blacks, especially in the South, lost a meaningful protection of rights even though they had nominally become federal citizens.

Discrimination in the states

While the federal government retreated from the protection of civil rights, "black codes" that were intended to regulate the lives of blacks were enacted throughout the South. Blacks could not serve on juries, which in turn served to heighten the possibility that blacks would be convicted under laws targeting blacks for criminal punishment. Vagrancy laws allowed local officials to try and convict blacks who did not have employment and contract their labor out to plantation owners as punishment. Some of these codes even allowed local justices to seize the children of black parents and "apprentice" them to white masters.[93]

Despite the Fifteenth Amendment, blacks were denied the right to suffrage by measures that disproportionately affected them. Literacy tests were conducted to keep out uneducated, illiterate people from voting rolls, but with exemptions that could only be claimed by whites. The "grandfather clause" exempted literacy tests for those who had voting rights before 1866—that is, before blacks had voting rights. Polling taxes served as an additional disincentive and barrier towards voting. The number of black voters plummeted in the South, throwing out of office the small number of blacks that had taken political office in the immediate aftermath of the war.

Private discrimination was pervasive. In restaurants and inns, theaters and anywhere else where the two races were to come in contact, owners segregated them and designated separate entrances, seating, restrooms, and even water fountains for colored people, if not denying them service outright. Residential segregation began in earnest around this time too. Studies have revealed that during the antebellum era, blacks and whites shared living quarters more commonly than after the War. Slaves lived with and accompanied their masters, black women took care of white children, and free black labor worked alongside white labor. Rather, it was in some parts of the North that segregation had its deepest roots.[94] But this pattern was reversed after the Civil War, as slaves were emancipated and blacks gained mobility.

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92 Ibid., 64-65.

93 Epps, *Democracy Reborn*, 83-84.

94 James M. McPherson, "Abolitionists and the Civil Rights Act of 1875," *The Journal of American History*, Vol. 52, No. 3 (Dec., 1965), 493-510, at 494.

Segregation by law was implemented throughout the South to concentrate the black population in limited locales where they could be easy targets of social control (such as the enforcement of vagrancy laws). White landowners, when selling property, entered into restrictive covenants ensuring that the property will continue to be held by a white person in the future.[95]

This brought to sharp relief the debate over nature of citizenship. Radical Republicans thought that citizenship meant integration and social equality. One wrote in 1867 that "separation in childhood would breed two races of citizens, hostile in their interests, with jealousies toward each other". Wendell Phillips declared that "the education of all classes and conditions of children together is one of the most valuable elements of our School System and makes it the root of our Republican Institutions."[96] Charles Sumner, also focusing on integration of public schools, argued that segregation "cannot fail to have a depressing effect on the mind of colored children, fostering the idea in them and others that they are not as good as other children."[97] As a lawyer in his home state Massachusetts, Sumner had argued as early as 1849 (*Roberts v. City of Boston*) that segregation of schools by race violated the Constitution. In 1855 the Massachusetts state legislature forbade such segregation.[98]

Sumner summed up his position in these words: "...it is not enough to provide separate accommodations for colored citizens, even if in all respects as good as those of other persons. Equality is not found in any pretended equivalent, but only in equality."[99] Douglass also wrote that segregation of public accommodation was "an invidious discrimination amounting to an abridgment of citizenship rights."[100]

But support for social equality was shaky even within the Republican Party. The Alabama Republican Party platform, for example, declared that it "does not desire or seek mixed schools or mixed accommodations for the colored people with the white people…" Even Lyman Trumbull thought that provision of equal facilities was enough to satisfy "equal protection".[101]

Opponents argued that social equality was a matter that should be left to individuals. If the government were to intervene at all, it should be the state governments that should do so, not the federal government. One Senator asked, "[i]f the General Government takes to itself the entire protection of the individual in his rights… what is the need of the State governments at all?"[102] Even some of Sumner's supporters switched positions after the Supreme Court decision in the *Slaughterhouse Cases* and argued that the bill was unconstitutional because the rights that were intended to be protected were attached to *state*

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95 In 1948, the U.S. Supreme Court ruled that enforcement of such covenants by the courts would be a violation of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1 (1948). See Chapter IX of this study.

96 McPherson, "Abolitionists and the Civil Rights Act of 1875," 498.

97 Bertram Wyatt-Brown, "The Civil Rights Act of 1875," *The Western Political Quarterly*, Vol. 18, No. 4 (Dec., 1965), 763-764.

98 Epps, *Democracy Reborn*, 68.

99 Frasure, "Charles Sumner and the Rights of the Negro," 146.

100 McPherson, "Abolitionists and the Civil Rights Act of 1875," 503.

101 Wyatt-Brown, "The Civil Rights Act of 1875," 764-769.

102 Ibid., 766, citing a Congressional debate in Feb.,1872.

citizenship, not federal citizenship.[103]

Congress rejected Sumner's proposals to promote integration through federal civil rights legislation. Since Sumner first proposed such a bill in 1870, it tabled and killed them each time. Only in Dec. 1874, after Sumner insisted on its passage at his deathbed, did it pass a moderate version of the bill. The bill, which became the Civil Rights Act of 1875, prohibited discrimination in places where the public gathered, such as inns, hotels, and theaters, and provided for the prosecution of violations in federal courts.[104] But the law had been stripped of provisions regarding the integration of schools before its final passage.[105]

Denial of Congressional Power to Protect Federal Citizens

Although the Civil Rights Act of 1875 was enacted, it was not vigorously enforced.[106] Then in 1883, the Supreme Court struck down the Act as unconstitutional. While the federal government had already retreated from enforcing the rights of federal citizens in the states, the Court's decision went a step further and denied the power of federal government to intervene at all. Edward Corwin has said pointedly that during this time the Supreme Court "at first proceeded to eliminate the Fourteenth Amendment from the law of the land."[107]

In what is known as the *Civil Rights Cases* (1883), a number of suits were brought by black citizens against owners of various facilities for not complying with the Civil Rights Act of 1875.[108] The Court, instead of granting relief to black citizens, held that the Civil Rights Act was unconstitutional, on the grounds that it exceeded the powers granted to Congress under the Fourteenth Amendment. According to the Court, the power granted to Congress under Section 5 of the Fourteenth Amendment was only remedial. This meant that only when states engaged in official acts of discrimination or enacted discriminatory laws, Congress could intervene and provide a remedy. But it could not regulate the actions of private individuals. Regulation of private discrimination remained under the exclusive control of the states.

The Court's reading went against what the drafters of the Fourteenth Amendment had in mind when they granted citizenship to all persons, including blacks. What the drafters aspired to was the primacy of federal citizenship, under which the parochial norms of state citizenship would be eradicated. Blacks, having been granted federal citizenship, were supposed to have meaningful rights accompanying that status, and Congress was to have the power to legislate on behalf of federal citizens to back up the protection of those rights. The rights guaranteed to federal citizens would have included all the rights listed in the Bill of Rights and possibly more.[109]

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103 McPherson, "Abolitionists and the Civil Rights Act of 1875," 504.
104 18 Stat. 335.
105 McPherson, "Abolitionists and the Civil Rights Act of 1875," 508.
106 Ibid., 509-510; Wyatt-Brown, "The Civil Rights Act of 1875," 774-775.
107 Mason & Garvey, *supra* note 63, 70.
108 *Civil Rights Cases*, 109 U.S. 3 (1883).
109 Rebecca Zietlow, "Civil Rights and Bingham's Theory of Citizenship," *Akron Law Review*, Vol. 36 (2003), 717-769, at 741.

But of the three components—the status of citizenship, the rights attached to citizenship, and protection of those rights, the Supreme Court mutilated two. While not touching upon the formal status of blacks as federal citizens, it limited the *rights* that were to accompany that status. Further, even for the limited rights that attached to federal citizenship, the Court held that the *role of Congress* was limited to correcting official discrimination by the states. This was cold relief for those prone to be victims of state and local discrimination. Blacks would have prove official discrimination by the state government before asking the federal government for protection. The prevention of subtle discrimination and private discrimination were left in the hands of those who were least likely to provide a remedy.

Chapter conclusion

There has been a debate over how far the Fourteenth Amendment changed the structure of federalism in the United States. Looking at this question from the standpoint of *citizenship*, the Fourteenth Amendment, as it came to be construed by the Supreme Court, left the structure of federalism intact despite the intentions of the framers of the Fourteenth Amendment. The U.S. Supreme Court narrowly defined each clause of the Fourteenth Amendment, effectively stripping federal citizenship of its meaning.

The Court held that the rights of federal citizens were small, and much of the rights remained attached to state citizenship. The power of the federal government to protect the rights of federal citizens was therefore limited. The Court also narrowly interpreted what constituted discrimination under the Equal Protection Clause. Discrimination between whites and blacks, especially in the form of segregation, went unchecked. Thus, blacks did not gain much by way of rights even though they had nominally become federal citizens.

The Amendment did not result in a unified national citizenship, in which the status and rights of citizenship were secured against encroachment by individual states. The relationship between the federal government and federal citizens remained indirect, according to the Court. The rights of federal citizens were to be protected primarily by *state* governments, and Congress can only intervene if the states deliberately deprived the rights of federal citizens.

As a result, state citizenship remained salient, to the disadvantage of blacks who could not readily assert the rights of citizens in the states. The Fourteenth Amendment, as constructed by the Court, did not meaningfully change the relationship between federal and state citizenship though it formed a basis for changes to come much later.[110]

[110] A real change in the power of the federal government to enforce the rights of federal citizens had to wait nearly another century, until the Civil Rights Act of 1957, the Civil Rights Act of 1964, and the Voting Rights Act of 1965. See Chapter IX of this study.

VIII. Federal control of international migration

> Do you think it possible for the two races to live in this country without, sooner or later, coming into a collision which will result in one becoming subject to the other? – No, sir. One will have to be subject to the other.[1]

The quote above is from an 1876 debate in the California state legislature over Chinese immigrants. This was a period in which the newly established powers of the federal government to protect the rights of federal citizens were being heavily contested in the South. Another contest of power between the federal government and state governments broke out over Asian immigrants, whose number was rapidly increasing in the Western states of California, Oregon and Washington. Both of these were contests over the power to control the status and rights of people inside a state.

The previous chapters examined how critical components of citizenship, including the control of territorial boundaries, the status of people within the boundaries, and the rights attached to citizenship, were controlled by the states prior to the Civil War. After the Civil War and the ratification of the Reconstruction Amendments, the control of status and rights of citizenship began to shift to the federal government.

This change did not only affect blacks. The fate of "undesirable" immigrants from foreign countries was tied together with that of blacks. Both had been excluded from citizenship, and a more inclusive vision of citizenship had the potential of benefiting both. The Fourteenth Amendment avoided using the term slavery or any other group-specific term when it granted citizenship to all "persons" born in the United States. This ended up granting federal citizenship to children of all immigrants regardless of the national origins of their parents.[2] One of the first groups to take advantage of the Fourteenth Amendment was Chinese immigrants who became the target of discrimination in the decades following the Civil War.

This chapter will discuss the two interrelated issues regarding federal citizenship. The first is how the power to regulate immigration was nationalized following the Civil War. An influx of Chinese immigrants in the decades since the Gold Rush of the 1850s led the Western states, and then the federal government to attempt to expand controls on immigration. By the end of the 19th century, the federal government took over most of the functions of regulating immigration from the state governments.

The second is the ability of the states to control immigrants by limiting their rights. Making the situation uncomfortable or unpleasant for immigrants was one way by which the states attempted to control immigration, even if they technically did not have the power to regulate immigration. But due to the Fourteenth Amendment, it became more difficult

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[1] *Chinese immigration: The Social, Moral, and Political Effect of Chinese Immigration—Testimony taken before a Committee of the Senate of the State of California, Appointed April 3d, 1876* (hereinafter "*CA Senate Testimony*"), 43 (Testimony by Charles Wolcott Brooks).

[2] Some argue, on the basis of this historical context, that the provision was not meant to apply to children of immigrants who are illegally in the United States. Peter Schuck & Rogers Smith, *Citizenship without Consent: Illegal Aliens in the American Polity* (New Haven: Yale University Press, 1985).

for states to openly discriminate among people who reside within their boundaries. This chapter examines the extent to which the power of the states to regulate the lives of immigrants was limited by the Amendment.

I. Establishing Federal Control of Immigration and Citizenship

Border control and the power of the states

The first step to citizenship is physical presence within the boundaries of the political unit that grants that status. Typically, those without citizenship can only gain citizenship by residing within the territorial limits of the country for a certain number of years and satisfying other conditions for naturalization. Thus, control of physical boundaries is the primary means of controlling citizenship.

Border control, which limited immigration from both other countries and other *states*, had traditionally been the function of state police power. Through poor laws and passenger laws, states selected who could enter and reside within their boundaries, and created enforcement mechanisms (such as bonding requirements) to ensure that undesirable migrants would not be able to stay and claim support from the community. At the same time, states actively recruited immigrants as a source of cheap labor. John Higham notes that in the 1860s and 1870s, "at least twenty-five out of the thirty-eight states took official action to promote immigration," such as appointing agents and establishing boards of immigration to recruit immigrants.[3]

Prior to the Civil War, the Court occasionally struck down particular means adopted by state passenger laws as an interference with interstate commerce, but left room for the states to regulate immigration based on their police power.[4] But in 1875, in a case striking down the passenger laws of New York, Louisiana, and California, the Court established a position on the Commerce Clause that left no room for states to regulate immigration.[5] The Court observed that personal intercourse had developed into an important component of interstate commerce and held that regulation of immigration was under the exclusive jurisdiction of Congress. It foreclosed the states' resort to police power by holding that even that power could not infringe upon a subject that fell under the exclusive jurisdiction of Congress.[6] The Court held that regulation of immigration from foreign countries should be uniform throughout the nation:

> A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character… It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments… The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco.[7]

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[3] John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (New Brunswick and London: Rutgers University Press, 2004), 17-18.

[4] See Chapter VI of this study.

[5] *Henderson v. Mayor of New York*, 92 U.S. 259 (1875).

[6] Ibid., at 271.

[7] Ibid., at 273.

New York's law was not particularly "onerous". It was a law that had been in operation since 1848, requiring shipmasters to post a bond or pay a small commutation fee for each passenger. The Commissioners of Emigration of New York had been enforcing this law ever since.

State passenger laws and poor laws were enacted to exclude people who might become a burden on the community. States did not distinguish migrants from other nations and other *states* in this regard. But the Court now focused on the national consequences of regulations touching upon international relations. For the sake of national uniformity, states had to refrain from regulating immigration, even if that meant that states would have to pay the cost.

The Court repeated this view when it struck down California's passenger law in the same case. California established the state Commissioner of Immigration, who had the power to detain and deport passengers who were deemed "lunatic, idiotic, deaf, dumb, blind, crippled, or infirm…" The exclusion of such classes of people would have been deemed a valid exercise of police power by the Court's precedents.[8] But this time the Court held that California's law was detrimental to the nation as it may disrupt foreign relations:

> If [the U.S. government] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the Federal government?[9]

Thus, in 1875, the Court "nationalized" the borders of the United States, giving the federal government exclusive control over the boundaries of the entire nation, regardless of which state the boundaries fell in. The federal government had the exclusive power to control who could land on the shores of New York or California, because they were shores of the *United States*.

The deprivation of the states' ability to control the migration of people across its borders was not limited to international migration. The right to move across state boundaries within the United States was also strengthened by the decisions of the Court. Passenger laws had applied to *both* international and interstate migration, in order to reject the immigration of undesirable people from other *states* as well as other nations. In striking down these laws as a violation of Interstate Commerce Clause, the Court did not distinguish between the origins of migrants. So, along with the control over international migration, the states lost a means of controlling the migration of people from other *states*.

The Court also struck down laws that it saw as interfering with the right of people to

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[8] The state of California, in an act of defiance, refused to take part in the case. The decision mentions that "[the judges] regret very much that... there has been no argument in behalf of the State of California, the Commissioner of Immigration [of California], or the Sheriff of San Francisco, in support of the authority by which plaintiff is held a prisoner; nor have we been furnished even with a brief in support of the statute of that State." (92 U.S. 275, at 277)

[9] *Chy Lung v. Freeman*, 92 U.S. 275 (1875), at 279.

move *out* of a state. In *Crandall v. Nevada* (1867), it held that a Nevada state law that imposed a tax on every passenger leaving the state using public transportation was unconstitutional. The Court held that the law violated the general principles of the federal government. In the opinion for the Court, Justice Miller wrote that the federal government should have the power to call to its seat "any or all of its citizens to aid in its service", and that as a corollary right, every person of the United States should have a "right to come to the seat of the [federal] government" to make claims or engage in transactions.[10] While Miller avoided the Interstate Commerce Clause, the concurring opinion by Justice Clifford did. Soon, the majority of the Court adopted a broad interpretation of the Interstate Commerce Clause to strike down a state tax on passengers moving out of a state.[11]

Federal regulation of immigration

In 1875, the same year that the Court struck down state passenger laws, Congress enacted a federal law that directly regulated immigration to replace the state laws. Although there had been federal passenger laws in the past, those laws focused on the condition aboard vessels during the cross-oceanic trip and did not contain provisions directed towards the immigrants themselves.

But the Page Law, enacted in 1875, targeted the immigration of Chinese or Japanese women and called for extra scrutiny of whether they had "entered into a contract or agreement… for lewd and immoral purposes".[12] The gender ratio of labor migration from these countries were greatly imbalanced—one women for twenty men at one time. Prostitution thus had become an issue from the beginning of Chinese immigration. As early as 1854, the Court of Sessions in San Francisco convicted Chinese women for operating brothels. In 1866 the city's board of health recommended that Chinese prostitutes should be removed out of the city. While this did not happen, a confined area was thenceforth established for the brothels.[13]

On the other hand, the federal government wanted to promote international trade and commerce and ensure the flow of humans for that purpose. When the United States entered into a diplomatic relationship with China in 1862, it negotiated and ratified the Burlingame Treaty. This treaty guaranteed the free movement of persons between the two nations and the protection of migrants from either country to the other. Congressional attempts to single out "prostitutes" from "China, Japan, or any Oriental country", conflicted with the amicable spirit of this treaty.

Congress and the President fought over who had the authority to deal with Chinese immigration. When Congress passed a Chinese Laborer Exclusion Bill in 1879, President Rutherford Hayes vetoed the law. The President recognized the "very grave discontents of the people of the Pacific States with the present working of the Chinese immigration" and emphasized that Chinese immigrants maintained "all the traits of race, religion, manners, and customs, habitations, mode of life, segregation here… which stamp them as strangers and sojourners, and not as incorporated elements of our national life and growth." But he

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10 *Crandall v. Nevada*, 73 U.S. 35 (1867).

11 *Case of the State Freight Tax*, 82 U.S. 232 (1872).

12 Act of March 3, 1875 (18 Stat. 477).

13 Sucheng Chan, *Asian Americans: An Interpretive History* (Boston: Twayne, 1991), 56.

argued that the purpose of restricting the number of future immigrants could be accomplished in an amicable manner through diplomatic channels, which was the President's prerogative.[14]

In 1881, the United States negotiated a revision of the Burlingame Treaty with China. The treaty reserved the power of the United States government to "regulate, limit, or suspend" the immigration of Chinese laborers, but not absolutely prohibit it.[15] Chinese merchants, students, and even tourists would maintain the ability to freely move between the two continents.

But despite the spirit of the treaty in which a modest and temporary regulation of Chinese immigration was implied, Congress passed a bill to restrict all forms of Chinese immigration for 20 years. President Chester Arthur vetoed the bill, arguing that "neither contracting party in concluding the treaty of 1880 contemplated the passage of an act prohibiting immigration for twenty years… I regard this provision of the act as a breach of our national faith..."[16] Congress was not ready to concede. In 1882, it enacted an act banning Chinese from immigrating to the U.S. ("Chinese Exclusion Act"), with the exception of merchants, students, and others.[17] Whereas the Page Law had excluded particular groups of Chinese people, the 1882 law made exclusion the norm. While this law was enacted as a temporary measure that was set to expire in ten years, Congress renewed the law in 1892 and extended it for ten years. Then in 1902, it extended the law indefinitely, imposing a permanent ban on Chinese immigration.[18]

Also, when the United States annexed Hawaii in 1898, it took special note of the Chinese population there. The Act of Annexation prohibited further immigration of Chinese to Hawaii, and another act two years later extended the prohibition of contract labor to that territory. The latter specifically provided that "Chinese in the Hawaiian Islands" must obtain certificates of residence to remain, and that "no Chinese laborer" could enter other parts of the United States from Hawaii even if he had such a certificate.[19]

The Chinese Exclusion Act initially allowed those who already resided in the United States to travel to China and re-enter the U.S. if they held a reentry certificate. Disputes quickly rose over the authenticity of reentry certificates and over people who did not hold reentry certificates but insisted that they had been residents of the U.S. In both cases, federal courts took an active role, frequently overturning the decisions of immigration

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14 President Rutherford's veto message of March 1, 1879, reprinted in Michael Lemay and Elliot Robert Barkan, eds., *U.S. Immigration and Naturalization Laws and Issues* (Westport, Conn.: Greenwood Press, 1999), 35-40.

15 Treaty between the United States and China concerning immigration (Oct. 5, 1881), reprinted in ibid., 49-50.

16 President Arthur's veto message on Apr. 4, 1882, reprinted in ibid., 50-51.

17 Act of May 6, 1882: To Execute Certain Treaty Stipulations Relating to Chinese ("Chinese Exclusion Act"), reprinted in ibid., 51-54.

18 In 1943, Congress allowed Chinese immigration to resume, though in very small numbers capped at a quota of 105 per year (57 Stat. 600). This was an expression of good will in the context of Chinese alliance with the United States in World War II. The national origins quota was eliminated by the Immigration and Nationality Act of 1965 (79 Stat. 911).

19 Act of Jul. 7, 1898 (30 Stat.750); Act of Apr. 30, 1900 (31 Stat.143).

commissioners at the ports of entry.[20]

Congress attempted to preclude judicial challenges by declaring that only the possession of reentry certificates qualified Chinese immigrants to re-enter the country and provided detailed procedures for the issuance of such certificates.[21] This countered the ad-hoc, flexible standards that had been used by the courts to decide in favor of immigrants seeking reentry. Further, in 1888, Congress followed up with the drastic step of stopping the issuance of re-entry certificates altogether and retroactively cancelling all re-entry certificates that had been issued.[22] Many Chinese residents who left for China with re-entry certificates found out upon returning to the United States that they could no longer enter the country.

The plight of Chinese residents who were denied reentry due to this policy led to a Supreme Court decision the next year (the *Chinese Exclusion Case*). There the Court established an extremely deferential position towards regulation of immigration by Congress. Instead of grounding the power of the federal government in a particular constitutional provision, the Court held that the power to regulate immigration was inherent in sovereignty.[23] Based on this inherent authority of the federal government, the Court refused to examine the exclusion act and gave wide latitude to Congress to decide who could be admitted to the United States.

Establishment of federal institutions to regulate immigration

Beginning with Chinese exclusion, the federal government quickly expanded its role in regulating all forms of immigration. After the U.S. Supreme Court struck down state passenger laws in 1875, officials from New York and Massachusetts conferred with Congressional representatives about a federal law that would replace them. In 1882, Congress passed its first general immigration law, modeled upon the laws of Massachusetts and New York.[24] It required the masters of vessels bringing in immigrants to pay a duty of fifty cents for each passenger who was not a citizen of the United States. This money was to be paid in to the treasury of the United States to indemnify the government from costs of supporting immigrants.

While the U.S. Supreme Court ruled that such a tax was unconstitutional in the case of state passenger laws, in 1884 it upheld the system of taxation enacted by Congress.[25]

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[20] Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995), 18-20. See also, Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (Oxford and New York: Oxford University Press, 2006), 26.

[21] Act of Sep. 13, 1888 (25 Stat. 476).

[22] Act of Oct. 1, 1888 (25 Stat. 540).

[23] *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

[24] Act of August 3, 1882, 22 Stat. 214 (reprinted in LeMay and Barkan, *supra* note 14, 55-56). Richard H. Leach, "The Impact of Immigration Upon New York, 1840-60," *New York History*, Vol. XXXI, No. 1 (Jan., 1950), 15-30, at 29; John Cummings, "Poor-Laws of Massachusetts and New York: With Appendices Containing the United States Immigration and Contract-Labor Laws," *Publications of the American Economic Association*, Vol. 10, Issue 4 (1895), 59; Higham, *Strangers in the Land*, 43-44.

[25] *Edye v. Robertson*, 112 U.S. 580 (1884).

According to the Court, the means itself were not much of an issue so long as the proper authority (in this case the federal government) was in charge. The question was framed as a matter of whether the federal government or state governments had the power to regulate immigration, rather than whether the regulation violated individual rights. The discussion of constitutional questions in terms of location of authority rather than the rights of immigrants has been the norm in the field of immigration, to the disadvantage of immigrants.

In 1885, Congress enacted a law prohibiting contract labor.[26] Until then, it was common for prospective employers to pay the fees for passage across the Atlantic in order to recruit immigrant labor from Europe. The immigrant was in turn bound to work for the employer for a certain number of years. In 1864, a contract labor law which *allowed* employers to bind immigrants in this manner was enacted to cover the labor shortage during the Civil War (this law was repealed in 1868).[27] Now, Congress wanted to *restrict* contract labor, which had become a major source of immigration to the United States.

Higham locates the source of this change in the attitudes of businesses. While unions had strongly opposed the influx of contract laborers who undercut wages and working conditions, business had served as a counterweight, favoring further immigration. But as it turned out, immigrants became prominent leaders and members of labor unions. On the ground, their ethnic ties, once provoked, could become a source of unrest (such as a strike in 1886 by Hungarian coal miners in Pennsylvania). This, along with the downturn in economic conditions, raised anxiety among the business community about further immigration. Business began to see immigration as a source of social instability and radicalism.[28]

After the 1882 law was enacted, the federal government established and steadfastly expanded the federal bureaucracy in charge of enforcing the law. Congress initially allowed the administration of immigration laws by pre-existing state immigration authorities. The 1882 law authorized the Secretary of the Treasury to "contract with such state commission, board, or officers as the governor of each state might designate, to take charge of the local administration of the law." An example of such a contract was that of March 1894, signed between the Massachusetts State Board of Lunacy and the Secretary of the Treasury.[29] Under this contract, the Massachusetts State Board would take care of "aliens… who shall become public charges from accident or bodily aliment or disease…" during the first year of that person's residence in the United States. For this care, the state could seek reimbursements from the Secretary of Treasury. The Port of New York also continued to be administered by the New York Commissioners of Emigration. The Commissioners had administered the immigration laws of that state since 1847, and now they functioned under contract with the federal government.

The "head tax" required by the 1882 law was collected by Commissioners of

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[26] 23 Stat. 332.

[27] Higham, *Strangers in the Land*, 14-17.

[28] Ibid., 47-52.

[29] Contract Between the Massachusetts State Board of Lunacy and Charity and the Secretary of the Treasury (signed March 28, 1894). Reprinted in Cummings, *supra* note 24, 134-135.

Immigration in each state and then handed over to the federal government. States could then seek reimbursement for expenses incurred in taking care of sick or poor immigrants. The process resembled a previous era when cities and towns sought reimbursement from the states for the expenses of taking care of paupers, with the difference being that now the federal government took over the purse.

Soon, the federal government began to directly administer the flow of immigration, instead of working through state bureaucracies. In 1890, the administration of immigration laws at the port of New York was taken over by the U.S. Commissioner of Immigration.[30] This led to the opening of the Ellis Island, which replaced Castle Garden (administered by the State of New York) and became a port of entry for U.S.-bound immigrants during the next half century.

A decision by the New York state court around this time confirmed this trend from the side of the states. In 1891, the New York high court held that an 1882 state law that gave Commissioners of Emigration of that state the power to raise funds for the inspection and care of immigrants was non-enforceable because the subject was solely within the jurisdiction of Congress. Because the Commissioners did not have the power to raise these funds in the first place, they were not liable to the City of New York for the maintenance of immigrants who had arrived at that port.[31] This meant that New York would have to pay on its own (out of state funds) for the care of the immigrant poor, or seek the help of the federal government.

As if marching in tandem, the same year (1891), Congress established the position of Superintendent of Immigration.[32] Then in 1894 it elevated the federal role in immigration regulation by creating the Immigration Bureau under the Department of Treasury (later transferred to the Department of Health and Labor).[33]

The 1891 law expanded the provisions for the exclusion and deportation of immigrants. Most significantly, the law for the first time empowered the government to deport persons who had already entered the United States, in addition to excluding them at the border. A person who entered illegally or who became a public charge from causes existing prior to landing could be deported if it was within a year of his or her entry.[34]

The law also included a clause which provided that all decisions made by inspection officers were to be final, though an appeal can be taken to the superintendent of immigration, whose actions were to be reviewed by the Secretary of the Treasury.[35] However, in San Francisco the federal court also became deeply involved in Chinese Exclusion. The federal district court there had been inundated with cases brought by Chinese persons detained at the port who claimed eligibility to reenter the country. Judges there were willing to issue writs of habeas corpus to these people, especially when it

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30 "Article on the Castle Garden Immigrant Reception Station," Foreign Language Information Service of New York, reprinted in Lemay and Barkan, *supra* note 14, 33.

31 *City of New York v. Commissioners of Emigration*, 13 N.Y.S. 751 (59 Hun. 624, 36 N.Y. St. Rep. 721).

32 Act of March 3, 1891, 26 Stat. 1084.

33 Act of August 18, 1894, 28 Stat. 390.

34 Act of March 3, 1891 (26 Stat. 1084), Sec.11.

35 Ibid., Sec.8.

involved claims of U.S. citizenship.[36] Lucy Salyer has found that in the decade up to 1891, the Chinese filed more than seven thousand petitions for habeas corpus in the federal district court for the Northern District of California, and that it allowed "the vast majority" of them to enter the United States.[37] But in 1905, the U.S. Supreme Court issued an opinion that held that the decision of administrative officials even as to the important question of whether the person was a U.S. citizen was to be final and not subject to judicial review.[38]

Thus, by the end of the 19th century, the federal government gained control over the admission of immigrants to the United States, to the exclusion of state authority. This takeover of authority was promoted through Congressional legislation, the expansion of federal bureaucracy, as well as judicial decisions. Within the federal government, Congress and the President continued to fight over the control of this field. This contest continued for another two decades, until Congress succeeded in enacting exclusionist policies through the Immigration Acts of 1917, 1921 and 1924, repudiating the more moderate policies of the President.

Expansion of exclusion by federal law

After the exclusion of Chinese laborers from the United States, Japanese immigrants replaced them as a source of cheap labor and created another wave of Asian immigration. The effect was again most strongly felt in California, where Japanese immigrants became successful in agriculture and came to dominate many of the state's agricultural crops.

Local reaction to the influx of Japanese immigrants was strong. A response that attracted national attention came in 1906, when the San Francisco school board decided to segregate Japanese children and place them in an "oriental school" which had been established for Chinese children.[39] The Japanese government, communicating through diplomatic channels, strongly opposed this idea. At the time, Japan was a rising power in international politics, having won a war against China in 1894, and then against Russia in 1904. For the Japanese government, the status of Japan in international politics and the treatment of its people abroad was a major concern. Perceived mistreatment in the United States (especially, treating Japanese in the same manner as the Chinese) led to indignation and protests in Japan.[40]

Diplomatic officials grew concerned about the Japanese reaction, and President Roosevelt intervened to prevent San Francisco's policy from taking effect. In convincing city officials to drop the policy, the President promised that he would negotiate with the Japanese government to stop the flow of immigrants from Japan. Diplomats from both

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[36] Salyer, *Laws Harsh as Tigers*, 69-93.

[37] Ibid., 33.

[38] *United States v. Ju Toy*, 198 U.S. 253 (1905). Salyer, *Laws Harsh as Tigers*, 111-114.

[39] For an analysis of the conflict between local law and treaty obligations, see Elihu Root, "The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution," *The American Journal of International Law*, Vol. 1, No. 2 (Apr., 1907), 273-286. This was the Presidential address at the First Annual Meeting of the American Society of International Law.

[40] Theodore S. Woolsey, "The California-Japanese Question," *The American Journal of International Law*, Vol.15, No. 1 (Jan., 1921), 55-59.

countries met to negotiate over Japanese emigration to the United States, and soon the two sides exchanged a series of memoranda that became known as the Gentlemen's Agreement. Under the agreement, the Japanese government would voluntarily restrict the emigration of Japanese laborers to the United States by stopping the issuance of passports. In turn, the U.S. government would refrain from including Japanese exclusion in its immigration laws.

Asians were not the only targets of anti-immigrant agitation around this time. Southern and Eastern Europeans, such as Italians, Poles, and Jews, also became targets. Around five times as many immigrants came from "Austria-Hungary", "Russia and Poland" and "Italy" during 1881-90 compared to the preceding decade.[41] A treatise on the "abnormal increase of criminals and the public burden of pauperism in the United States" attributed the cause of the increase to these immigrant groups and called for a strict regulation of immigration.[42] This sentiment was commonly heard in Congress, leading to measures aimed at restricting the number of immigrants from this part of Europe.

Among the mechanisms of restriction were literacy tests and quota. Congressional proposals for literacy tests were proposed repeatedly since the 1890s. For example, a bill that occupied the attention of Congress from 1895 through 1897 would have excluded people "who can not read and write the English language or some other language." This was calculated to exclude immigrants from Southern and Eastern Europe who were disproportionately illiterate. The Immigration Restriction League, composed of intellectuals from Boston who were intent on preserving the demographics of the nation, campaigned nationally for the literacy test. In Congress, Senator Henry Cabot Lodge of Massachusetts made a strong push for this proposal, leading both houses to pass the bill in 1896.[43] But President Cleveland vetoed the bill, stating that the ability to read and write was "a misleading test of contended industry and supplies unsatisfactory evidence of desirable citizenship or a proper apprehension of the benefits of our institutions."[44]

Lodge nearly succeeded again in 1906, leading the Senate to pass a bill with a literacy test provision. But this time House Speaker Joe Cannon stood firmly against the literacy test, forcing a procedural maneuver to drop the provision. When the House and Senate deadlocked over their bills, President Roosevelt intervened to persuade Lodge to drop his insistence on the literacy test. The President wanted to clear the deadlock and make good on his promise to strengthen restrictions on Japanese immigration, rather than European immigration.[45] In the end, the immigration bill that passed in 1907 authorized the President to issue an Executive Order that prohibited Japanese citizens from entering the United States through Mexico, Canada, or Hawaii.[46]

Along with literacy tests, quota systems were proposed with formulas that would favor

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41 Statistics based on Quarterly Report of Chief of Bureau of Statistics, Treasury Department of the United States, reprinted in Henry M. Boies, *Prisoners and Paupers: A Study of the Abnormal Increase of Criminals, and the Public Burden of Pauperism in the United States; The Causes and Remedies* (New York: Putnam, 1893), 46.

42 Ibid.

43 Higham, *Strangers in the Land*, 101-105.

44 President Grover Cleveland's Veto Message, reprinted in LeMay and Barkan, *supra* note 14, 80-82.

45 Higham, *Strangers in the Land*, 128-130.

46 Executive Order No. 589, Mar. 14, 1907; based on the Act of Feb. 20, 1907 (34 Stat.898).

British immigrants over immigrants from other parts of Europe. One proposal would have set the quota according to the proportion of that immigrant group among all the immigrants who arrived in 1890. Since 1890 would be before Southern and Eastern Europeans began arriving in large numbers, this formula would result in limiting the quota for those groups to a small number. An even more restrictive proposal was to set the quota according to the proportion of that immigrant group among the entire population of the United States. Since most of the population of the United States was of British ancestry, this formula would have assigned nearly 70% of the quota to British immigrants while limiting Southern and Eastern Europeans to only a few percent.

These exclusionist ideas and trends came to fruit in a rapid succession of immigration laws that passed in 1917, 1921 and 1924. The Immigration Act of 1917 for the first time combined immigration law and naturalization law. As we have seen, the power to regulate immigration had long been contested, and only gradually did Congress enact laws regulating immigration. With the 1917 immigration law, Congress tied its power to set rules for naturalization with the power to regulate immigration. The connection was that physical presence in the United States was the first step towards naturalization. To regulate who could naturalize and become citizens, it was more effective to go back a step further and regulate who could come to the United States in the first place. The Act set a geographic boundary (the law was popularly called the "Asiatic Barred Zone Act") that included most of Asia and prohibited all immigration from that area.[47] Only Japan was exempt from this exclusion, due to the Gentlemen's Agreement of 1907.

The push for a literacy test finally succeeded, over the objections of President Wilson. Congress overrode his veto and passed the 1917 law with the literacy test provisions intact. The anti-foreigner climate in the context of World War I likely helped. Higham notes how this was a time when calls for One Hundred Percent Americanism permeated with a "crusading impulse" throughout the nation. German societies and German-language newspapers, along with the teaching of the German language were suppressed. Towns, firms and individuals with German names changed them to English-sounding names. The Russian Revolution in 1917 also sparked fear of foreign radicals, leading Congress to pass the Espionage Act in 1917 and the Sedition Act in 1918.[48] Also around this time, states that used to allow voting by foreigners who had declared the intent to naturalize eliminated that possibility by amending their state constitutions.[49] In 1919, fifteen states enacted laws decreeing that English must be the sole language of instruction in all primary schools, whether they were public or private.[50]

Restrictionists also succeeded in their other long sought demand. The idea of a national origins quota was adopted for the first time through the Immigration Act of 1921.[51] The quota limited the admission of immigrants from any country to 3% of the number of people from that country that was living in the United States as of 1910. This was meant to preserve the racial demographics of the nation as of 1910 and to prevent a further

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47 39 Stat. 874.
48 Higham, *Strangers in the Land*, 204-212.
49 Ibid., 214.
50 Ibid., 260.
51 42 Stat. 5.

increase in the number of immigrants from Southern and Eastern Europe.

Finally, the Immigration Act of 1924 (Johnson-Reed Act) completed the efforts to regulate immigration by providing for an exclusion of all "aliens ineligible for citizenship".[52] Since most Asians were already barred from entry by the 1917 law, the effect of this provision was to exclude Japanese immigrants who had until then been exempt from the prohibition. The Act of 1924 also established the now common system of dual checks through the process of issuing immigration visas. This allowed federal officials to examine the qualifications of a prospective immigrant not only at the port of entry in the United States, but also *before* the immigrants left their own countries. It required the prospective immigrant to obtain a visa from the U.S. consulate (diplomatic offices) in their country before leaving for the U.S.[53] To extend such power to foreign citizens living in a foreign territory risked accusations of extraterritoriality, which was a major diplomatic issue in that era.[54]

The Act of 1924 further stipulated that from 1927, quotas were to be allotted based on the proportion of persons of that nationality among the *entire* population of the United States.[55] Since the immigration of Southern and Eastern Europeans were more recent, their share among the *entire* population was meager, even if they held a large share among the newly arriving immigrants. Thus, the new formula would further reduce the quota allotted to these nationalities. When the latter method was implemented in 1929 (after a two year delay), the number was dramatic. Hungary was allotted 869; Poland 6524 and Italy 5802. In contrast, Great Britain was allotted 65721 and Germany 25957.[56] Of course, Great Britain claimed the largest share if one looked at the proportion of people who claim that origin within the entire population.

This rapid expansion of federal authority and its use to restrict and exclude immigrants were strengthened by the unusual deference given by the U.S. Supreme Court in the field of immigration. In cases involving the exclusion of Chinese and Japanese immigrants, the Court refused to scrutinize the constitutionality of the exclusion process. Immigrants who were excluded typically argued that they were not given a fair hearing and were being held in custody without due process. But the Court held that whatever process Congress had provided was "due process" in the area of immigration.[57]

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[52] 43 Stat. 153.

[53] An early proposal for such a mechanism is found in Boies, *supra* note 41, 51-52. Boies proposed that the document should be checked by officials not only when the immigrant entered the United States but also when moving from one *county* to another domestically.

[54] Western powers sought extraterritoriality when they entered into diplomatic relations with Asian countries such as Japan. This meant that a U.S. citizen who committed a crime in Japan would be tried by U.S. officials instead of the Japanese legal system. A major diplomatic goal of Japan during this era (1890-1910) was to remove this "inequality" from the treaties.

[55] Higham, *Strangers in the Land*, 319-324.

[56] President's Proclamation No. 1872, Mar. 22, 1929; reprinted in LeMay and Barkan, *supra* note 14, 163-165.

[57] Lucy Salyer points out that in the context of administrative law, courts have typically deferred to administrative officers and tribunals in the determination of facts (Salyer, *Laws Harsh as Tigers*, 30-31). But such deference in the area of immigration leads to drastic

The Court denied judicial review even in cases where a *U.S. citizen* was excluded by immigration officials. In *United States v. Ju Toy*, it held that decisions of immigration officials regarding whether a person seeking entry was a U.S. citizen was not subject to judicial review. The district court in this case had found that Ju Toy was a U.S. citizen. The U.S. Supreme Court reversed that decision, saying that courts could not review such cases in the first place.[58]

Thus, by 1924, the federal government had acquired and exercised exclusive authority in the field of immigration regulation, with Congress gaining a stronger voice than the President with the endorsement of a deferential Supreme Court. In the previous era, states regulated immigration and the federal government had only passive control over people who might become future citizens of the United States. Now the federal government exclusively decided whether to admit or exclude immigrants and states had to accept people whom the federal government chose to admit.

Not only did the states lose power to admit or exclude aliens, but they also faced constraints regarding the treatment of aliens *within* their territories. This is because the Reconstruction Amendments, especially the Fourteenth Amendment, limited how states could treat *any* person. The next section analyzes how the Fourteenth Amendment was applied to immigrants.

The U.S. Constitution and state discrimination against immigrants

The Civil War and the ratification of amendments to the Constitution established new limits on how states dealt with people residing within its border. The Fourteenth Amendment, in particular, protected the rights to due process and equal protection of the laws of "all persons" residing within a state.

During the late 19th century and through the early 20th century, agitation against Asian immigration became hysteric in the West Coast. Western states such as California, Oregon, and Washington enacted various laws that were intended to deter the immigration of these groups by limiting their rights and making their life uncomfortable.

Questions arose over whether states had the power to enact such laws under the U.S. Constitution. In this section, we look at how the states attempted to limit the rights of immigrants and how the courts responded to such laws in light of the constitutional amendments after the Civil War.

Local responses to Chinese immigration

The debate over the treatment of Chinese immigrants took place at the same time that the effect of the Fourteenth Amendment on the ability of the states to regulate the rights of blacks was being contested. The Page Law was passed in 1875, the year that the *Civil Rights Cases* were decided. The Chinese Exclusion Law was passed in 1882, which was about the same time the *Slaughterhouse Cases* were decided.

Analogies between the treatment of blacks and Asians were made and reminded the reasoning of legislators and judges. Some Republicans saw in the treatment of Chinese

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consequences (such as deportation) that are in a class of its own.

[58] *United States v. Ju Toy*, 198 U.S. 253 (1905).

the same denial of citizenship rights based on account of race, and equated their fate with blacks and former slaves. Charles Sumner, who gained fame in the preceding decades as a staunch abolitionist, also became one of the few people in Congress that denounced the exclusion and discrimination of Chinese as a violation of equal protection under the law.

The Gold Rush commenced soon after the discovery of gold in the summer of 1848. That fall, people from Hawaii, Oregon, Peru, and Chile began to arrive in search of gold. The next summer (1849), the news reached the East Coast of the United States, bringing a rush from that region. Then gold-seekers from Europe, Australia, and Asia arrived.[59] Among these groups the Chinese immigration created the most visible racial tension. While the census of 1850 listed only 660 people from China, two years later the state census recorded 25,000.[60] The census of 1860 recorded the Chinese as the largest group of immigrants in California, and by the 1870s they were also the largest single racial or national group among miners. In the mines they were relegated to inferior locations and limited to inferior means of digging, while in the cities and towns they lived in segregated neighborhoods, and sustained themselves not through local merchants but through mutual-benefit associations called "Companies".[61]

California enacted numerous laws hostile to Chinese immigrants. As early as 1850, California enacted a Foreign Miners' Tax Act in an attempt to deter the activities of Chinese miners. This led to frequent abuses by collectors of the tax who double-charged the same miners, knowing that Chinese miners had little recourse against such abuses.[62] In 1855, California imposed a head tax on passengers arriving by vessels as part of an act to discourage immigration, but the state Supreme Court struck down the tax two years later, citing the *Passenger Cases*.[63] But the state legislature followed up with a law that gave state inspectors the discretion to deny admission of immigrants unless the shipmaster posted a bond for support and maintenance. In 1862 it passed an act to "protect free white labor against competition with Chinese coolie labor", which imposed a monthly "police tax" on every Chinese person. In 1870 the state passed an act to prohibit the immigration of "Mongolian, Chinese, and Japanese females for criminal or demoralizing purposes" and also to prohibit "coolie slavery".[64]

In 1876, in response to local unrest against Chinese immigrants, the California Senate convened a special committee to conduct hearings and report measures to deal with the situation. The 14 day hearing[65] was a showcase of complaints from police officers, prosecutors, local businessmen and ordinary citizens against the Chinese. The transcripts of the hearings recorded derogatory questions from committee members, such as about the cleanliness of the "Chinese Quarters" (which typically led to answers describing how filthy

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59 Rodman W. Paul, *California Gold: The Beginning of Mining in the Far West* (Lincoln: University of Nebraska Press, 1967), 22-23.

60 Ibid., 28.

61 Ibid., 320-322.

62 Chan, *Asian Americans: An Interpretive History*, 46.

63 Motomura, *Americans in Waiting*, 23.

64 Chan, *Asian Americans: An Interpretive History*, 54.

65 The hearings were conducted between Apr. 11 and May 27, 1876 in Sacramento and San Francisco, both of which had a concentration of the Chinese population.

the conditions there were)[66], the effects of Chinese immigrants on the morals of the society[67], whether Chinese laborers replaced white labor[68], whether Chinese prostitutes induced white boys[69], and whether Chinese testimony were reliable in the courts (the answer generally being that they would swear anything depending on their self-interests)[70].

Slavery was a useful point of reference for legislators seeking to restrict Chinese immigration. Since the "coolie trade" was prohibited by the treaty between the U.S. and China, state legislators attempted to define all Chinese labor as brought under that trade. They tried to draw analogies to the slave trade and emphasized that Chinese men were brought here under terms binding them to harsh labor. They also argued that numerous Chinese women were prostitutes bought and sold by men and subject to death threats if they attempted to escape.

Some legislators thought that the U.S. and Chinese government should amend the treaty so that the whole situation could be dealt with in a friendly manner. But questions still remained over what power *Congress* had to deter Chinese immigration under the terms of the treaty.[71] There were uncertainties about whether immigration regulation was for Congress to decide or was a diplomatic matter for the President to negotiate. The following exchange took place between a legislator and F. F. Low, the U.S. Minister to China:

> "Q—Is not the whole remedy of this evil with Congress? Has it not the power to pass laws restricting this class of immigration?" "A—It is not easy to map out." "Q—Is not the power there?" "A—Yes, sir; the same as—it all lies there, if anywhere. It is not an easy problem to solve by any means, because of our treaties with China…"

Despite the uncertainties over authority, local prejudice and demand for action won the day. In 1879, when a convention was held to revise the state constitution, one of its chief purposes was to exclude Chinese immigrants from California. One-third of the delegates to the convention were from the Workingmen's Party, which succeeded in organizing labor around strong anti-Chinese sentiments, blaming Chinese laborers for the suffering of American laborers amidst economic depression.[72] The convention established a Committee on the Chinese to specifically consider anti-Chinese measures to include in the revised state constitution.[73]

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[66] *CA Senate Testimony*. The index to the transcript lists 22 pages regarding "Cleanliness, want of, among Chinese". I cite this because the manner in which these items were indexed reflects the tenor of these hearings.

[67] The index lists 9 pages regarding "Morals, Chinese" and 17 pages regarding "Morals, effect of presence of Chinese on white".

[68] The index lists 14 pages regarding "Labor, how affected by Chinese immigration".

[69] The index lists 16 pages regarding "Prostitution, effect on white boys".

[70] The index lists 11 pages regarding "Honesty, lack of, among Chinese" and 13 pages containing the item "Oath, Chinese Regard for".

[71] *CA Senate Testimony*, 6.

[72] Salyer, *Laws Harsh as Tigers*, 12.

[73] Charles J. McClain, *In Search of Equality: The Chinese Struggle Against Discrimination*

The Committee proposed an article specifically concerning the Chinese population, with nine sections intended to impose hardships on this group and to force their exit from the state. The first section of the proposed article gave the state the power to remove aliens, while another section forbade further Chinese immigration into California. The article also sought to deprive Chinese immigrants of economic means by making corporations that employed *aliens ineligible for citizenship* (which was an alternative way of referring to Asian immigrants) forfeit their charters. Such aliens were also made ineligible for all public employment. Neither could they be granted licenses to carry on any trade or business, nor did they have the right to fish in the state's waters, nor could they purchase or lease real property anywhere in the state. In other words, every means of living would be foreclosed for Chinese residents.

Most of the proposals were adopted by the convention and became Article XIX of the proposed constitution. In the finalized form, the Article contained four sections. The first section was a full assertion of the power to control immigration, from admission to conditions for residence to exclusion, despite the fact that state regulation of immigration had been ruled unconstitutional by the U.S. Supreme Court:

> The Legislature shall prescribe all necessary regulations for the protection of the State… from the burdens and evils arising from the presence of aliens who are or may become vagrants, paupers, mendicants, criminals, or invalids afflicted with contagious or infectious diseases… and to impose conditions upon which persons may reside in the State, and to provide the means and mode of their removal from the State…[74]

After this general provision regarding the power to regulate immigration, the Article specifically targeted Chinese immigrants. Chinese immigrants were banned from both public and private employment. Section 2 prohibited all corporations in the state from employing "any Chinese or Mongolian" and Section 3 provided that "No Chinese shall be employed on any State, county, municipal, or other public work…" Finally, Section 4 declared that the "presence of foreigners ineligible to become citizens of the United States" was "dangerous to the well-being of the State…" Following this declaration the section allowed the legislature to delegate to cities and towns the power to remove the Chinese or to set the location of their residence (in other words to segregate the Chinese), and also gave the legislature the power to prohibit further introduction of the Chinese into the State.

The Article was captioned "Chinese", despite the fact that several members in the convention had pointed out that the provisions were constitutionally suspect. One historian has rightfully noted that "if there was any inspiration or model for the anti-Chinese provisions, it would have been the Black Codes [of the South]".[75] Nonetheless, in May 1879, the revised California Constitution was approved in a special election, with 77959 votes in favor of and 67134 against its adoption.

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in Nineteenth-Century America (Berkeley: University of California Press, 1994), 81-83.

74 Constitution of California, 1879, Article XIX, Section 1.

75 Harry N. Scheiber, "Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution," *Hastings Constitutional Law Quarterly*, Vol. 17 (1989), 35-80, at 69.

Legal challenges to state discrimination

Chinese immigrants commenced a series of legal challenges against discriminatory laws enacted by California. The litigants asserted that the laws violated treaty obligations between the federal government and China as well as general principles of international law. They also argued that the laws violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against the Chinese[76], and also the Due Process Clause by depriving the right to occupation, the right to contract for employment, and vested interests in property.

These claims, brought by Chinese immigrants and their representatives as well as American employers who defied the laws, were surprisingly successful in the courts. For example, in 1880, the president of a mining company was charged with violating a new state law that prohibited the employment of Chinese miners, but was able to secure his release from custody after convincing the judges of the federal circuit court in California that the law was unconstitutional.[77]

The judges held that the law violated the privileges and immunities of Chinese persons that were guaranteed by a treaty between the two nations. Under the Burlingame Treaty, the United States and China mutually guaranteed to citizens of each other the privileges and immunities that they gave to citizens of the "most favored nation" (a description common in international treaties). This promised a mutually favorable treatment, though it did not specify in detail what this meant.

Judge Hoffman pointed out that California's law was designed to force the Chinese out of California and was in "open and contemptuous violation" of treaty rights. Judge Sawyer asserted that the term "privileges and immunities" covered the fundamental privileges of free persons in a free society, and that it must include the right to acquire property as well as the right to engage in a trade or business. The California law violated the treaty because it deprived those privileges.

In another case, a law prohibiting the Chinese from fishing in the states waters was struck down by the same court as discriminatory. In *In re Ah Chong* (1880), Judge Sawyer held that prohibiting the Chinese from fishing in state waters while allowing people from other nations to do so violated the treaty provision that guaranteed the same privileges as are "enjoyed by the citizens or subjects of the most favored nation."[78]

San Francisco also enacted ordinances which were intended to deprive the means of living from the Chinese. For example, a laundry ordinance required city licenses for people operating laundries in wooden buildings. Though it looked like a public safety legislation that fell under state police powers, the city used the law to close down Chinese laundries. When Chinese laundry operators applied for the license, most of them were rejected, while applications by white owners were mostly accepted.

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[76] Among the cases cited was *Strauder v. West Virginia*, 100 U.S. 303 (1880), in which a state law denying the eligibility of blacks to serve on juries was struck down as a violation of the Equal Protection Clause.

[77] *In re Tiburcio Parrott* (Circuit Court of the United States, District of California, 1880). See discussion in McClain, *In Search of Equality*, 83-92.

[78] McClain, *In Search of Equality*, 93-94.

It was this laundry ordinance that led to a landmark ruling on the Fourteenth Amendment by the U.S. Supreme Court. In *Yick Wo v. Hopkins*, the U.S. Supreme Court held that the protection of the Fourteenth Amendment extended to "any person" within the United States, and that this included aliens.[79] San Francisco's laundry ordinance violated the equal protection of the laws because of the discriminatory manner in which it was administered:

> … while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions… [T]he conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution.[80]

State courts also applied constitutional scrutiny to discriminatory legislation involving immigrants. In 1921, the California Supreme Court struck down the Alien Poll Tax law of that state, which imposed an annual poll tax on all alien male residents who were between 21 and 60 years old. In a test case brought by a Japanese resident and a Mexican resident of that state, the Court ruled that the law was ineffective in relation to a citizen of a Japan because it conflicted with the treaty between the United States and Japan, and that in the case of the Mexican resident, it was a violation of the Fourteenth Amendment.[81]

Discriminatory legislation was not limited to the Chinese and the Japanese in the Western states. On the East coast, the influx of immigrants from Eastern and Southern Europe had created increased tension between the native population who saw these immigrants as undereducated, impoverished and uncivilized people. In 1894 and 1895, New York and Pennsylvania enacted laws that excluded aliens from state and local public works. Pennsylvania in 1897 further enacted laws that set up residence and language requirements for certification as a miner (a major means of employment for immigrants) and required employers to deduct a special state tax from the wages of all foreign laborers. This was struck down by the highest court in Pennsylvania as a "vicious species of class legislation" that violated the Fourteenth Amendment.[82] Thus, the Fourteenth Amendment was beginning to have an impact on state legislation that attempted to discriminate against a person on the basis of citizenship.

Segregation and Equal Protection

While *Yick Wo* applied the Equal Protection Clause to Chinese immigrants and struck down a discriminatory state legislation, a decade later another pervasive means of discrimination was upheld by the Court. This was the forced segregation of races by law.

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79 118 U.S. 356 (1886).

80 Ibid., at 374.

81 "California Poll Tax on Aliens Overruled," *The New York Times*, Sep. 13, 1921.

82 Higham, *Strangers in the Land*, 72-73.

In 1896, the U.S. Supreme Court decided *Plessy v. Ferguson*, in which it held that Louisiana's segregation law did not violate the Constitution. In this case, the state law mandated the separation of blacks and whites in railroad coaches. Plessy, who was convicted for refusing to move to the "black car", challenged the law as a racial discrimination that violated the Equal Protection Clause of the Fourteenth Amendment.

The Court was reluctant to expand the rights of citizens to cover "social equality", or the association of races on equal terms. Segregation was a powerful symbol of social distinction between whites and non-whites. The Court saw this not as discrimination but a natural outcome of social status and of human tendency to associate with one's own kind. While the government had to provide equality in the arena of civil rights, such as the right to sue and own property, it was not the duty of the government to mandate integration and interaction between races, which was deemed a matter of "private choice".[83]

According to the Court, segregation did not violate the Equal Protection Clause because it applied to both whites and non-whites. Blacks could not ride on cars reserved for whites and whites could not ride in cars reserved for blacks. The Court refused to look beyond this facial equality and notice that the law was enacted with the intent of excluding blacks from white cars instead of the other way around. Neither did the Court recognize that the quality of the separate facilities was not equal.

The Court's approval of legal segregation also meant that segregation of the Chinese, which had become common by the time *Plessy* was decided, would also be sustained. The 1879 California state constitution had mandated residential segregation. "Oriental Schools" for Chinese children were established around the state in 1885.[84]

California also capitalized on other opportunities to segregate the Chinese. In particular, the state was able to assert the traditional authority under its police power by framing Chinese immigrants as carriers of deadly diseases and enacting health regulation targeting the group. After the outbreak of the bubonic plague in Canton and Hong Kong in 1894, the San Francisco Board of Health required medical inspection of arriving immigrants. But the Chinese and Japanese immigrants were singled out for quarantine, on the grounds that the ports in China and Japan were supposedly infected. In Hawaii, the reaction was even more drastic. When incidents of that disease were discovered in Honolulu, the State Board of Health removed and quarantined 4500 Chinese, after which it burnt down the entire Chinatown.[85]

Alien land laws and other state-based discrimination

California and other western states enacted laws that deprived the right to own land from "aliens ineligible for citizenship". Ownership of real estate had been a prerequisite for economic independence as well as political rights (suffrage and the eligibility to run for office) since the colonial era. Many states granted foreigners the ability to hold land in

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[83] 163 U.S. 537 (1896) at 542-545. This distinction was arbitrary, since prejudice and stereotypes stemming from non-association in private may lead to public discrimination. For example, racial bias may affect the outcome of jury trials in which the race of the defendant differs from that of the plaintiff and the jurors.

[84] Chan, *Asian Americans: An Interpretive History*, 58.

[85] Ibid., 56-57.

order to induce immigration and settlement. This attitude began to change in the final years of the nineteenth century as Congress was tightening the regulation of immigration. In 1897, Congress passed "An Act to better define and regulate the rights of aliens to hold and own real estate in the Territories."[86] This act prohibited, with an exception for those who had the right under existing treaties, the ownership of land by aliens who had not declared the intent to naturalize and become a U.S. citizen. The act did not apply to land already owned by foreigners and allowed the inheritance of such property by children of foreigners already owned land.

State alien land laws specifically targeted "aliens ineligible for citizenship" and denied them the right to own land in their state. California passed the first of such acts in 1913. This mainly affected Japanese immigrants, who had come to dominate the agricultural industry in that state. Initially, Japanese landowners were able to get around the law by forming land-owning companies and sharing its stocks, or by transferring the title of the land to their U.S. born children, who were citizens by virtue of the Fourteenth Amendment. But in a few years these loopholes were closed, depriving the primary source of economic independence from Japanese immigrants. Other states, including Arizona, Washington, Louisiana. New Mexico, Idaho, Montana, and Oregon, enacted similar laws restricting land ownership by "aliens ineligible for citizenship".[87]

Some viewed these laws as an interference with the treaty obligations of the United States. A treaty between the U.S. and Japan in 1911 had stipulated that the citizens of both countries "shall have liberty to enter, travel and reside in the territories of the other, to carry on trade, wholesale or retail…, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects…" While anti-alien land laws took the form of limiting the rights of "aliens ineligible for citizenship", it was well-known that the laws in fact targeted the Japanese. Thus, an editorial in the *American Journal of International Law* commented of California's attempts that "a single State of these United States arrogates to itself the right to change a national treaty."[88]

Reference was made to *Yick Wo v. Hopkins*, in which a California law that sounded neutral but in fact was used to selectively shut down Chinese laundries was held unconstitutional. An article in the *Yale Law Journal* confidently predicted that because California's differential treatment of "aliens ineligible for citizenship" was a "mere subterfuge to evade" the Fourteenth Amendment, it was "certain to fail if the court goes beyond the letter to the real purpose of this legislation."[89]

However, the Supreme Court in the context of distribution of public resources was not open to the Equal Protection argument. Reservation of natural resources such as land and

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[86] *U.S. Statutes at Large*, XXIX, 618-619. This Act, approved by the President on Mar. 2, 1897, amended the Act of Mar. 3, 1887.

[87] Chan, *Asian Americans: An Interpretive History,* 47.

[88] Woolsey, "The California-Japanese Question," 58.

[89] Charles Wallace Collins, "Will the California Alien Land Law Stand the Test of the Fourteenth Amendment?," *The Yale Law Journal*, Vol. 23, No. 4 (Feb., 1914), 330-338, at 337.

wild animals to citizens had been repeatedly upheld under the U.S. Constitution.[90] Scheiber notes that "antiforeignism" had been especially strong in the area of land policy, and that alien landownership became targets of both Congressional and state legislation in the late nineteenth century.[91]

The Court also held that the distinction between aliens eligible for citizenship and ineligible for citizenship did not violate the Equal Protection Clause.[92] The Court thought that the latter could be discriminated against, because as perpetual foreigners, they could never be loyal to the interests of the nation:

> It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of the state and so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries.

The Court acquiesced in the notion of designating groups of people as unfit for citizenship and making that inability a justification for limiting their rights. This was reminiscent of the denial of citizenship to blacks prior to the Civil War.

However, in regards to employment and occupation restrictions that burdened aliens *in general*, the Court did extend the application of the Fourteenth Amendment to strike down discriminatory state laws. In *Truax v. Raich* (1915), the U.S. Supreme Court struck down a Nebraska state law that required that at least 80% of the workers employed in a firm had to be "qualified electors or native-born citizens". Justice Hughes pointed out that this law forced discrimination in the "conduct of ordinary private enterprise" and went beyond the police power of the state. Further, he held that such a law violated the powers of the federal government to regulate immigration:

> The assertion of an authority to deny to aliens the opportunity of earning a livelihood… would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot

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[90] *Crane v. N.Y.*, 239 U.S. 195 (1915) (upholding a law prohibiting aliens from being employed in public works); *Tbop v. Ulysses Land Co.*, 237 U.S. 580 (1915) (upholding a Nebraska law prohibiting aliens from inheriting or holding real estate); *Patsone v. Pennsylvania*, 232 U.S. 138 (1914) (upholding a Pennsylvania law prohibiting aliens from killing wild bird or animal). These cases are discussed in Raymond Leslie Buell, "Some Legal Aspects of the Japanese Question," *The American Journal of International Law*, Vol. 17, No. 1 (Jan., 1923), 38-42.

[91] Harry N. Scheiber, "Xenophobia and Parochialism in the History of American Legal Process: From the Jacksonian Era to the Sagebrush Rebellion," *William and Mary Law Review*, Vol. 23 (1982), 625-662, at 650-657.

[92] *Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding Washington's alien land law); *Porterfield v. Webb*, 262 U.S. 225 (1923) (upholding California's alien land law). The U.S. Supreme Court later reversed this position and demanded that states provide independent justification for discriminating against aliens. *Oyama v. California*, 332 U.S. 633 (1948); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948). See also, Sherman A. Itlaner, "Alien Land Law Violates Fourteenth Amendment," *Michigan Law Review*, Vol. 51, No. 5 (Mar., 1953), 742-744.

> work… And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality."[93]

This showed how federal power to regulate immigration could be used to expand the power of the federal government to other fields of regulation. The Court was suggesting that regulations in areas traditionally reserved to the states, such as labor, education, agriculture, may be unconstitutional if it interfered even if indirectly with federal immigration law. Once Congress has admitted a person as an immigrant, states may not make their lives uncomfortable by way of state legislation except in special cases such as the alien land laws. The rights extended to immigrants residing in a state should be part and parcel of federal immigration policy. In this manner, federal power to regulate immigration grew at the expense of states' power to make personal status distinctions, and allowed Congress to reach into policy areas that were traditionally reserved to the states.

Standardization of the naturalization process

In the early twentieth century, the federal government also pursued uniformity across the states in the rules for classifying citizens and aliens. For example, the boundaries of "aliens ineligible for citizenship" had remained contested. While the intent of state laws that targeted this group was to exclude *Asians* (in particular the Chinese and the Japanese), the laws avoided specifically naming these groups.[94] The application of these laws depended on how the federal law regarding naturalization was interpreted when deciding whether a particular group was eligible for citizenship.

Congress had not taken a positive action to exclude Asians from naturalization. The naturalization law limited eligibility for naturalization to "free, white persons", and after the Civil War, also allowed persons of African ancestry to naturalize. But where Asians would fit in could not be answered easily. The "free, white" language in the naturalization laws was first inserted in the 1790s, when there was no Asian presence in the United States. Some argued that since the naturalization laws included whites only, everyone else including Asians should be excluded. Others argued that the law excluded blacks only, so that Asians should be included.

For example, there was a debate over whether Asian Indians were Asians or white. Some anthropologists argued that Asian Indians had the same biological roots as European whites and that many were in fact white in terms of skin color. In 1923, however, the U.S. Supreme Court held that the term "white" was to be construed in a popular sense and not in a scientific sense as some anthropologists claimed. According to the Court, "white persons" were people from the British Isles and Northwestern Europe, and immigrants from

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93 *Truax v. Raich*, 239 U.S. 33 (1915), at 42.

94 If the state laws openly targeted a specific group for discriminatory treatment, it risked running afoul of the Equal Protection Clause, as was the case in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). But states hoped that "aliens ineligible for citizenship" would serve as a proxy for those groups.

other parts of Europe who readily amalgamated with these groups.[95]

The federal government was unsure about the racial classification of Asians. This uncertainty showed in the census classifications of race. From the first census in 1790 through the 1850 census, there were only three categories of racial classification: "Whites", "Free Colored", and "Slaves" (as in the 1850 census) or a slight variation of those terms. In 1860, the Asian population was noticed for the first time, but the three-tiered classification was maintained. The census report noted that in the statistics for California, "Asiatics are included in the white population". In 1870 and 1880 there were four categories, "White", "Colored", "Chinese", and "Indians" (in both cases the report noted that the Japanese were included under Chinese). Technically, then, the "Chinese" and "Indians" were distinct from the "Colored".[96]

State courts also diverged on the question of who counted as "whites" under the naturalization laws. Although the U.S. Constitution gave Congress the power to adopt a uniform rule of naturalization, the actual administration of naturalization was left to any court of record. Most naturalization petitions were sent to local courts within the state court systems. Variations developed between these local courts for the definition of "white" and consequently, who could naturalize. In 1878, fifteen Chinese people gained citizenship through the New York courts, while the same year the U.S. circuit court in California ruled that they were ineligible for naturalization.[97] As for the Japanese, the U.S. circuit court in Massachusetts ruled in 1894 that they did not come within the meaning of the term "white persons".[98] Yet one study says that "some fifty or a hundred" Japanese have been admitted to citizenship by courts in California, Indiana, Florida and New York prior to 1911 (when the Bureau of Immigration and Naturalization issued more strict orders)[99], and another points out that in the 1910 census there were more than four hundred naturalized Japanese in the country.[100]

In 1906, Congress enacted the Basic Naturalization Act of 1906, which established the Bureau of Immigration and Naturalization that was charged with administering "all matters concerning the naturalization of aliens".[101] The Act specified in detail the procedure for naturalization, such as information to be submitted, the timing and manner of application, requirement of witnesses and an oath of allegiance, etc. It also prohibited the naturalization of aliens "who cannot speak the English language".

The Act also established mechanisms to ensure uniformity across the nation by allowing the United States to appear in any naturalization proceeding to oppose the

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95 *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923). See A. Warner Parker, "The Ineligible to Citizenship Provisions of the Immigration Act of 1924," *The American Journal of International Law*, Vol. 19, No. 1 (Jan., 1925), 23-47, at 27.

96 Roy Malcolm, "American Citizenship and the Japanese," *Annals of the American Academy of Political and Social Science*, Vol. 93 (Jan., 1921), 77-81.

97 Chan, *Asian Americans: An Interpretive History*, 47. The circuit court case is *In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878).

98 Malcolm, "American Citizenship and the Japanese," 78, citing *In re Saito*, 62 F. 126 (C.C.D. Mass. 1894).

99 Ibid., 79.

100 Buell, "Some Legal Aspects of the Japanese Question," 31.

101 34 Stat. 596.

naturalization of a person, and by making it the duty of United States district attorneys to bring suits to cancel the certificate of citizenship if it was illegally procured. The law seems to have been effective in this regard. A recent study that looked at the variables affecting naturalization of immigrants around this time found that differences in naturalization rates attributable to the state in which the immigrant lived diminished significantly after the passage of the 1906 Naturalization Act.[102]

In line with the rise of anti-immigration sentiment, the U.S. Supreme Court adopted a narrow definition of "whites" for the purpose of naturalization. In a series of decisions coinciding with the Immigration Act of 1924, the Court decided that Japanese were "aliens ineligible for citizenship"[103]; that whites should be defined as "traditionally understood" and not scientifically so that Asian Indians were excluded from that category[104]; and that a child of mixed British, Chinese, and Japanese heritage was "not sufficiently white" to be eligible for naturalization.

Confusion arose in states where aliens who had already been allowed to naturalize were held later by the U.S. Supreme Court to have been ineligible for citizenship. In the state of Washington, a person of Japanese descent who had been granted naturalization by a superior court in that state was denied the right to incorporate a land-holding company because he was now deemed to be an alien ineligible for citizenship. The state claimed that he should not have been allowed to naturalize in the first place. The U.S. Supreme Court in 1922 ruled that based on its decision in *Ozawa v. United States*, which denied the eligibility of Japanese to naturalize, the superior court's judgment that granted this Washington men naturalization was void.[105]

Meanwhile, children of immigrants, even if their parents were Asian immigrants who were ineligible for citizenship, acquired U.S. citizenship by birth because the Fourteenth Amendment gave citizenship to "all persons born or naturalized in the United States". As discussed in previous chapters of this study, this provision reversed the *Dred Scott* decision and made it clear that free blacks as well as emancipated slaves were U.S. citizens if they were born in the United States. Because of this context of the Fourteenth Amendment, some argued that it should not apply to Chinese immigrants.

In *Wong Kim Ark v. U.S.*, the Supreme Court held that a person born in the United States of Chinese parents was a U.S. citizen.[106] Wong Kim Ark was born in San Francisco, but when he traveled to China and returned he was refused entry on the ground that he was not a U.S. citizen. The Court ruled that the Fourteenth Amendment applied to Chinese persons and that Wong Kim Ark was a citizen. The Fourteenth Amendment had become an instrument to promote the status and rights of Asian immigrants in the face of state-level hostility towards them.

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102 Irene Bloemraad, "Citizenship Lessons from the Past: The Contours of Immigrant Naturalization in the Early 20th Century," *Social Science Quarterly*, Vol.87, No. 5 (Dec., 2006), 927-953.

103 *Ozawa v. United States*, 260 U.S. 178 (1922).

104 *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923).

105 *Yamashita v. Hinkle*, 260 U.S. 199 (1922).

106 169 U.S. 649 (1898).

Chapter conclusion

When state passenger laws were nullified by the U.S Supreme Court in 1875 and the federal government began legislating in the field of immigration, it was not yet clear what the roles of the different branches of the federal government would be on this subject-matter. Initially, both Congress and the President took initiative in regulating immigration. For example, it was common for the Executive branch to initiate and negotiate bilateral treaties with other nations on commerce and trade. Such treaties were likely to contain provisions protecting not only the flow of goods but also of people, especially merchants who were engaged in international trade.

But the diplomatic focus of the President frequently clashed with the more inward-looking, populist demands of Congress. Riding on a tide of anti-immigration sentiment from coastal states, Congress repudiated treaties and executive agreements and enacted exclusionary immigration legislation over Presidential veto. Congress also established federal institutions to enforce its laws, and took over the roles of state agencies that controlled ports of entry. It also refined naturalization laws and standardized the naturalization process.

The U.S. Supreme Court first expanded the interpretation of the Commerce Clause and then applied the Fourteenth Amendment to strike down state laws that conflicted with this power. Whenever constitutional challenges to federal immigration laws arose, the Court took an extremely deferential position to Congress. Thus, by 1924, Congress had become a dominant institution in the United States that charged with controlling the boundaries of immigration and citizenship for foreigners coming to the United States. The "plenary power" of Congress, or the exclusive authority of Congress to regulate immigration, was established.[107]

Meanwhile, the Court struck down discriminatory state laws directed towards aliens as a violation of the Fourteenth Amendment, with the exception of alien land laws targeting aliens ineligible for citizenship. In addition scrutiny under the Equal Protection Clause, the Court also suggested that discriminatory treatment of aliens by the states interfered with federal immigration policy. Since the Court now held that regulation of immigration was the "plenary power" of Congress, state laws that affected immigration or the rights of immigrants would be scrutinized more carefully. States no longer had a free hand in defining the status and rights of immigrants who entered their territory.

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[107] When the "plenary power" of Congress was first recognized by the Court, it was in the context of *federal-state relations*. The Court struck down *state* immigration regulation on the ground that Congress had "plenary power" over the matter. While this meant that state governments could not interfere with federal regulation, it is unclear whether the Court meant that co-equal branches of the *federal* government could not act in regards to immigration.

IX. Elimination of obstacles to the interstate migration

While in the early twentieth century the federal government gained exclusive control over whom to admit to the United States, people inside the United States still faced barriers to migration across state borders due to regulations enacted by individual states. Poor laws for the regulation and exclusion of paupers remained in effect. In addition, other laws to keep the poor out of the state as well as to limit the impact of newcomers on state resources were enacted. For example, states enacted laws that made it a crime for existing state residents to bring in poor relatives, and limited welfare benefits available to newcomers in order to discourage people from coming to the state for the benefits.

This chapter examines how this last obstacle to nationalized citizenship was eliminated. Under a nationalized citizenship, citizens of the United States should be able to travel freely to any state and claim the full rights of citizenship there without being hindered by the notion of state citizenship. Discrimination based on state citizenship should be eliminated, and the federal government should have exclusive control over migration of people into and within the United States, over the status of people residing in the United States, and the rights of the people no matter which state they reside in.

In this chapter, I will discuss *Edwards v. California*, which focused national attention on the plight of U.S. citizens migrating from one state to other, and subsequent cases that built upon this case. In these cases, the U.S. Supreme Court scrutinized state legislation that limited the rights of newcomers (people arriving from other states) and held them unconstitutional, thereby eliminating obstacles to the interstate migration of persons.

National concerns over the "Dust Bowl migration"

In *Edwards v. California* (1941)[1], the Supreme Court struck down a California law that made it a crime to bring in a pauper from another state. Edwards was a California citizen who was convicted for driving his wife's brother from Texas to the state. The case occurred in the context of an unprecedented social unrest over the domestic migration of indigent farmers inside the United States, particularly from the Southwestern states of Oklahoma, Arkansas, Texas, and Missouri to California. By one estimate, as of early 1939, 500,000 migrants were driven out of the South and Midwest, of which between 150,000 and 200,000 went to California.[2] Large-scale migration from these states had begun in the 1920s. In California, the Southwestern migrants went either to the Los Angeles area or the San Joaquin Valley. The latter group especially was slow to integrate and formed distinct subcultures, contributing to their alienation from local communities.[3]

Several factors combined to multiply the negative effects of the Great Depression in

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1 314 U.S. 160 (1941).

2 "Depression Migrants and the States," *Harvard Law Review*, Vol. 53, No. 6 (Apr., 1940), 1031-1042 at 1031, footnote 7. The majority opinion in *Edwards v. California* cited this article and questioned whether the traditional notion of "paupers" fits the "able-bodied but unemployed person" of the modern era. 314 U.S. 160, at 176.

3 James N. Gregory, *American Exodus: The Dust Bowl Migration and Okie Culture in California* (New York: Oxford University Press, 1989).

the Southwest during the 1930s.[4] Prices of crops fell as the market for agricultural commodities disappeared. Foreclosures on small farms, accompanied by the mechanization of farming and the evolution of large-scale corporate farming, threw families out of small farms. Finally, a spectacular drought and frequent dust storms struck the region from 1933 to 1935.[5] While the image of destitute migrants swamping California spread through the media, people of diverse socio-economic backgrounds including white-collar workers left the area.[6]

In California, agitation and resentment grew against indigent migrants arriving from across the nation, including these "Dust Bowl migrants". In 1935, a bill in the state legislature that would have closed the state border to "All paupers and persons likely to become public charges" failed by only a small margin. Soon after, the police chief of Los Angeles unilaterally dispatched 125 policemen to patrol the state's major border crossings, garnering national attention.[7] State officials called for the prevention of further migration and asked the federal government to provide assistance towards states that were impacted by the migration. The winter of 1937-38 was especially severe, with heavy rains flooding the encampments of these migrants. At this point, the Farm Security Administration of the federal government launched an emergency assistance program for agricultural workers who did not meet California's residency requirement for assistance.[8]

In 1939, the district attorney in several California counties commenced prosecution under the state's Indigent Act, which was first passed in 1933 but had not been enforced until then. The law made it a crime for anyone to bring indigents from other states into California.[9] According to one study, at least half of the 1930s migrants followed already settled relatives in California, creating a chain migration in which a network of relatives and friends sustained the flow of migration from Oklahoma to California.[10] This pattern of migration became so common that by the end of the 1930s, a billboard on Highway 66 just outside Tulsa, Oklahoma warned "NO JOBS in California… No State Relief Available for Non-Residents".[11] The state law was used in an effort to stem this migration pattern. At least two dozen people were prosecuted before the American Civil Liberties Union brought a constitutional challenge that led to *Edwards v. California*.[12]

The Indigent Act was an extension of the poor laws. As we saw earlier, poor laws

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4 Edward W. Adams, "Constitutional Law: State Control of Interstate Migration of Indigents," *Michigan Law Review*, Vol. 40, No. 5 (Mar., 1942), pp.711-733 at 712-713.
5 Gregory, *American Exodus*, 10-11.
6 Ibid., 15-17.
7 Ibid., 80.
8 Ibid., 64-65.
9 Section 2615 of the Welfare and Institutions Code of California read: "Every person, firm or corporation or officer or agent thereof that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person, is guilty of a misdemeanor" (314 U.S. 160, at 171).
10 Gregory, *American Exodus*, 26-29.
11 Ibid., 22, citing a photograph from a report of a Select Committee established in the House of Representatives to investigate the issue of interstate migration.
12 Ibid., 98-99.

were based on local responsibility for taking care of the sick and poor.[13] Each person had "settlement" (legal residence) in a particular town, and if the person fell in need, the town in which the person had settlement was responsible for looking after the person. Qualifications for settlement were set by state laws, and people required permission in order to move into a town where they did not have settlement. Towns also had the power to turn away or evict persons who did not have settlement. As of the time of Dust Bowl migration, at least 31 states had laws explicitly authorizing state officials to remove a poor person to his place of settlement within the state.[14]

To prevent the migration of paupers into the state, state laws criminalized people who assisted their entry. Further, states enacted residency restrictions that required a number of years of residence before a person can gain settlement and become eligible for welfare benefits. During the Dust Bowl migration, states tightened these laws to discourage the migration of those seeking assistance. California lengthened its residence requirement from three years to five years in 1940, the year before the *Edwards* decision.[15]

This idea of local responsibility was difficult to maintain in the context of large-scale migration. The concept of "settlement" led to much confusion because each state had different qualifications for that status. Some states provided for a loss of settlement after a short absence from the state. Other states required a lengthy period of residence before a person could acquire settlement. This meant that a person could lose his settlement in one state before gaining one in another. Should the other state remove that person because he had become a public charge, the person had no place to return to. This led to conflicts between the states over which state had responsibility for a person. States had an incentive to shorten the time before a person lost settlement and to extend the time before a person could gain settlement.

Poor laws had thus become an outdated mode of dealing with the indigent population. These laws placed responsibility for the care of the sick and poor on the towns and ultimately on the states[16], based on the assumption that those people were unable or unwilling to work and had no means of sustenance. They were dependent on their community, and this burden was not to be pushed upon other communities. As such, paupers were deprived of the *right of free movement*. The Dust Bowl migrants were qualitatively different, for they were in the main, able-bodied young farmers willing to work if they had employment. Often, it would not take much time before the migrant could find a job in the factories or as a field hand if they could move to another locale. Industrialization and mechanization of farm-work had led to a social condition in which remaining in the town became obsolete and impractical, while migration to industrial areas became the norm. A system based on local liability for those who cannot work was

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13 See Chapter II of this study.

14 "Depression Migrants and the States," *Harvard Law Review*, Vol. 53, No. 6 (Apr., 1940), 1032, footnote 8.

15 "Constitutional Law: State Statute Penalizing Bringing Non-Resident Indigents into State," *University of Chicago Law Review*, Vol. 9, No. 2 (Feb., 1942), 338, footnote 26.

16 As discussed in Chapter II, state poor laws provided mechanisms for reimbursement from state coffers when the location of settlement was in dispute. Local officials were authorized by these laws to send back paupers from other towns.

outdated and went against the conditions of a modern economy.[17]

Constitutional issues in *Edwards*

Edwards v. California was a test case attacking the constitutionality of state laws that targeted indigent migrants. Several constitutional provisions were relevant to the case. This included the Interstate Commerce Clause, the Privileges and Immunities Clause of Article IV, Section 2, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Due Process Clause.

The Privileges and Immunities Clause of Article IV provided that citizens of state A must be treated as citizens of state B when they migrate to the latter. However, the content of the rights of citizens was to be determined by each *state*, as long as citizens and non-citizens of that state were treated equally. An equal denial of rights was fine—if a state chose to not guarantee a particular right to *its* citizens, then there was no need for that state to guarantee that right to citizens of other states. There was no nationally-guaranteed set of rights that states had to respect.

The Privileges and Immunities Clause of the Fourteenth Amendment was different in that it was based on *federal* citizenship. All states had to guarantee the rights of federal citizens. However, the Supreme Court had interpreted this clause so narrowly that only a few essential rights attached to federal citizenship.[18] The question was whether this provision could be resurrected so that the right to move across state borders could be held as one of the privileges attached to *federal* citizenship. This would make state laws that restricted the interstate migration of persons a violation of this Clause.

Finally, the Due Process Clause of the Fourteenth Amendment prohibited states from depriving life, liberty and property of persons without due process. Earlier in the century, the Court used this provision as a vehicle for guaranteeing substantive rights that were otherwise not mentioned in the Constitution. In *Lochner v. New York* (1905), the Court held that the term "liberty" included freedom of contract, and that a state law regulating hours and wages of workers violated this guarantee of liberty.[19] Law journals were rife with articles debating the merits of reading such substantive rights into the Due Process Clause. In the context of state poor laws, the argument was whether the term "liberty" included the right to freedom of interstate movement.

In addition to these rights-based contentions, the law was also challenged from the standpoint of allocation of power between the states and the federal government. According to this argument, the movement of people inside the nation should be a matter that only Congress could regulate instead of individual states. The Court had already held

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[17] Adams, *supra* note 4, 715-717.

[18] See discussion of the *Slaughterhouse Cases* in Chapter VII.

[19] 198 U.S. 45 (1905). However, the Court during the Great Depression reversed this stance and adopted a deferential stance towards socio-economic legislation designed to protect the welfare of workers. See for example, *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which upheld a state law regulating the minimum wage. See in general, Richard Polenberg, *The Era of Franklin D. Roosevelt, 1933-1945: A Brief History with Documents* (Boston: Bedford/St.Martin's, 2000). Thus, at the time of the Edwards decision, reading substantive rights such as freedom of contract into the Due Process Clause was a disfavored approach.

that state passenger laws which amounted to a tax or a burden upon people moving across state borders was unconstitutional because it infringed upon the power of Congress under the Interstate Commerce Clause.[20]

The Court strikes down the California statute

The majority opinion of the Supreme Court held that California's law infringed on the Interstate Commerce Clause. In doing so, it built upon precedents that expanded the scope of federal powers under that Clause. It was established by then that the term "commerce" included the movement of persons, both as a means of carrying goods and articles, and as an end in itself-- the person was also an article of commerce. State passenger laws had been struck down on the basis of this interpretation.

The Court had stated in its previous decisions that states could still exclude paupers as a "moral pestilence", just as it may quarantine people in the interest of public health. This time, the majority opinion held that social opinion had changed, and that people like Edward's relative should not be equated with "moral pestilence". State police power could no longer be a justification for excluding them:

> Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that, because a person is without employment and without funds, he constitutes a 'moral pestilence'. Poverty and immorality are not synonymous.[21]

The majority opinion avoided arguments based on the Fourteenth Amendment, which would have been more controversial. Such arguments would have either required the Court to resurrect the Privileges and Immunities Clause which it had brushed aside in the *Slaughterhouse Cases*, or to use the Due Process Clause to guarantee substantive rights, which was in disrepute. The Court, in the context of an urgent need for the regulation of the markets during the Depression, had just reversed *Lochner* and held that states could regulate labor conditions.[22] In doing so, it backtracked from the idea in *Lochner* that the Due Process Clause guaranteed the freedom of contract.

The concurring opinion, however, took a different approach. Justice Douglas and Justice Jackson expressed discomfort about treating persons as a part of "commerce". Instead, they argued that "the right to move freely from State to State is an *incident of national citizenship* [emphasis by the author]," [23] which was protected by the Privileges and Immunities Clause of the Fourteenth Amendment:

> To hold that the measure of his rights is the commerce clause is likely to result either in distorting the commercial law or in denaturing human rights. I turn, therefore… to the clause of the Constitution by virtue of which Duncan is a citizen of the United States and which forbids any State to abridge his privileges or

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[20] See discussion of the *Passenger Cases* in Chapter VI.

[21] 314 U.S. 160, at 176.

[22] The *Lochner* decision was reversed by the Court in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

[23] 314 U.S. 160, at 178 (Justice Douglas, concurring).

immunities as such.[24]

According to Justice Jackson, the California law that punished Edwards for bringing in Duncan (his relative) infringed on the fundamental privilege of Duncan to move freely across state borders. If a person was a citizen of the United States, it should be a matter of right that he should be able to travel and reside in any state without hindrance. The Privileges and Immunities Clause of the Fourteenth Amendment was enacted to avoid this kind of an encroachment upon the rights of federal citizens.[25]

Justice Jackson recognized that the rights of federal citizenship had been narrowly interpreted by the Court in the past. But in his opinion, the right of free movement throughout the nation *was* one of those few rights that should be guaranteed by virtue of federal citizenship. Freedom of movement across state borders was a fundamental privilege of federal citizens. He deemed this so fundamental that he declared: "If national citizenship means less than this, it means nothing."[26]

Effects of the *Edwards* decision

The *Edwards* decision struck a blow at a critical means of controlling state citizenship. The loss of the ability to control the entry of people into the state had an additional significance in light of the Fourteenth Amendment, since it declared that *any* citizen of the United States residing within a state was automatically a *citizen of that state*. Combined with *Edwards*, this meant that anyone can freely enter a state and become its citizen by residing there. The status and rights of state citizens could be acquired regardless of the individual's personal status or wealth.

This decision deprived what was left of the power of states to prohibit the entry of people into its territory. Up to that point, states had retained the power to reject certain people on the basis of its *police power*. This allowed the states to prevent the entry of paupers as well as people with diseases, for example. Now the Court held that states had to respect the right of free movement of all persons, including the poor. The Justices had become receptive to the idea that this was a fundamental privilege of *federal* citizens that could not be encroached upon by the states.

A commentator presciently noted that the effects of the *Edwards* ruling would depend on how it would affect related issues. Most critically, do durational residency requirements (requiring a person to have resided in the state for a number of years) for welfare benefits violate the right to free movement because it was meant to discourage poor people from coming to the state?[27]

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[24] Ibid., at 182 (Justice Jackson, concurring).

[25] A commentator noted that reliance on the Privileges and Immunities Clause would have been a disadvantage in that it would not have protected the interstate migration of aliens who were among the Depression-era migrants. "Constitutional Law: State Statute Penalizing Bringing Non-Resident Indigents into State," *The University of Chicago Law Review*, Vol. 9, No. 2 (Feb., 1942), 337.

[26] 314 U.S. 160, at 183.

[27] "Constitutional Law: State Statute Penalizing Bringing Non-Resident Indigents into State," *The University of Chicago Law Review*, Vol. 9, No. 2 (Feb., 1942), 337-338.

Changes in conditions surrounding equality and federal citizenship

Several developments surrounding the Court supported the elimination of distinctions based on state citizenship. First was the development of Equal Protection jurisprudence, under which the Court systematically applied the Equal Protection Clause of the Fourteenth Amendment to scrutinize legislation that made distinctions among people. Specifically, the Court articulated the conditions for a heightened scrutiny of legislation. Laws that systematically disadvantaged minority groups (along the lines of race, ethnicity, nationality or alienage) or deprived fundamental rights from a particular group would receive extra scrutiny from the Court. Second was the change in the attitudes of the political branches towards federal intervention to protect the rights of citizens from state discrimination. Finally, there was the broad application of the Due Process Clause to protect the rights of citizens in the context of the welfare state. States had used its power to subsidize or provide benefits to citizens as part of their policy to encourage or discourage migration from other states. The Court placed constraints on this discretion of the states and made it subject to the procedural guarantees of the Due Process Clause.

The most significant development towards judicial protection of the rights of federal citizens was the Court's heightened scrutiny of state laws that discriminated on the basis of race, ethnicity and nationality. The Court began to apply the Equal Protection Clause of the Fourteenth Amendment in a rigid manner when state laws treated people differently on the basis of those classifications (called "suspect classification"). Specifically, such laws would have to be necessary to achieve a *compelling* state interest (not merely important or reasonable), and the means that are used would have to be narrowly-tailored to achieve that purpose. In other words, if the same purpose could be achieved without making distinctions based on a suspect classification, the law does not survive this scrutiny. A law that failed either prong of this means-ends test would be unconstitutional.

The Court suggested that it would take this approach as early as 1938, in the *United States v. Carolene Products Co.* decision. The case itself was one in which the Court all but abandoned judicial scrutiny of socio-economic legislation and instead chose to leave such legislation to the political process. The Court switched to this position under popular pressure resulting from the wide-spread support of President Franklin D. Roosevelt's New Deal economic programs and his willingness to confront the Court on their constitutionality. But significantly, the Court reserved specific areas of legislation for closer judicial scrutiny— in instances where the political process could not be expected to fairly protect the rights of the people. Justice Stone, in an indirect manner, implied that legislation targeting racial minorities may require more scrutiny:

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious…, or national…, or racial minorities…, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry [*citations omitted*].[28]

[28] 304 U.S. 144 (1938), footnote 4.

The Justices began to apply strict scrutiny towards legislation that targeted a racial minority in cases that involved the mass incarceration of Japanese Americans during World War II. 110,000 people of Japanese Americans living on the West Coast were forcefully relocated to internment camps set up by the military in the name of national security. The relocation program was eagerly promoted by military officers on the West Coast and ultimately sanctioned by President Roosevelt's executive order.[29] There was no effort to separate the loyal from the hostile; in fact, even the second generation U.S. citizens were incarcerated on the basis of Japanese ancestry.

Hirabayashi v. United States (1943) challenged one aspect of the program, which was a curfew order that singled out Japanese Americans. The Court unanimously upheld the order based on military necessity. However, Justice Murphy, who concurred with the majority and upheld the evacuation order, expressed strong doubts about such a measure:

> Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry… [N]o less than 70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial inheritance… The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour — to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power.[30]

A year later, the core element of the program, which was the evacuation order that required Japanese Americans to report to military authorities in order to be sent to internment camps, was again upheld by the majority of the Court. But this time, three Justices (including Justice Murphy) explicitly dissented, saying that this was an unconstitutional discrimination. Justice Murphy argued that the incarceration of Japanese Americans deprived the due process rights of individuals by criminalizing an entire racial group on the basis of suspicion towards some members of the group:

> No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights.[31]

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[29] Executive Order No. 9066, 7 Fed. Reg. 1407. For details about how this policy emerged and Japanese American responses, see Chan, *Asian Americans: An Interpretive History*, 121-142. See also, David K. Yoo, *Growing Up Nisei: Race, Generation, and Culture among Japanese Americans of California, 1924-49* (Urbana: University of Illinois Press, 2000 2000), 92-123.

[30] *Hirabayashi v. United States*, 320 U.S. 81 (1943), 111.

[31] *Korematsu v. United States*, 323 U.S. 214 (1944), 241. The Justices referred to the Due Process Clause of the Fifth Amendment, since that Clause applied to federal laws while the

The Court's scrutiny against towards state laws that targeted racial minorities further developed following World War II. Its new attitude was made visible in cases involving segregation. In *Shelley v. Kraemer* (1948), the Court held that restrictive covenants which were private agreements between landowners not to allow members of a particular race to own property were not judicially enforceable. Such covenants were utilized to preserve racially segregated neighborhoods. The Court held that the power of the government cannot be used to sanction such contracts. Therefore, it was a violation of the Equal Protection Clause of the Fourteenth Amendment for the state courts to enforce these contracts:

> We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color.[32]

Another six years later, the Court issued a landmark decision in the application of the Equal Protection Clause to protect the interests of racial minorities. In *Brown v. Board of Education* (1954), the Court reversed its precedent, which held that racial segregation did not violate the Equal Protection Clause so long as the facilities provided were "equal". This time, the Court held that segregation in itself was suspect.[33] In particular, segregation of public elementary schools imposed an early badge of inferiority on black children, which would forever disadvantage them. The Court, therefore, held that segregation was "inherently unequal" and a violation of the Equal Protection Clause in the case of school segregation.

The causes of such a dramatic reversal of the Court's position are various. It should first be noted that the *Brown* case did not suddenly emerge, but was another step in the progression of decisions since the NAACP (National Association for the Advancement of Colored Persons) began to systematically challenge school segregation in the 1930s.[34]

Fourteenth Amendment only applied to state laws. Though the Fifth Amendment did not contain the Equal Protection Clause, Justice Murphy argued that laws which deprived rights to liberty on the basis of race would be a violation of due process, thereby reading the Equal Protection guarantees of the Fourteenth Amendment into the Due Process Clause of the Fifth Amendment. See 320 U.S. 81, 112.

[32] *Shelley v. Kraemer*, 334 U.S. 1 (1948), 20-21.

[33] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[34] For the history of school desegregation cases, focusing on the involvement of the NAACP, see Robert J. Cottrol, Raymond T. Diamond, and Leland B. Ware, *Brown v. Board of Education: Caste, Culture, and the Constitution* (Lawrence, Kan.: University Press of Kansas, 2003).

Since then, the Court had held that denial of law school education for blacks was unconstitutional, and further that the establishment of a separate law school for blacks was also unconstitutional because of inequality in the quality of education as well as intangible benefits such as alumni networks.[35] The NAACP strategy thus attacked the "equal" prong of the "separate but equal" doctrine. The *Brown* decision went a step further and attacked "separate" schooling itself.

Studies also point out the leadership of Chief Justice Earl Warren. It was his interpersonal skills as a former Governor of California that received a rare bipartisan support that allowed him to muster a unanimous decision. He took time in deciding the case by ordering a reargument of the constitutional issues and personally approached Justices who initially signified a dissenting position.[36] When he finally wrote the decision, he declared segregation unconstitutional but left the most contentious aspect of such a decision—the issue of enforcement, out. After further hearings, the Court issued a ruling (*Brown II*) a year later that asked states to voluntarily desegregate schools at "all deliberate speed" instead of forcing immediate desegregation by judicial order.[37]

A recent trend is to analyze why the political branches acquiesced to the decision. These studies point out the broad international context of the Cold War, in which the communist regimes were using racial discrimination in the United States as a propaganda tool.[38] Thus, the U.S. Department of Justice filed amicus briefs supporting Brown in favor of ruling against racial segregation, singularly from the perspective of its impact on foreign relations. The brief quoted the Secretary of State, Dean Acheson, as saying that race discrimination "remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world."[39]

Even before the Soviet propaganda, the Executive branch was beginning to promote racial integration. In 1946, President Truman appointed the President's Commission on Civil Rights, which issued a report critical of racial segregation in general and particularly in the armed forces. In 1948, the President signed Executive Order 9981, ordering the elimination of racial discrimination in the armed forces, which he said meant the end of segregation.

The Court could thus expect that at least the President would agree with a decision against race segregation. This was confirmed when, in 1957, President Eisenhower went as far as dispatching federal troops and putting the Arkansas National Guard under federal command to enforce a federal court order regarding the integration of Central High School in Little Rock, Arkansas.[40] Governor Orval Faubus of Arkansas had defied the court order

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[35] *Sweatt v. Painter*, 339 U.S. 629 (1950).

[36] S. Sidney Ulmer, "Earl Warren and the Brown Decision," in Lawrence M. Friedman and Harry N. Scheiber eds., *American Law and the Constitutional Order: Historical Perspectives* (Cambridge, Mass: Harvard University Press, 1988), 343-349.

[37] 349 U.S. 294 (1955).

[38] Mary L. Dudziak, "Brown as a Cold War Case," *The Journal of American History*, Vol. 91, Issue 1 (June 2004), 32-42.

[39] Ibid., 34.

[40] Executive Order 10730, Providing for the Removal of an Obstruction of Justice Within the State of Arkansas, Sep. 24, 1957.

and mobilized the Arkansas National Guard to prevent the African American students from entering the school. The President emphasized that an order by a federal court must be followed, instead of urging integration *per se*. In a handwritten note about his decision to send federal troops, he wrote:

> Troops—not to enforce integration but to prevent opposition by violence to order of a court.[41]

Thus, there was a mutual expectation between the Court and the President. The Court could expect that the President would support racial integration, and the President could rely on the Court to pronounce doctrines that may be politically unpopular. The President could then say that he was merely following the Constitution and support racial integration without explicitly saying so.

Congress did also act that same year, by passing the Civil Rights Act of 1957, which was the first civil rights legislation enacted by Congress since the Civil Rights Act of 1875. The Senate had to overcome a record-breaking filibuster by Senator Strom Thurmond of South Carolina to do so. Following sustained demands by Civil Rights activists, Congress enacted more civil rights legislation in the 1960s. Following a summer of mass demonstrations in 1963 (which culminated in the "March to Washington" on Aug.28, 1963 where Martin Luther King made his famous "*I Have a Dream*" Speech) and the assassination of John F. Kennedy in Dallas later that year, Congress renewed its efforts to pass a comprehensive Civil Rights bill, with the support of President Lyndon B. Johnson.

The Civil Rights Act of 1964 outlawed segregation of public accommodations, encouraged school desegregation, prohibited state and local governments from denying access to public facilities in a discriminatory manner, and prohibited discrimination in employment.[42] The next year, Congress also passed the Voting Rights Act of 1965, which outlawed discriminatory practices such as the literacy test that had been used to disenfranchise blacks. It also provided for a strong federal oversight of election administration.

Thus, political conditions were ripe for the assertion of equality during the 1960s. The Civil Rights Act of 1964 was not just about blacks, but also provided for the equal treatment of persons regardless of religion, ethnicity, national origin, and gender. Extending that idea to external relations, Congress also enacted the Immigration Act of 1965, which was the first fundamental revision of federal immigration law since 1924. The Act, which had its roots in ideas promoted by John F. Kennedy, eliminated race as a criteria for determining admission to the United States.[43]

During this period, all branches of the federal government promoted the idea of

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41 Eisenhower Presidential Library & Museum, "Handwritten notes by President Eisenhower on decision to send troops to Little Rock, September 1957," http://www.eisenhower.archives.gov/research/digital_documents/LittleRock/littlerockdocuments.html (accessed July 10, 2010).

42 78 Stat. 241.

43 In 1958, John F. Kennedy wrote a manuscript, *A Nation of Immigrants*, advocating the elimination of racial distinctions in immigration law. This was published posthumously in 1964.

equality. Attempts by state and local authorities to evade or resist the command of equal treatment would face sanctions from the federal government. Usually the sanction would come in the form of federal court orders, but those orders were backed up by Presidential and Congressional authority.

***Shapiro v. Thompson* and the rights of newcomers to the state**

The promotion of the idea of racial equality positively affected another group of people that was constantly excluded from the rights of citizenship by state and local authorities. Paupers had been excluded as a public burden under a system of poor laws enacted by the states.

In *Shapiro v. Thompson* (1969)[44], the U.S. Supreme Court struck down residency requirements for welfare benefits as a violation of the Equal Protection Clause. The case challenged the residency requirements of Connecticut and the District of Columbia. In the Connecticut case, the state denied an application for AFDC (Aid to Families with Dependent Children) by an unwed mother who had recently moved back to New Jersey and could not work due to pregnancy. The applicant was not eligible because the state law required a person to have been a resident for at least a year before being able to receive benefits.

In a 6-3 decision, the majority opinion written by Justice Brennan held that the one-year residency requirement was a classification that violated the Equal Protection Clause. The Court ruled that the right to travel across state borders was a fundamental right, and therefore strict scrutiny of state legislation must be applied. Under this test, there needs to be a compelling state interest if the government is going to make distinctions among people. The Court held that none of the objectives put forward by the government were permissible or compelling. The Court also struck down the District of Columbia legislation as a violation of the Due Process Clause of the Fifth Amendment because it deprived the "liberty" of a person.

Even though the right to travel across state boundaries had been recognized as a fundamental right of citizens since the 19th century[45], this right was limited by various means, such as by denial of citizenship (exclusion of slaves and free blacks), or by the use of police powers (exclusion of the sick and the destitute).[46] But the Court in *Shapiro* held that poor people did not lose this fundamental right and that the discouragement of migration through indirect means was as unconstitutional as direct exclusion:

> We do not doubt that the one-year waiting-period device is well suited to discourage the influx of poor families in need of assistance. … But the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible.[47]

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[44] 394 U.S. 618 (1969).

[45] The Court cites a string of cases beginning with *Corfield v. Coryell*, 6 F.Cas. 546, 552 (C.C.E.D.Pa. 1825); *Paul v. Virginia*, 8 Wall. 168 (1869); and *Ward v. Maryland*, 12 Wall. 418 (1871). 394 U.S. 618, footnote 8.

[46] See Chapter II of this study.

[47] 394 U.S. 618, 629.

This holding expanded the scope of the *Edwards* decision. The *Edwards* decision struck down a California law because it was based on the outdated assumption that "paupers" were unwilling or unable to work. The Court thought that it was unreasonable to exclude people like Edwards based on this presumption, since they were able-bodied and migrating *in order to* work. But the plaintiff in *Shapiro* squarely fit the traditional description of paupers. The plaintiff was an unwed mother who was pregnant, could not work, and without a means of support. She asked for public assistance immediately after her arrival in the state. Yet, the Court said that even migration in pursuit of welfare benefits could not be deterred:

> … a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account.[48]

Thus, the Court placed a high premium on the right of individuals to migrate across state boundaries, regardless of the motive. From the standpoint of the states, their traditional powers to "fence out" indigents were denied. In doing so, the Court conformed to another tradition in U.S. constitutionalism, which is the promotion of economic liberty. In an industrialized nation, it is crucial for individuals to have the ability to move about in search of economic opportunity—no longer can people assume that they will be able to remain on a small family farm to sustain their living. Mobility thus is a basis for guaranteeing broader American values such as economic independence and the "pursuit of happiness".[49]

People who were at the frontlines of social welfare were delighted with the decision. "If any aspect of the American public aid scene had seemed to be permanent, it was the durational residence requirement," wrote one article, describing how this was a feature of poor relief ever since the Elizabethan Poor Laws.[50] One study went as far back as 1562, describing a statute enacted that year in England as "a system of complete paternalism: no free labor, let alone a free labor movement, existed."[51] It had been the practice of poor relief ever since those days to confine the poor to a designated location and keep them under the supervision of local officials. If he was able to work, local officials could force him to do so under the threat of harsh penalties. The poor themselves could not refuse to work nor choose to move elsewhere to find jobs on their own.

The dissenting opinions in *Shapiro* criticized the majority for overreaching and striking down a practice that had long been deemed reasonable. Justice Harlan called it

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[48] 394 U.S. 618, 631-632.

[49] Harry N. Scheiber, "Economic Liberty and the Modern State," in Harry N. Scheiber ed., *The State and Freedom of Contract* (Stanford, Calif.: Stanford University Press, 1998).

[50] Margaret K. Rosenheim, "Shapiro v. Thompson: 'The Beggars are Coming to Town'," *The Supreme Court Review*, Vol. 1969 (1969), 303-346, at 304.

[51] Jacobus tenBroek, "California's Dual System of Family Law: Its Origin, Development, and Present Status: Part I," *Stanford Law Review*, Vol. 16, No. 2 (Mar., 1964), 257-317, at 273.

unfortunate that the Court was changing the standards, using "strict scrutiny" under the Equal Protection Clause in a way that had not been used before. Heightened scrutiny of legislation had been developed in the context of laws that involved racial classifications and might have been appropriate there, but expanding the reach of this standard would set the Court up as a "super-legislature".[52] While Harlan admitted that freedom of interstate travel was a fundamental right under the Constitution[53], he argued that the appropriate test should be whether the legislation constituted an "undue burden" upon that right.

Harlan thought that the residence requirement was not an undue burden on individual rights and that there was a legitimate purpose for the requirement. States were concerned about the "magnet effect", under which people would migrate to states with higher welfare benefits. People who challenged the residential duration requirement had argued that the elimination of this requirement would not lead to such an effect. People move in search of opportunity, not welfare benefits. But Harlan turned this argument around and said that if the contentions were true, then the residence requirement had not been hindering interstate travel, so the requirement was not an "undue burden" on that right.[54]

The federal government responded favorably to the Court's decision and promulgated regulations that implemented the decision. Specifically, the Department of Health, Education and Welfare demanded the states to notify potential applicants for public assistance about the abolition of residency requirements. It also prohibited the states from inquiring into the purpose for which a person entered the state.[55]

In striking down residency requirements in state laws as a hindrance to interstate travel, the Court was risking constitutional challenges to a variety of state legislation that also contained distinctions based on residency. This included limits on voting, occupational licenses, or subsidy (including eligibility for lower tuition) for university education, etc.[56] While the majority noted that they were not taking positions on the constitutionality of these laws, Chief Justice Warren (who dissented) pointed out that there was no way to prevent such cases from arising in the future and that he could not see why they would also not be unconstitutional under the majority's reasoning.[57]

The *Shapiro* decision attacked distinctions that were based on duration of residency—between established residents and newcomers.[58] Combined with the *Edwards*

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[52] 394 U.S. 618, 661 (Justice Harlan, dissenting).

[53] Harlan located the right to travel under the "liberty" protected by the Due Process Clause of the Fifth Amendment (394 U.S. 618, 671).

[54] 394 U.S. 618, 671-672.

[55] Rosenheim, *supra* note 50, 338.

[56] See, for example, an argument for extending *Shapiro* to eligibility for in-state tuition at public universities in "Residence Requirements after Shapiro v. Thompson," *Columbia Law Review*, Vol. 70, No. 1 (Jan., 1970), 152-155.

[57] 394 U.S. 618, 654. Warren argued that the case should be decided on the basis of whether Congress had the power to enact such a legislation based on the Interstate Commerce Clause. He held that Congress did have such power (394 U.S. 618, 652).

[58] For a criticism of the Court's heightened scrutiny of this distinction, see, Katheryn D. Katz, "More Equal than Others: The Burger Court and the Newly Arrived State Resident," *New Mexico Law Review*, Vol. 19 (Spring, 1989), 329-376. Katz argues that newcomers are not categorically vulnerable minorities that require special judicial protection.

decision, the cumulative effect of this was that states could no longer prevent a person from entering the state, and when a person entered the state, he was in principle entitled to all of its benefits as a citizen (although the contours of the *Shapiro* decision was yet to be spelled out). A state can no longer make distinctions based on the acquisition of state citizenship or the length of time since acquisition. A commentator in the wake of the *Shapiro* decision noted that this might "give rise to a new federalism, one which will render state boundaries irrelevant to the distribution of governmental privileges and benefits."[59]

***Graham v. Richardson* and state policies towards aliens**

After *Shapiro*, states could no longer limit *citizens of other states* from migrating to their territory and claiming all the benefits of state citizenship. But could they at least prevent aliens (people who were not citizens of the United States) from claiming public resources? Two years after *Shapiro* decision, the Court, in *Graham v. Richardson* (1971), denied the authority of the states to distinguish even between U.S. citizens and aliens in the provision of welfare benefits.[60]

The case arose from state statutes that limited eligibility for welfare benefits based on U.S. citizenship. In one instance, a plaintiff was denied old-age assistance under an Arizona law that limited eligibility to U.S. citizens or aliens who had resided in the U.S. for 15 years. However, the Court had struck down durational residency requirements for U.S. citizens in *Shapiro*. The question was whether such requirements for aliens should also be struck down.

Significantly, the Court started by defining aliens as a "distinct and insular minority".[61] By placing aliens under this category, the Court signified that laws involving distinction between citizens and aliens would be subject to heightened scrutiny by the Court. Because such minorities were at a disadvantage in the political process, the Court could provide extra scrutiny so that the majority does not arbitrarily trump on their rights.[62] The Court developed this focus so that it could carry on the important role of protecting rights while also making sure that it would not have to second-guess the political branches for every single distinction made in law and policy.

Applying heightened scrutiny, the Court examined whether there was a compelling reason for the states to deny old-age assistance to the plaintiffs solely because they were not citizens. The states argued that they should be able to preserve its resources for its own citizens and that welfare benefits were privileges granted by the government and not the right of the individual. The Court rejected these arguments and held that there was no rational basis for the distinction. Preserving fiscal resources might be a valid goal, but it

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[59] "Residence Requirements after Shapiro v. Thompson," *Columbia Law Review*, Vol. 70, No. 1 (Jan., 1970), 155.

[60] 403 U.S. 365 (1971).

[61] Ibid., at 372.

[62] This approach was elaborated by the Court in Footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). The Court in this case abandoned heightened scrutiny of economic regulation, giving broader discretion to the federal government in that field. The footnote was meant to clarify in what kind of instances the Court would carefully scrutinize legislation.

could not be achieved by making "an otherwise invidious classification".[63] Just like a state may not save resources by denying welfare benefits on the basis of race, it cannot do so by denying welfare benefits on the basis of citizenship status. The Court quoted approvingly a lower court decision which held that denying benefits to aliens were "particularly inappropriate and unreasonable" because they "may live within a state for many years, work in the state and contribute to the economic growth of the state."[64]

In addition, judicial developments that strengthened the position of individuals receiving assistance from the government may have contributed to the *Graham* decision. In *Goldberg v. Kelly*, decided a year before *Graham*, the Court held that the government had to provide due process before depriving a person's welfare benefits.[65] The government argued that welfare benefits were privileges provided at the government's will. It was not a personal property that could be acquired, owned, sold and inherited by individuals. But the Court held that the contemporary situation made welfare benefits as essential as property. The role of the government had expanded and individuals had come to depend on government benefits for their well-being. For example, without occupational licenses granted by the government, countless people would lose their means of living. Under these circumstances, the use of the Due Process Clause should be expanded to protect welfare benefits as much as it had protected traditional property.[66]

Property had traditionally been a means of guaranteeing the economic independence of individuals. Such independence in turn allowed individuals the liberty to pursue their own goals independent from government coercion. Seen in this light, the Court's action can be seen as an attempt to revive the status of the individual against the vast administrative powers of the welfare state. By treating welfare benefits as quasi-property, the individual could use it as a stepping stone to economic independence, instead of being at the mercy of government discretion and intrusion.

The Court also built on precedents that eliminated the ability of the states to interfere with federal immigration laws. It pointed out that discrimination against aliens at the state level conflicted with federal authority over immigration. If Congress had extended a welcome to foreigners, individual states should not be able to enact hostile policies that would discourage foreigners from settling in their states. The Court noted that, while Congress had enacted provisions that denied admission to aliens who were likely to become public charges, it had not provided for the deportation of those who fell in need *after* entry. A denial of welfare benefits by a state would amount to an exclusion of the alien from that state while federal policy was to allow the alien to stay in the United States. This was an encroachment upon exclusive federal power:

> …this Court has made it clear that… aliens lawfully within this country have a right

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[63] 403 U.S. 365, at 375.

[64] Ibid., at 376.

[65] 397 U.S. 254 (1970).

[66] For an influential analysis of how various forms of government largess has become for the individual an important basis for subsistence (such as occupational licenses that allow access to the occupation and earnings), see Charles A. Reich, "The New Property," *Yale Law Journal*, Vol. 73 (1964), 733-787. It is often said that the Court's decision constitutionalized Reich's thesis.

> to enter and abide in any State in the Union "on an equality of legal privileges with all citizens under non-discriminatory laws." …State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government.[67]

The effects of the *Graham* decision

Graham v. Richardson had a visible impact on state laws that discriminated against aliens. Especially in the area of occupational licenses and employment, many states, anticipating constitutional challenges, voluntarily rescinded restrictions based on alienage. One recent study surveyed the state laws regarding 23 occupations in which aliens had been commonly excluded before *Graham*. In the six states (major destination states for immigration) that the authors surveyed, a very clear trend was found after 1977. Between 1977 and 1999, all of the states eliminated or significantly reduced instances of such exclusion. In Florida, the number went from 11 to 0, in Illinois from 18 to 2, in New York from 11 to 1, in Texas from 13 to 0.[68] The authors noted that federal district courts, state courts and state attorneys general actively issued opinions that conformed to the *Graham* decision and promoted the elimination of such distinctions.[69]

As the dissenting judges in the *Graham* decision had predicted, the Court had to struggle with the implications of holding that state must treat aliens on an equal basis with U.S. citizens. Soon, the Court began to carve out exceptions such as the political community doctrine, under which functions essential to the maintenance of the states as a political community could be reserved to U.S. citizens.[70] Based on this rationale, aliens may be excluded from certain public offices. States took advantage of the willingness of the Court to allow exceptions. In California, the Government Code merely stated that "peace officers" must be U.S. citizens. But a detailed examination of various codes of that state found that 75 positions, ranging from park rangers to livestock inspectors and employees of the Division of Forestry were designated in that state as "peace officers".[71] Nonetheless, the Court reversed a lower court decision and upheld this summary exclusion.[72] The Court also upheld citizenship qualification for public school teachers because they have a critical role in teaching the children "fundamental values necessary to the maintenance of a democratic political system."[73]

The Court's positions in *Graham* and subsequent cases appear more consistent if we see its main concern as maintaining the exclusivity of federal power in the area of immigration.[74] This concern appeared in the *Graham* decision itself—that unequal

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67 403 U.S. 365, at 377-378.

68 Luis F. B. Plascencia & Gary P. Freeman, "The Decline of Barriers to Immigrant Economic and Political Rights in American States: 1977-2001," *International Migration Review*, Vol. 37, No. 1 (Spring, 2003), 5-23.

69 Ibid., 14.

70 This doctrine was first articulated in *Sugarman v. Dougall*, 413 U.S. 634 (1973).

71 Plascencia & Freeman,16.

72 *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982).

73 *Ambach v. Norwick*, 441 U.S. 68 (1979).

74 David F. Levi, "The Equal Treatment of Aliens: Preemption or Equal Protection?,"

treatment of aliens by the *states* was unconstitutional because it conflicted with the invitation that Congress had extended to immigrants. It would be detrimental to national policy if immigrants invited by the nation then faced unreasonable discrimination in the states. But when Congress authorized the states to deny welfare benefits to aliens or when Congress itself imposed such a restriction by federal law, the Court has chosen to defer and let the restrictions stand.[75]

Since states could use federal citizenship as a basis for excluding aliens from public offices, *federal* citizenship was made relevant in the states, while *state* citizenship was submerged under a national discourse promoting equal rights for all federal citizens. By using federal citizenship as a basis of distinction in state law, the states were now upholding the primacy of federal citizenship over other personal status distinctions.

Chapter conclusion

Even after the power to regulate migration to the United States had been absorbed by the federal government, states continued to engage in a limited form of control through the use of its police powers. States attempted to limit the migration of people from other states by outright exclusion as well as by indirect methods such as residential duration requirements for the provision of welfare benefits. In doing so, the states capitalized on the discretionary power that they had traditionally exercised.

But from the late 1940s, the Supreme Court began to eliminate what was left of the states' power to control the migration of people. First, in *Edwards v. California*, the Court eliminated the ability of the states to directly control the migration of the poor. States could no longer use criminal laws to exclude paupers. *Shapiro v. Thompson* went a step further by confirming the fundamental right to travel across state borders even if a person was poor (or, from the standpoint of economic liberty, precisely because he needed the ability to move in search of opportunity). The Court held that using restrictions on welfare benefits in an attempt to control interstate migration was a hindrance of that right. Around the same time, in *Goldberg v. Kelly*, the Court limited the discretion of states to grant or withhold welfare benefits by holding that distinction between rights and privileges were no longer acceptable. Finally, after *Graham v. Richardson*, states could not treat aliens differently from citizens unless it was authorized by Congress or if it was within the exceptions determined by the Court.

Cumulatively, these cases meant that states retained little capacity to enact laws and policies that distinguished between citizens and non-citizens, or between new citizens and old citizens. States could not attempt to limit the movement of anyone across its borders, whether directly or indirectly. The physical, political and economic boundaries around the states that were drawn on the basis of state citizenship had disappeared. Instead, the federal government gained the predominant role in defining the status and rights of people living in the United States, based on the notion of *federal* citizenship.

Stanford Law Review, Vol. 31, No. 6 (Jul., 1979), 1069-1091.

[75] A well-known example is Proposition 187 of California (1994), which denied a variety of benefits to undocumented aliens. The federal district court struck down the main provisions of this law. But Congress next year enacted a law that denied federal welfare benefits not only to undocumented aliens but also to legal, permanent residents.

X. Conclusion

Citizenship and Federalism

When the U.S. Constitution was written, the Founders did not start from a blank slate. Instead, they built on colonial practices and inherited a system under which the status and rights of persons were largely defined by individual colonies (and states after the Declaration of Independence). The poor laws gave local towns and ultimately the states the power to exclude individuals who might become a burden on the community. This applied to people from other colonies (states) as well as other nations. In other words, the control of borders as well as of the rights of people once inside the colonies (states) was the prerogative of individual colonies (states).

Citizenship under the U.S. Constitution, according to the Privileges and Immunities Clause of Article IV (in contrast to the later Clause under the Fourteenth Amendment), was based on *state* citizenship. The Clause said that citizens of each *state* should have the privileges and immunities of citizens in other states of the union. Precisely what was to be counted among such privileges and immunities was left ambiguous. Also, the Fugitive Slaves Clause commanded each state to respect the status of slavery and return slaves who escaped into their territory to their owners.

Both of these provisions became a source of conflict as people migrated across state borders. What rights did citizens of one state have in another state? To complicate the picture, the U.S. Constitution gave Congress the power to enact uniform rules of naturalization. Under federal naturalization laws, aliens became citizens of the United States. This meant that in addition to state citizenship, there was a federal citizenship that could be granted by the federal government. Then, what rights did people with federal citizenship have in the states?

Over the course of two centuries, all of these questions were resolved in favor of people who sought rights in their new place of residence. The Privileges and Immunities Clause of Article IV was replaced by the Fourteenth Amendment, which gave *federal* citizenship to all persons born in the United States. While this new Privileges and Immunities Clause (of the Fourteenth Amendment) was obliterated by a conservative Court in the *Slaughterhouse Cases*, the other Clauses in that Amendment, namely, the Equal Protection Clause and the Due Process Clause, served to expand the range of rights a person can claim against state and local authorities. In particular, the Court's application of the Equal Protection Clause eliminated the ability of the states to exclude or limit the rights of newcomers. The Court held that states could not prevent a person from moving into their territory, and also that a person residing in a state should be able to claim its benefits regardless of their length of residence. This diminished the meaning of state citizenship by denying the ability of the states to reserve its resources to state citizens or to limit the number of people who can claim state citizenship. People, by virtue of *federal* citizenship, can enter, reside, and claim benefits in any state as they wish.

The Fugitive Slaves Clause also proved to be unsustainable, as conflicts of opinion between the North and the South over the status of slaves who escaped into the free states led to protracted battles in Congress, the Court, and the state legislatures and between state governors. While the *Dred Scott* decision has been discredited in later years, Chief Justice Taney was instinctively right in his understanding that the

problem of black citizenship had created a constitutional crisis that had to be resolved one way or the other. Taney chose to deny black citizenship altogether and to prevent the question from being brought to federal courts in the future. But his intent backfired, and the question was resolved in the other direction after the Civil War. The Fourteenth Amendment granted all blacks *federal* citizenship that would override state citizenship, and granted a set of rights attached to federal citizenship that could be enforced by the federal government.

While a period of backtracking followed, the means provided by the Fourteenth Amendment finally proved useful a century later, when Congress acted decisively and passed the Civil Rights Act of 1964, which was backed up by the Court's active stance in applying the Equal Protection Clause to eliminate discrimination by the states. Federal citizenship now gave people the claim to rights which the federal government had the duty and authority to protect.

Constitutional interpretation and the role of the Court

In the process of this expansion of federal citizenship, constitutional change was achieved through the interaction of the courts and the political branches of the government. Both in times of progressive change and conservative backlash, the initiatives of the Court were ultimately endorsed or accepted by the political branches. When the political branches proved antagonistic, the Court backtracked. Rarely was there a sustained division of opinion between the courts and the political branches, as other studies of judicial politics have also found.

In taking away the prerogatives of the states to control their borders and instead giving the federal government the exclusive power to do so, the Court always walked a step ahead of the political branches, but ultimately its position was endorsed by the federal government as a whole. The Court began to question the authority of the states to regulate immigration with the second round of the *Passenger Cases*, as Congress was beginning to inquire whether the federal government should regulate immigration. But at the time, the Court could not entirely deny the power of the states to control immigration for fear that this would adversely affect the ability of the states to control the migration of blacks. Once the latter fear became null as a result of the Civil War, the Court took a decisive step, holding the passenger laws of New York and Massachusetts unconstitutional and forcing the states to negotiate with the federal government for a federal regulation instead. Congress took full advantage of their newfound power, and steadily expanded federal regulation in this field, accompanied by the establishment of a full-fledged federal bureaucracy in charge of immigration.

The Court took a more twisted path on the issue of the rights of federal citizens. In the 1870s and 1880s the Court almost reversed the gains of the Civil War by interpreting the rights of federal citizens and Congressional power to enforce those rights narrowly and giving back to the states most of the control over people within their territories. However, it should be noted that the political branches did not do much to reverse this trend but tacitly accepted it, allowing Jim Crow laws to go unchallenged for decades.

The Court reversed this conservative stance only when the political branches were moving in the same direction. *Brown v. Board of Education* was decided years after President Roosevelt desegregated the armed forces by Executive Order. Desegregation cases were building up since the 1930s, and although *Brown* had a

larger impact than previous decisions, its idea was not unprecedented and the decision was an extension of accumulating precedents. The Court's insistence on equality of races was backed up by President Kennedy and his successor, President Johnson. Congress also overcame filibusters by Southern Senators to pass the Civil Rights Act of 1957, the Civil Rights Act of 1964, and the Voting Rights Act of 1965, all targeting discriminatory practices in Southern states.

The Court expanded its Equal Protection jurisprudence to protect the rights of new citizens from discrimination. States had inherited the idea of local control of borders and of public resources through the use of poor laws. The Court, in *Edwards v. California*, held that such practices violated the Equal Protection Clause. This too was a development in the context of the expanded role of the federal government in protecting the poor from economic devastation. The ability to move to a place where employment could be found was compatible with the idea of federal intervention in economy. From the standpoint of the federal government, states should not be able to put up barriers against federal policy by preventing the movement of labor or by hounding state resources for their "own" citizens.

Thus, while the Court has flexibly interpreted the Constitution to suit the needs of the era (the "living constitution" idea), this has been done in conformity with the broad trends in the U.S. society or with tacit recognition from the political branches. In the context of federalism and citizenship, the Court has not deviated from the policy priorities of the political branches of the time. Whether it was the conservative backlash during the Reconstruction or progressive change during the Civil Rights revolution of the 1960s, the Court received attention because it was particularly articulate and spoke with an identifiable and authoritative voice ("the Opinion of the Court"), but the decisions reflected ascendant views among politicians and the public.

Constitutional change in the area of federalism and citizenship has been accomplished through a sustained interaction between the Court and the political branches, with the Court announcing a path-breaking constitutional interpretation only when it seemed the political branches were going to accept the change. The "living Constitution" approach to constitutional interpretation in this area has been compatible with majoritarian democracy. The Court served to articulate concerns and viewpoints that were tacitly expected by democratically-elected politicians.

Race and citizenship

Race has been perceived as the most persistent line along which people have been included or excluded from citizenship. This study partly confirms this view, as emotional conflicts over slaves, fugitive slaves, and free blacks frustrated any rational deliberation of whether state-centered views of citizenship were wise or sustainable. Further, in the late nineteenth century, Asians emerged as another target of exclusion from citizenship.

The demand for protection based on federal citizenship, in this context, was motivated by the desire to overcome local racial prejudices. Only by federal intervention, especially through the use of federal courts that tend to be receptive of rights-based arguments, could these racial minorities pursue the rights of citizens.

However, it must be noted that race was not the only factor that determined citizenship. At its core, citizenship has been a means to exclude newcomers in favor of preserving something that existing citizens cherish. While the preservation of

pre-existing racial order may be one of those values, another constant has been the preservation of economic resources. The exclusion of the poor at the physical boundaries of the states, the exclusion of foreigners from the natural resources of the state, or the exclusion of newcomers from state welfare benefits, all have this motive in common. They seek to protect the benefits of long-term citizens to the exclusion of those seeking entry to the state.

The plight of poor whites ultimately opened up this barrier. Rural, poor whites were thrown out of their land during the Dust Bowl migration and emigrated to California in search of employment. These people did not fit the traditional description of paupers. In the age of industrialization, it had become inevitable that more people would move out of their family farms in search of employment in the cities. They were moving, not in search of charity, but in search of a means to earn a living. The Court, in response to this trend, struck down state laws that attempted to limit the entry of people from other states or favored long-term residents over short-term residents. In doing so, it used the Equal Protection Clause, which was originally meant to ensure the equal treatment of blacks by the states.

Thus, a more inclusionary, national version of citizenship was accomplished through an unconscious collaboration of people of different races. Chinese immigrants benefited from the Equal Protection Clause when they used it to strike down local ordinances that deprived their means of living.[1] Poor whites were able to use this Clause to strike down state laws that prevented or discouraged them from migrating in search of employment.[2] It actually took the longest for blacks to gain from this Clause. In the 1940s, the Court began to apply the Equal Protection Clause more rigorously (strict scrutiny) when it involved racial distinctions. This heightened standard of review was first articulated in a case involving the internment of Japanese Americans during World War II.[3]

People have been excluded from citizenship not just on account of race, and so demands for inclusion also came from people of different races. Although these groups may not have been conscious about the connections themselves, the story of federal citizenship is one in which diverse groups of previously excluded people coalesced around the demand for inclusive citizenship and equality. This dialogue, which took place over the course of two centuries, has sought an inclusive society of co-equal citizens instead of a society of distinct classes of people that is based on mechanisms of local exclusion.

Application to current debates

In a recent case, *Saenz v. Roe* (1999), the U.S. Supreme Court decided that a California state law that limited the welfare benefits of residents who recently arrived from other *states* violated their rights as *citizens of the United States*. The law limited the amount of benefit such residents could receive to the amount they would have received in their prior state of residence. The intent was familiar—it was to prevent people from other states from migrating to California for the higher benefits.

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[1] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
[2] *Edwards v. California*, 314 U.S. 160 (1941).
[3] *Korematsu v. United States*, 323 U.S. 214 (1944).

The Court stated that under the Privileges and Immunities Clause of the Fourteenth Amendment, citizens of the United States had the right to travel to, settle, and be treated as a citizen of in any state. A *bona fide* residency, meaning residency with the intent to settle, made that person a citizen of that state. Further, there should be no distinction based on how long he or she has been a state citizen. Newcomers should be treated the same as long-term residents.[4]

The dissenting opinion argued that states could impose requirements in order to limit privileges to *bona fide* residents (one example is to limit eligibility for in-state tuition at state universities to such residents). The state law in this case was a reasonable regulation to prevent citizens of other states from coming to a state, taking the benefits and "running away" with it.[5] Another dissent pointed out that the Privileges and Immunities Clause was meant to protect certain fundamental rights, but not the right to equal welfare benefits upon arrival.[6] But the Court in *Shapiro* had already held that restriction on welfare benefits that served as an indirect means of excluding a person from the state was a violation of the fundamental right to travel.[7]

The dissent also questioned the manner in which the majority had resuscitated a moribund provision in the Constitution (the Privileges and Immunities Clause) which had been "relied upon for only the second time since its enactment 130 years ago".[8] It argued that if the Court was going to use this provision, it should engage in a thorough analysis of its original meaning, examining what was meant by the privileges and immunities of federal citizens.

This study provides a partial answer to that question. Placed in its historical context, the Privileges and Immunities Clause of the Fourteenth Amendment was enacted to overcome the limits of the old Privileges and Immunities Clause (Article IV of the Constitution). This older provision was based on *state* citizenship. While each state had to treat citizens of other states as they would treat their own citizens, it did not concretely define what rights had to be guaranteed. The Court left it to each state to decide what the rights of citizens should be. But the newer provision in the Fourteenth Amendment was based on *federal* citizenship. It was enacted in combination with a provision granting federal citizenship to all persons born in the United States. Under this provision, state citizenship was acquired by mere residence in a state— states could not withhold state citizenship from federal citizens. In the historical context, the main beneficiaries of this provision were blacks who had been denied citizenship, especially in the South, prior to the Civil War.[9]

The Fourteenth Amendment granted the status of federal citizenship and followed up with a provision that was meant to guarantee the rights of federal citizens. The privileges and immunities of *citizens of the United States* could no longer be abridged by individual states. This Privileges and Immunities Clause faced a premature death because of the

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4 *Saenz v. Roe*, 526 U.S. 489 (1999).
5 526 U.S. 489 (Chief Justice Rehnquist, dissenting).
6 Ibid. (Justice Thomas, dissenting).
7 See Chapter IX of this study.
8 526 U.S. 489 (Chief Justice Rehnquist, dissenting).
9 See Chapters IV, V and VII of this study.

manner in which the first case testing its limits was brought to the Supreme Court. The case asked whether butchers had the right to continue their business in a manner that would harm the public health. The Court understandably held that the Privileges and Immunities of citizens did not include the right to engage in whatever occupation a person chose (regardless of public health interests).

If the first case to reach the Court had been closer to the origins of this Clause, the Court may have decided differently. The Clause was meant to overcome the difficulties that resulted from decades of conflict under state laws that defined citizenship and its rights differently. Blacks, immigrants, and paupers who migrated across state borders faced hostile state laws. It is these laws—laws that deprive the right of people who migrate to another state, that the Privileges and Immunities Clause attempted to restrain. *Saenz v. Roe* finally brought back the Clause to its proper role.

The historical evolution points toward a broad interpretation of the privileges and immunities of federal citizens. No longer should states be able to exclude citizens of other states physically as they did with the poor laws and passenger laws of the past.[10] And if states are not allowed to exclude people physically, they should not be able to achieve the same purpose indirectly by denying the rights of citizenship. Denial of means of economic subsistence would be the same as setting up physical boundaries for most people who migrate in search of a means of living.

The U.S. Constitution, after a prolonged series of conflicts between the states, has developed the notion that individual states should not be able to make personal status distinctions that are detrimental to the United States as a whole. The Fourteenth Amendment established an overarching status of *federal* citizenship, which was to be infused with meaningful rights that are protected by the institutions of the federal government. *Saenz* is another step forward in fulfilling this promise of federal citizenship.

[10] See Chapters II and VI of this study.

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