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THE CITIZEN OF THE UNITED STATES.

BY SIMEON E. BALDWIN, LL.D.,
PROFESSOR OF CONSTITUTIONAL LAW IN YALE UNIVERSITY.

The term "citizen of the United States" first appears in those articles of the Constitution of the United States which provide for the qualifications of members of Congress and of the President. The phrase was first suggested by Mr. Pinckney in the Federal Convention of 1787,[1] but in none of the discussions of that body do we find any attempt to define its meaning, though it seems to have been taken for granted that a citizen of any State was necessarily a citizen of the United States.[2] The United States of America had existed for many years before the adoption of the Federal Constitution. That name had been assumed in the Declaration of Independence and repeated in the Articles of Confederation. Since the States retained their original sovereignty as to all matters of internal concern[3] it could only have been their citizens to whom the Constitution referred as those who had been for nine years citizens of the United States. But that a citizen of the United States must thereafter always be a citizen of a State was obviously not true. A naturalized alien, a resident in territory of the United States outside of any particular State, or of the District of Columbia, might be a citizen of the United States without being a citizen of any State. But of so little importance was the case of such persons considered that no provision was made to give the ordinary Courts of the United States jurisdiction over controversies

1 5 Elliot's Debates, 129.
2 See remarks of Mr. Sherman and Mr. Wilson, *ibid.* 412, 414.
3 Minor *v.* Happersett, 21 Wall. 162, 167.

to which they might be parties. This anomalous condition of things was commented on by Chief Justice Marshall early in the century as "extraordinary,"[4] but has remained unaltered to the present time. As soon, however, as a naturalized alien took up his residence in any State, it was held that he became a citizen of that State, though not necessarily an elector of it.[5]

The inhabitants of a conquered or ceded territory may also by treaty acquire, if they remain upon the soil, the character of citizens of the United States.[6]

In 1821, the meaning of the term under discussion came before William Wirt, as attorney general of the United States. A colored man was in command of a coasting vessel, which, under our statutes, could only be commanded by a citizen of the United States. Mr. Wirt's opinion was that the statute did not include free colored persons, as those of that class were not generally recognized as citizens, at the time of the adoption of the Constitution.[7]

In 1843, however, Attorney General Legaré came to a contrary conclusion, upon the construction of a statute as to the preemption of public lands by citizens of the United States.[8]

In 1849, and again in 1856, Chief Justice Taney had occasion to consider much the same question and from different points of view. In the Passenger Cases,[9] which stretch their weary length over nearly two hundred pages of our reports, the chief justice was one of the dissenting minority. In his opinion after premising that (p. 482) "every citizen of a State is also a citizen of the United States," he uses this language (p. 492):

> "Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States from the most remote States or Territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial authorities and public offices in every State and Territory of the Union. * * * For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

In the second case referred to, which arose seven years later, the chief justice, now speaking for the majority of the court,

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4 Hepburn *v.* Elzey, 2 Cranch., 445.

5 Gassies *v.* Ballon, 6 Pet. 761.

6 Dred Scott *v.* Sanford, 19 How. 533.

7 1 Opinions of the Attorneys General, p. 506.

8 4 *id.* 147.

9 7 How. 283.

brought all his great learning and force of reasoning to bear upon the determination of the right to citizenship of a free colored person. It was the "Dred Scott case,"[10] to which more than to any other publication, unless it be "Uncle Tom's Cabin," may be attributed the outbreak, in 1860, of the Civil War. The leading positions taken in his opinion, as to the matter now in question, were thus expressed:

"The words 'people of the United States,' and 'citizens,' are synonymous terms, and mean the same thing. They both describe the political body, who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty (p. 404). * * *

"In discussing this question, we must not confound the rights of citizenship, which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States (p. 405). * * *

"The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this Court to be so. Consequently no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the federal government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

"It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

"The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who was then or should afterwards be made free in any State, and put it in the power of a single State to make him a citizen of the United States and endue him with the full rights of citizenship in every other State without their consent? (pp. 405, 406). * * *

"It is true, every person and every class and description of person, who were at the time of the adoption of the Constitution, recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them and for them and their posterity, but for no one else" (p. 406).

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[10] 19 How. 393.

A different view was taken by Mr. Justice Curtis, in an able dissenting opinion, his conclusion being that "those persons born within the several States, who, by force of their respective constitutions and laws, are citizens of the State, are thereby citizens of the United States" (p. 582).

In 1862, in the second year of the civil war, the construction of the navigation laws asserted by Mr. Wirt, was overruled by Attorney General Bates[11] in a somewhat verbose and effusive opinion, the pith of which was that "the Constitution uses the word 'citizen' only to express the political quality of the individual in his relation to the nation," that any citizen of a State was necessarily a citizen of the United States, and that any citizen of the United States, who was domiciled in a State, was a citizen of that State.

The Civil Rights bill of 1866, passed over the President's veto, sought to settle these controversies forever by declaring all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, to be citizens of the United States. Its constitutionality was seriously questioned, and a few months later the XIVth amendment to the Constitution was proposed, which commences with a still broader provision, making all persons born or naturalized in the United States and subject to its jurisdiction, citizens of the United States and also of the States wherein they reside.

Before this amendment was passed, came the case of Crandall *v.* Nevada,[12] in which it was held that a State tax on travelers passing through its territory, abridged the right of a citizen of the United States to go freely to and from any place, from the seat of government to the remotest land office, where the functions of the United States were being discharged, as well as to the various courts of the States, in which his right to sue was guaranteed by the National Constitution.

The interval between the adoption of the XIIIth and the proposal of the XIVth amendment had been marked by legislation in the Southern States, designed, under the guise of repressing vagrancy and regulating contracts of employment, to keep the colored race there in a subject condition. The main purpose of the XIVth amendment was to lift the freedmen into the acknowledged position of American citizens.[13]

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11 10 Opinions of the Attorneys General, p. 382.

12 6 Wall. 35, 43.

13 The Slaughter House Cases, 16 Wall. 36, 73.

The adoption of this amendment in 1868 was the first authoritative declaration in our history (excepting the statutes of 1802, Rev. Stat., Sec. 2172, and of 1855, Sec. 1993, as to children of Americans born abroad) of what constituted a citizen of the United States.

It was now to be determined what were his rights and privileges.

The partial definition given in Crandall *v.* Nevada was thus enlarged in 1872 in the Slaughter House cases:[14]

"Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered."

The other clause to be considered was that prohibiting the States from depriving any person of life, liberty or property without due process of law, or denying to any person within its jurisdiction the equal protection of its laws. Obviously the word "person," as here used, comprehends more than "citizen." Any person, whether natural or artificial, native or alien, is within its meaning.

A majority of the court inclined to the position (p. 81) that so far as the equal protection of the laws was concerned, the prohibition would never be held to apply to any State action not directed against negroes, as such. A broader view, however, was taken by Mr. Justice Field in a dissenting opinion, concurred in by Chief Justice Chase, Mr. Justice Swayne, and Mr. Justice Bradley. To them, the XIVth amendment seemed to make a most important change in the source of American citizenship. It had, save in exceptional cases, sprung from the State as its fountain. It was now to spring from the United States, in every instance, and what was more, it was to involve the acquisition of citizenship in

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14 *Ibid.* 79.

the State. Citizens might be forced upon the State, without its consent, in every case of residence within its limits of a citizen of the United States. One sovereign was henceforth to make citizens of another sovereign. In the language of Mr. Justice Field (p. 95) "a citizen of a State is now only a citizen of the United States, residing in that State." "It is now settled," said Mr. Justice Bradley (p. 112), "that citizenship of the United States is the primary citizenship in this country; and that State citizenship is secondary and derivative, depending upon citizenship of the United States, and the citizen's place of residence." It necessarily followed from these positions that the fundamental rights of citizenship, such as those secured by *Magna Charta*, including right to choose and pursue any lawful employment, unrestrained by monopolies, were now, whether claimed by white or black, all under the direct protection of the United States (p. 123).

While, however, the State has no right to refuse admission to its citizenship to any citizens of the United States residing within its limits, such citizens have a right to decline the grant. The citizen of one State may reside in another without surrendering his native domicile, and, in such case, though a citizen of the United States, he does not become a citizen of the State of his residence.[15]

The tendency of judicial opinion, since the decision of the Slaughter House Cases, has been against that restriction of the benefit of the prohibitions of the XIVth amendment to the negro race, towards which the majority of the Supreme Court then inclined. On the other hand, it has been against what seems to have been substantially the contention of the minority, that the rights of an American were now mainly dependent or consequent on his citizenship in the United States. In the words of Chief Justice Fuller: "Protection to life, liberty, and property rests primarily with the States, and the amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights, which belong to citizenship, and which the State governments were created to secure."[16]

This was brought prominently out in the final disposition made of the Civil Rights Act. The Act of 1866, the invalidity of which had been asserted by the State Courts,[17] had been replaced

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[15] Bradwell *v.* State, 16 Wall. 138; Sharon *v.* Hill, 26 Fed. Rep. 337, 344; Robertson *v.* Cease, 97 U. S. 646, 649.

[16] *In re* Kemmler, 136 U. S. 436, 448.

[17] Bowlin *v.* Commonwealth, 2 Bush (Ky.) 15.

by another of a similar tenor in 1870, and that in turn by another in 1875. It was the latter which was declared unwarranted by the XIVth amendment in the Civil Rights Cases,[18] the Court holding, though with vigorous dissent from Mr. Justice Harlan (p. 52) that it must be construed, in the light of the Xth amendment, as giving Congress only a corrective power, and not any right of primary legislation for the establishment of individual rights. There are certainly some difficulties in harmonizing this doctrine with that of the Virginia and West Virginia jury cases decided four years earlier, in which State laws were held invalid, as against persons of color, which excluded all of their race from the jury box. It is true, said the court, that the language of the XIVth amendment is prohibitory, but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property.[19] This immunity, however, seems to have been regarded as one attaching to any person, whether a citizen or not, and as was clearly shown in the dissenting opinion of Justices Field and Clifford, if the right to serve on juries were an incident of citizenship, it would belong to women and children as well as men.[20] The same argument is conclusive against the claim that the right to vote is inherent in every citizen of the United States.[21]

The XVth amendment, while not conferring the right of suffrage on persons of color, does guaranty them an immunity from such discrimination on the part of their States as must follow from laws granting the right to whites only. This is a new constitutional right appurtenant to national citizenship.[22]

The original draft of this amendment, introduced by Senator Henderson of Missouri, was that no State should deny "the right of its citizens to vote," on account of color, and the judiciary committee of the Senate gave it its present form, by which it operates in favor of citizens of the United States, and against a denial of suffrage on equal terms, whether "by the United States or any State." In view of the history of this legislation, Mr. Justice Hunt, in his dissenting opinion in United States *v.* Reese, maintained that it covered mere municipal elections, and that Congress

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[18] 109 U. S. 3, 15.
[19] Strauder *v.* West Virginia, 100 U. S. 303, 310.
[20] *Ex parte* Virginia, 100 U. S. 339, 365.
[21] Minor *v.* Happersett, 21 Wall. 162, 171.
[22] U. S. *v.* Reese, 92 U. S. 214, 217.

could make its election and enforcement laws extend to them, notwithstanding no Federal officer was to be voted for.[23]

The rights given by the XVth amendment have been guarded by the Enforcement Act of 1870 (Rev. Stat., Sections 5508 and 5520), and it is thereby made a criminal offense to conspire to deter any citizen by threat or force from their exercise.[24]

There is a right belonging to the citizens of every free government to assemble peaceably to discuss political matters, or frame petitions for change of laws, and this is one of the rights of citizens of the United States.[25]

They have no such inherent right of assembly, with arms, or of association for military purposes. Congress may permit it for purposes of national defense, but if so, it must rest on and be regulated by the statute law.[26]

The citizen of the United States has, as such, no right to engage in any particular pursuit within any State, which its laws restrict for reasons of public policy to certain classes of persons. A woman, therefore, though a citizen as fully as a man, has no right to admission to the bar of any State, if it sees fit to confine such admission to men.[27]

The right of trial by jury in State courts also, is no incident of national citizenship, and it may be denied, without infringing the guaranties of due process of law which are given by the XIVth amendment.[28] This conclusion was reached by the Supreme Court of the United States, against the dissent of Justices Field and Clifford, who apparently must have considered the right of trial by a jury of one's peers to stand on a different ground from that of eligibility to jury service, and to be one of the privileges and immunities of citizens of the United States which no State can abridge.

Nor does the Constitution of the United States make it a right of its citizens, as such, to testify in its courts. It is their duty if called upon by proper authority, but it is not a constitutional privilege.[29]

The XIVth amendment seeks to protect individuals both in their civil and their political rights, but its provisions in defense of

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[23] U. S. *v.* Reese, 92 U. S. 248.
[24] *Ex parte* Yarbrough, 110 U. S. 657.
[25] U. S. *v.* Cruikshank, 92 U. S. 542, 552.
[26] Presser *v.* Illinois, 116 U. S. 252, 267.
[27] Bradwell *v.* State, 16 Wall. 130, 139, 142 (Chief Justice Chase dissenting).
[28] Walker *v.* Sauvinet, 92 U. S. 90, 92.
[29] U. S. *v.* Sanges, 48 Fed. Rep. 78, 87.

their civil rights are much the broader. These it aims to secure to all persons within the jurisdiction of the United States, free from improper interference by State authority, whether such persons are natural or artificial, Americans or foreigners.

It has compelled each State to count among its citizens many whom its own laws had before excluded. It presents the anomaly of one sovereign's forcing subjects upon another while they yet retain their original allegiance, and so may be guilty of treason to either or both.[30] But it leaves these new-made citizens to find most of their privileges and immunities in the laws and institutions of the State into which they have been thrust.

"The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the National Government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof."[31]

They are few in number, though great in importance.

Those granted by the Constitution have been sufficiently considered.

Treaty stipulations have often constituted large bodies of men citizens of the United States, or given them equal rights with citizens, as to succession to property and personal security; but in a brief article like the present, it is impossible to refer to them in detail.

As to congressional legislation, the main statutory rights of citizens of the United States are these: To hold and convey property, real and personal, in any State and Territory as freely as its own white citizens (Rev. Stat., Sec. 1978); To the exclusive ownership and command of American shipping (Sec. 4131); To vote and hold office in the several Territories (Sec. 1860); To pre-empt 160 acres of public land (Sec. 2259), and gain a homestead (Sec. 2289); To passports for foreign travel (Sec. 4076); To the prompt intervention of the President in case of their unjust arrest by a foreign government (Sec. 2001); To renounce their citizenship by removal to a foreign country and acquiring citizenship there (Sec. 1999).[32]

The citizen of the United States has a right to its protection to secure him the free exercise of any of these rights and privileges,

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30 People *v.* Lynch, 20 Johns. 549.

31 Boyd *v.* Thayer, 143 U. S. 135, 160.

32 Charles Green's Son *v.* Salas, 31 Fed. Rep. 106.

and Congress has properly made any forcible interference with them a criminal offense.[33]

If a question arises in a State court as to whether a person is a citizen of the United States, and it is decided in the negative, he can have this denial of the right or quality which he claims reviewed on writ of error from the Supreme Court of the United States.[34]

There is no difference in right between the native-born citizen and the naturalized alien, except that the latter cannot be made president or vice-president of the United States. Congress may prescribe the mode of naturalization, but not its effects.[35]

It has taken a century and a civil war to settle, even in this imperfect way, the status of the citizen of the United States. American jurisprudence has few clearer examples of that disinclination towards attempting exhaustive definitions of political or legal rights, which it has inherited from English sources and the Colonial era.

The privileges of American citizenship on American soil, as distinguished from those of State citizenship, were hardly thought of until the Civil War had done its nationalizing work. They would have remained largely a matter of sentiment, then, had it not been for the new conditions and controversies precipitated by the enfranchisement of the colored race. By fundamental alterations in our Constitution, they have acquired a new dignity and power, but their ultimate range and scope have been left for the future to determine by the slow growth of national institutions.

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[33] U. S. *v.* Waddell, 112 U. S. 76.

[34] Boyd *v.* Thayer, 143 U. S. 135 (Field J. dissenting, 183).

[35] Stone *v.* Bank of the United States, 9 Wheat. 738, 827.