CITIZENSHIP IN THE AMERICAN CONSTITUTION*

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In the view both of the ancients and of modern liberal political theorists, the relationship between the individual and the state is largely defined by the concept of citizenship. It is by virtue of his citizenship that the individual is a member of the political community, and by virtue of it that he has rights. Remarkably enough—and as I will suggest, happily—the concept of citizenship plays only the most minimal role in the American constitutional scheme.

The original Constitution, prior to Reconstruction, contained no definition of citizenship, and precious few references to the concept altogether. The subject was not entirely ignored by the Framers. They empowered Congress to make a uniform rule of naturalization.[1] But wishing to attract immigrants and therefore to be hospitable to them, the Framers rejected nativist suggestions for strict naturalization requirements, such as long residence.[2] They plainly assumed that birth as well as naturalization would confer citizenship, but they made nothing depend on it explicitly aside from a few offices: President, Congressman, Senator, but notably not judge.[3] State citizenship provided one, but only one of several, means of access to federal courts (under the diversity jurisdiction),[4] and carried the not unqualified right, under the privileges and immunities clause of article IV, section 2, to be treated generally by each state in the same fashion as its own citizens were treated.

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1. U.S. CONST. art. I, § 7.

2. *See* F. FRANKLIN, THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES ch. II (1969).

3. U.S. CONST. art. I, § 2 (Congressman); *id.* § 3 (Senator); *id.* art. II, § 1 (President).

4. Judiciary Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78.

There is no further mention of citizenship in the Constitution prior to the Civil War amendments, even though there were plenty of occasions for making rights depend on it. The Preamble speaks of "We the people of the United States," not, as it might have, of we the citizens of the United States at the time of the formation of this Union. And the Bill of Rights throughout defines rights of people, not of citizens.

No wonder, then, that citizenship was nowhere defined in the original Constitution. It was not important. To be sure, implicitly, the citizen had a right freely to enter the country, whereas the alien did not; and implicitly also the citizen, while abroad, could be held to an obligation of allegiance, and might under very specific conditions be found guilty of the crime of treason for violating it, while the alien generally could not. But these were hardly critical points, as the Framers demonstrated by saying nothing explicit about them. It remains true that the original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizen.

THE CONCEPT OF CITIZENSHIP AS AFFECTED BY THE *Dred Scott* OPINION

This idyllic state of affairs was rudely disturbed by the crisis of the 1850's. Like so much else, it foundered on the contradiction of slavery. Of a sudden, the concept of citizenship became important when a majority of the Supreme Court seized on it in the *Dred Scott* case[5] in a futile and misguided effort, by way of a legalism, and an unfounded legalism at that, to resolve the controversy over the spread of slavery.

Dred Scott, the slave of one John Sandford in Missouri, brought suit in the Circuit Court of the United States for his freedom. The form of the suit, which was provided by the law of Missouri for trying questions of personal freedom, was as if Sandford held a piece of property, and Scott claimed that Sandford held it unlawfully, because he, Scott, owned it. That is to say, Scott sued to recover himself.

The ground on which Dred Scott claimed title to himself was as follows. A predecessor owner, from whom Sandford had bought Scott, had taken Scott from Missouri to Illinois and from there into the Upper Louisiana Territory, north of the latitude 36 degrees and 30 minutes north. Illinois was a free state, of course, and that part of the Louisiana Territory in question was also free because Congress had

5. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

forbidden slavery there by the Compromise of 1820. So Scott had lived in free territory and in a free state for some years before being returned to Missouri. His claim was that freedom is infectious, and that he had caught it.

But Scott was suing in a federal court, and under the only federal jurisdictional statute then applicable to a case such as this in a lower federal court—the statute implementing the constitutional grant of diversity of citizenship jurisdiction—Scott could come into federal court only by claiming that he was a citizen of Missouri, whereas admittedly Sandford, although he held Scott in Missouri, was a citizen of New York. Sandford answered that Scott could not be a citizen of Missouri, "being a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves."[6] If Scott was not a citizen of Missouri, there could be no federal jurisdiction, and that was an end of the matter.

In the Supreme Court of the United States, the majority, per Chief Justice Taney, held that Dred Scott could not be a citizen; not because he was a slave, or for any other reason peculiar to himself, but even if he were a free man, because as Sandford's answer claimed, he was "a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves." The words "people of the United States" and "citizens" are synonymous terms, wrote Taney, used interchangeably in the Constitution.

> 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.[7]

At the time of the framing of the Constitution, Taney continued—and in this he was probably quite wrong, as the dissenters demonstrated, particularly Justice Curtis of Massachusetts—even free Negroes were not viewed as being a portion of "this people," which was the constituent membership of the sovereignty. They were not viewed as citizens or as entitled to any of the rights and privileges which the Constitution held out to citizens.

Notice the transition Taney has made. He posits a constitution which holds out rights and privileges to citizens, even though the document in fact holds out precious few to citizens as such, does not bother to define the status of citizenship, and altogether appears to set very

6. *Id.* at 400.
7. *Id.* at 404.

little store by it. Taney can take the position he takes only because by an *ipse dixit*, he has chosen to lay it down that when the Constitution says "people," it means the same thing as citizens. And rights and privileges are, of course, accorded to "people." Yet the Constitution actually says citizens very few times, says people most of the time, and at any rate uses both terms, and by no means interchangeably.

Negroes, Taney goes on, were at the time of the formation of the Constitution "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them."[8] Now, this is a perversion of the complex, guilt-ridden and highly ambivalent attitude of the Framers towards slavery, and of their vague, and possibly evasive and culpably less than candid expectation of some future development away from slavery.[9] It is possible to have some compassion for the Framers in their travail over the contradiction of slavery. It is not possible to have compassion for Taney's hardening of the Framers' position, his stripping it of its original aspirations to decency as well as of its illusions, and his reattribution to the Framers of the position thus altered.

The original Constitution's innocence of the concept of citizenship was thus violated in the *Dred Scott* case, in an encounter with the contradiction of slavery. A rape having occurred, innocence could never be fully restored. But remarkably enough, after a period of reacting to the trauma, we soon resumed behaving as if our virginity were intact, and with a fair measure of credibility at that.

The thirteenth amendment became law in December 1865. Within less than 4 months, Congress enacted the Civil Rights Act of 1866. With the express intention of overruling the *Dred Scott* case, this Act began by declaring 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,"[10] thus providing the first authoritative definition of citizenship in American law. The reason why this effort at definition was undertaken, and the whole reason, was that it had become necessary to make clear that race and descent from slaves was no ground of exclusion.

For the first time, and for the same reason also, a set of rights depending on citizenship was defined in the Civil Rights Act of 1866.

8. *Id.* at 404-05.
9. *See* U.S. CONST. art. 1, § 9, cl. 1.
10. Civil Rights Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

The dependence of these rights on citizenship was incidental. Actually, a previous version of the statute referred to inhabitants in conferring these new rights, rather than to citizens.[11] As it occurred to the draftsman that he had better make clear that Negroes could be citizens, it became a matter of ease of drafting to also define the rights that he was about to confer in terms of citizenship.

The *Dred Scott* decision itself gave no definition of citizenship, or of its rights and privileges. It invested the concept with no affirmative meaning. It used the idea negatively, in exclusionary fashion, to indicate who was not under the umbrella of rights and privileges and status, and thus to entrench the subjection of the Negro in the Constitution. For this purpose and in this posture alone, *Dred Scott* had brought the concept of citizenship to the fore. The purpose in the Civil Rights Act of 1866 was equally negative. *Dred Scott* had to be exorcised. In the process, as a matter of syntactic compulsion, of stylistic necessity, as a matter of the flow of the pen, the concept of citizenship was again brought to the fore. Rights were made to depend on it as a convenient device of draftsmanship.

When this same Congress that passed the 1866 Civil Rights Act wrote the fourteenth amendment, it included in section 1 a provision forbidding any state to "abridge the privileges or immunities of citizens of the United States; . . . ." The author of this phrase, as of much else in section 1 of the fourteenth amendment, was a man named John A. Bingham, a Representative from Ohio, a Republican of abolitionist antecedents.[12] He was a type of frequent occurrence in our political life, a man of enthusiastic rhetorical bent, on the whole of generous impulse, and of zero analytical inclination or capacity. A Republican colleague of Bingham's in the House, recalling quite specifically the privileges and immunities clause of the fourteenth amendment, and that it came from Bingham, said: "Its euphony and indefiniteness of meaning were a charm to him."[13]

The only explanation of the clause that was so much as attempted in the entire course of the Congressional debate on the fourteenth amendment, which was a lengthy process, was by Bingham, and it confirms his contemporaries' estimate of him—it was highly confused.[14] In the Senate, the principal sponsor of the fourteenth amendment, Senator Howard, conceded quite plainly in his opening remarks that it was difficult to tell what the privileges and immunities of United

11. *See* C. FAIRMAN, RECONSTRUCTION AND REUNION 1864-88 at 1172, in VI HISTORY OF THE SUPREME COURT OF THE UNITED STATES (P. Freund ed. 1971).
12. *Id.* at 1270.
13. *Id.*
14. *Id.* at 1275-76.

States citizenship might be. Another Senator, Reverdy Johnson, probably the most noted constitutional lawyer in the Senate, said of the privileges and immunities clause, "I do not understand what will be the effect of that."[15] No one answered him, but the clause stayed in.

As an afterthought, by amendment in the Senate of the text passed in the House, a definition of citizenship modeled on that of the Civil Rights Act of 1866 was added to the beginning of section 1, to come just before the privileges and immunities clause. It reads: "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, [which may exclude the children of foreign ambassadors, and means little, if anything, more that that] are citizens of the United States and of the state wherein they reside." It is not difficult to reconstruct, even without the help of any legislative history, the train of thought on which this sentence rode in. It helped assuage somewhat the painful confusion that everybody was in about the privileges and immunities clause. It must have occurred to someone that whatever that clause might turn out to mean, it might well lend some importance to the status of being a citizen of the United States. Hence it would be provident to be clear who was a citizen. Moreover, it would be well at the same time to be sure that *Dred Scott* was effectively, which is to say constitutionally, overruled by a definition of citizenship in which race played no part.

So, in a fashion no one quite understood but everyone apparently found necessary, the *Dred Scott* case was exorcised. That having been done, the rest of section 1 of the fourteenth amendment made no further reference to citizens. And the distinction between citizens and persons did not go unnoticed. In the Senate, Howard pointed out that the due process and equal protection clauses "disable a State from depriving not merely a citizen of the United States, but any person, . . . of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State."[16]

THE STATUS OF CITIZENSHIP AS AFFECTED BY THE *Slaughter-House Cases*

At this stage of our history we stood at a point where the status of citizenship might have become all-important, not because of a deliberate, reasoned decision, but owing to the particular dialectic of the *Dred Scott* case, which one may view as an accident, and of the natural reaction of it. Actually, the concept of citizenship, once inserted in the fourteenth amendment, survived as a drafting technique in three

15. Cong. Globe, 39th Cong., 1st Sess. 3041 (1866).
16. C. FAIRMAN, *supra* note 11, at 1295.

later constitutional amendments which safeguard the right to vote against particular infringements. But on the whole, the development was away from this concept—owing to yet another accident.

This other accident was the decision in the *Slaughter-House Cases*[17] of 1873, in which the Supreme Court for the first time construed the newly enacted fourteenth amendment. Oddly enough, this first reading of the great Reconstruction amendment had nothing to do with Negroes, slavery, civil rights or in any other way with the aftermath of the Civil War. The case instead arose from a somewhat more than ordinarily corrupt enactment of the Louisiana legislature in 1869, which created a slaughtering monopoly in New Orleans in behalf of the so-called Crescent City Live-Stock Landing and Slaughter-House Company, organized for no other purpose than to procure the monopoly—by liberal bribery—and benefit from it. Independent butchers who had been engaged in the trade would under the statute be at the mercy of the monopoly, and they therefore attacked it in a number of suits in state and federal courts.

In retrospect, one never ceases to be astonished that it should have occurred to anyone that the brand-new fourteenth amendment, designed to settle the issues that gave rise to the Civil War, might be relevant to a controversy about who did the butchering in the Crescent City. But it did occur to one of the counsel for the butchers, a rather special counsel, John A. Campbell of Alabama. Campbell had been a Justice of the Supreme Court of the United States, and was a member of the majority that decided the *Dred Scott* case. Though he had opposed secession on political grounds, Campbell thought it his duty to resign when his state seceded. He was the only Southern Justice to do so. During the war he held office under the Confederate government.

By 1873, the ex-Justice had one of the most extensive practices in the Southeast, and as counsel for the independent butchers attacking the Crescent City monopoly it occurred to him that their newly guaranteed privileges and immunities as citizens of the United States—those figments of John A. Bingham's imagination—had been denied them by the Louisiana legislature. Campbell argued that the fourteenth amendment, "with an imperial authority," had defined national citzenship and had made it primary. It was now central to the relationship between the individual and government. The privileges of a citizen of the United States, Campbell went on, must include the right "to cultivate the ground, or to purchase products, or to carry on trade, or to maintain himself and his family by free industry."[18] Obviously the

17. 83 U.S. (16 Wall.) 36 (1873).
18. C. FAIRMAN, *supra* note 11, at 1345.

Crescent City monopoly denied to independent butchers the right to carry on their trade and maintain themselves. The fourteenth amendment, Campbell was quite clear, had worked a "mighty revolution" in the American Constitution. Through it, citizenship had been made "a word of large significance, and comprehended great endowments of privilege, immunity, of right. . . ."[19]

All this eloquence went for nought. Cambell's clients lost. "The banded butchers are busted,"[20] Matthew Hale Carpenter, counsel for the monopoly, wired his clients. The fourteenth amendment was a mighty revolution, and it did create great endowments of privilege, immunity, and of right, but they were not to depend on citizenship.

The opinion of the Court was by Justice Miller. The main purpose of the fourteenth amendment's definition of citizenship, Miller began, was to overrule the *Dred Scott* case and "to establish the citizenship of the negro."[21] In addition, the definition clarified what Miller thought was a previously open but hardly world-shaking question: whether a person born, not in a state, but in a territory or in the District of Columbia, who was therefore not a citizen of any state, could be a citizen of the United States. He could be. The fourteenth amendment made sure there would be no limbo.

But what could be meant by privileges and immunities of citizens of the United States? The first place to look for an answer, obviously, was the privileges and immunities clause of the original Constitution, article IV, section 2. "Its sole purpose," said Miller, "was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise [whatever those rights may be that you, the state, may grant], the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."[22] But the rights themselves did not depend on the federal government for their existence or protection. Their definition and their limitation lay within the power of the states, so that a state was free to limit or even extinguish the right of most of its citizens to practice their trade as butchers. If a state did so, as Louisiana had done, citizens of other states had no greater right in Louisiana under article IV, section 2, than citizens of Louisiana. That, said Miller, was the situation before enactment of the fourteenth amendment.

Was the fourteenth amendment, by creating national citizenship, meant to institute a radical change, as Campbell urged, and to cause

19. *Id.* at 1346.
20. *Id.* at 1349.
21. 83 U.S. (16 Wall.) at 73.
22. *Id.* at 77.

basic relationships between the individual and the state to turn on federal law? If so, there had been a transfer from the state legislatures to Congress of the power to regulate economic and social conditions at large. For by section 5 of the fourteenth amendment, Congress was given enforcement power. It could, therefore, legislate at will on virtually any such subject. What is more, the consequence would be a transfer of power, not only to Congress, but to the Supreme Court, which would be constituted "a perpetual censor upon all legislation of the states" dealing with social and economic affairs, "with authority to nullify [any regulation enacted by a state that the Supreme Court] did not approve. . . ."[23]

Justice Miller's answer to Campbell's conception of national citizenship as created by the "imperial" fourteenth amendment was a vigorous negative. Miller and his majority were convinced that the Congress which proposed the fourteenth amendment and the states which ratified it did not intend "so great a departure from the structure and spirit of our institutions;" nor so radical a change in the "whole theory of the relations of the state and Federal governments to each other and of both these governments to the people. . . ."[24] The purpose of the privileges and immunities clause was to define, secure and protect the citizenship of the newly freed slaves; that and no more. As for other portions of the amendment which Campbell had not stressed, Miller strongly implied that the due process clause, repeating as it did language of the fifth amendment, had narrow procedural application only. The equal protection clause, Miller was quite clear, applied to racial discrimination. He would be astounded, he said, if at any time in the future the equal protection clause should be applied to "any action of a state not directed by way of discrimination against the negroes as a class. . . ."[25] In sum, the fourteenth amendment carried no "purpose to destroy the main features of the general system."[26]

Was the privileges and immunities clause, then, entirely meaningless? Why did the draftsman put it in? We know why—because John A. Bingham liked the sound of it. But that is not good enough. Statutory and particularly constitutional enactments must be invested with some meaning, which Miller proceeded to do. National citizenship, he said, confers the right to come to the seat of government, which would be protected for inanimate things, and for aliens as well, by the commerce clause; the right to seek (though probably not to claim) the protection of the government when outside the United

23. *Id.* at 78.
24. *Id.*
25. *Id.* at 81.
26. *Id.* at 82.

States; the right to use the navigable waters of the United States, which under international law may be forbidden to aliens.[27] That was about it.

The *Slaughter-House Cases* were decided by a closely-divided Court, 5 to 4. The dissenters, who included two powerful figures, Field and Bradley, accepted Campbell's argument with some variations. The rights of national citizenship, they thought, did include at least the right to be protected against the imposition of arbitrary restrictions, as by the creation of a monopoly, on the practice of trades and professions. Field, as he was to demonstrate again and again, was a passionate exponent of a *laissez-faire* philosphy, and he was entirely willing to construe the fourteenth amendment indeed to enthrone the Court as supreme censor of state social and economic legislation—most of which he would cheerfully strike down. In Bradley's mind the emphasis was perhaps more on social justice than on economic *laissez-faire*, but in this case it all came to the same thing; and as to social justice, one must not overestimate what it meant to Bradley.

The decision in the *Slaughter-House Cases,* however narrowly reached, has stuck, so far as the argument proceeding from the privileges and immunities clause is concerned. And what it did was to bring us back to where we started. It concluded the flurry of the *Dred Scott* case, came around just about full circle, and left matters almost as they were before that episode. While we now have a definition of citizenship in the Constitution, we still set very little store by it. But I said that this outcome, the closing of the circle, was again accidental, or at least incidental, just as the exaltation of citizenship in *Dred Scott* was accidental, or at least incidental. Let me now substantiate this assertion. Justice Miller's *Slaughter-House* opinion—and in this Miller succeeded—just about read the privileges and immunities clause out of the Constitution. But Miller did what he did for reasons of federalism because he thought it important not to destroy the main features of the preexisting federal system, with its distribution of powers between state and federal governments, except as that distribution had been altered in order to secure rights for the newly freed Negro. That was the ground of decision, not that it would be wrong to make citizenship central to the relationship between the federal government and the people, not some philosophical notion about the proper role of the concept of citizenship.

Citizenship became an issue only because Campbell, as counsel for the independent butchers, fastened on the privileges and immunities

27. *Id.* at 79.

clause as the instrument for securing protection for his clients through an enlargement of federal power. Had Campbell's argument turned on the due process or equal protection clauses, Miller's answer would have been the same—he says as much.[28] But Campbell argued privileges and immunities, and it is that clause that Miller's decision authoritatively construes. Concerning that clause, Miller has prevailed. But it turned out within a relatively short term of years that on the fundamental issue of federalism that formed the real substance of his view and the basis of his construction of the privileges and immunities clause, Miller was not to prevail. The victory would go instead to the dissenters, to Field and Bradley.

All that Miller strove to forestall did occur, if under a different formal rubric. The protection that Campbell unsuccessfully claimed for his independent butchers in the *Slaughter-House Cases* pursuant to the privileges and immunities clause was later extended under the due process and equal protection clauses. The main features of the preexisting federal system—to paraphrase Miller's fears—were indeed heavily altered, if not destroyed. A radical change in the whole theory of relations between the state and federal governments was accomplished. A great departure from the structure and spirit of the original institutions was made. State governments were fettered and degraded by being subjected to federal control, and the Court was constituted a perpetual censor upon all legislation of the states, with authority to nullify whatever it did not approve.

For a season, the economic *laissez-faire* notions of Justice Field, which he advocated ably and passionately, held sway, and the Court, invoking the due process and equal protection clauses, ruthlessly struck down all manner of social and economic regulations that the states attempted to enact.[29] Later, somewhat broader and more humane ideas of social justice, some of which might, but many of which would not, have been congenial to Bradley, were put into effect by the Court under the same clauses.[30] The central purpose of the equal protection clause, posited by Miller as the sole purpose—to protect Negroes against racial discrimination—came to fruition more slowly, despite an early good beginning; considerably more slowly than other applications

28. *Id.* at 82.

29. *See, e.g.,* Coppage v. Kansas, 236 U.S. 1 (1915) (criminal statute proscribing non-union membership as condition of employment); Lochner v. New York, 198 U.S. 45 (1905) (statute limiting employment in bakeries to 60 hours per week and 10 hours per day).

30. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969) (denial of welfare benefits to residents of state for less than 1 year violates the equal protection clause of the fourteenth amendment). *See also* Reed v. Reed, 404 U.S. 71 (1971).

which Miller could not imagine, and would have found astounding indeed.

In any case, all that was to be came to pass in the form of due process and equal protection, not privileges and immunities. The defeat of Miller was completely achieved, and quite rapidly. So far as it applied to the privileges and immunities clause, however, Miller's initial victory endured. From Miller's point of view, the victory has to be seen as pyrrhic. But the fortuitous result is that the future belonged to constitutional clauses that speak of persons, not of citizens. Corporations, which have a legal personality, and which are formed and run by people, though they are themselves obviously not natural persons, were before long held covered by many constitutional protections. That need not have happened simply because "person" is the operative word, however, and might have happened as readily if everything had been made to turn on the word "citizen."[31]

THE CONTEMPORARY ROLE OF CITIZENSHIP IN THE CONSTITUTION

The consequences of the decision in the *Slaughter-House Cases* with respect to the role played in our polity by the concept of citizenship have followed with inexorable logic. Although the fifteenth, nineteenth and twenty-sixth amendments guarantee the right to vote in terms of citizenship, and the right to vote is now generally a function of United States citizenship, it was not always, and in some states not recently, so; and in any case, it is not the Constitution that ties even that most symbolically charged act of participation in governance to the status of citizenship. There have been other, aberrant departures from the logic of the *Slaughter-House Cases*. But when challenged, they are most often found to be insupportable contradictions, and are eliminated.

Over the years, as one or another wave of xenophobia or unemployment swept the country, state statutes were enacted excluding noncitizens from various callings, employments and activities: optometrist, dentist, doctor, nurse, architect, teacher, lawyer, policeman, engineer, corporate officer, real estate broker, public accountant, mortician, physiotherapist, pharmacist, peddler, pool or gambling-hall operator, all or some government employment or public works employment, hunting and receiving public charity. It is to be questioned how rigorously such statutes have ever been enforced. Just before and after the First

31. That word proved to be no obstacle when it came to holding that a corporation was a citizen for purposes of diversity jurisdiction. Louisville, Cincinnati & Char. R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 558 (1844).

World War, the Supreme Court upheld a few.[32] Thus in 1915, the Court upheld a New York statute that forbade employment of aliens in public works, in this case the building of the New York City subways.[33] So much, apparently, for the myth that Irish and Italian immigrants built the subways, although it is probable that the myth is no myth, and that alien labor was widely used. Tammany, bless its memory, surely found a way. In 1923, the Court upheld the most traditional type of alien disability: California and Washington statutes forbidding aliens—it was the Japanese who were aimed at—to own land.[34] And as late as 1927, the Court held constitutional a Cincinnati ordinance that limited the issuance of poolhall licenses to citizens.[35]

In the meantime, however, in a decision that has been greatly more influential, the Court held unconstitutional an Arizona statute imposing a 20 percent maximum quota on alien employment by private industry (any work force of more than five employees). The equal protection clause guaranteed aliens the unrestricted right to earn a living in the common callings, said the court.[36] This decision, and not the others, which are now of very dubious validity if any at all, is the authentic voice of the American Constitution. So the Supreme Court went out of its way to emphasize in June 1971, while holding unconstitutional Arizona and Florida statutes that attempted to deny welfare benefits to aliens. It is persons, not only citizens, to whom the equal protection clause applies, said the Court.[37] Similar decisions by lower courts have followed in other contexts, one even going so far as to hold aliens entitled to admission to the bar.[38]

This is not quite an end of the matter. Resident aliens are under

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32. *See, e.g.*, Heim v. McCall, 239 U.S. 175 (1915) (laborers in public works project); Crane v. New York, 239 U.S. 195 (1915); *cf.* Patsone v. Pennsylvania, 232 U.S. 138 (1914) (upholding statute forbidding aliens from killing wild game).

33. Heim v. McCall, 239 U.S. 175 (1915).

34. Frick v. Webb, 263 U.S. 225 (1923); Terrace v. Thompson, 263 U.S. 197 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Webb v. O'Brien, 263 U.S. 313 (1923).

35. Clarke v. Deckenbach, 274 U.S. 392 (1927).

36. Truax v. Raich, 239 U.S. 33 (1915). *See also* Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948).

37. Graham v. Richardson, 403 U.S. 365, 371 (1971). *Contra, In re* Griffiths, 162 Conn. 249, 294 A.2d 281 (1972), *prob. juris. noted*, 92 S. Ct. 2413 (June 7, 1972). *See* Faruki v. Rogers, 349 F. Supp. 723 (D.C.C. 1972) (U.S. Foreign Service employment); Dougall v. Sugarman, 339 F. Supp. 906 (S.D.N.Y. 1971) (civil service employment); Chapman v. Gerard, 341 F. Supp. 1170 (D.V.I. 1970), *aff'd*, 456 F.2d 577 (3rd Cir. 1970) (scholarship fund).

38. Raffaeli v. Committee of Bar Examiners, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972). *Contra*, In re Griffiths, 162 Conn. 249, 294 A.2d 281 (1972), *prob. juris. noted*, 92 S. Ct. 2413 (June 7, 1972). *See* Faruki v. Rogers, 349 F. Supp. 723 (D.D.C. 1972) (United States Foreign Service employment); Dougall v. Sugarman, 339 F. Supp. 906 (S.D.N.Y. 1971), *prob. juris. noted*, No. 71-1222, 407 U.S. 908 (Mar. 24, 1972); Chapman v. Gerard, 341 F. Supp. 1170 (D.V.I.), *aff'd*, 456 F.2d 577 (3rd Cir. 1970) (scholarship fund).

the protection of our Constitution substantially no less than citizens.[39] But conditions, including employment conditions, may be attached to the entry permits of visiting aliens and, in time of war, even resident enemy aliens may be subject to fairly harsh restrictions. But that is a consequence, I suggest, more of our perception of the meaning of foreign citizenship and of the obligations it may impose than of the significance of the status of citizen in our own domestic law.

These remarks about visitors and enemy aliens lead to an affirmative statement of what is the core, irreducible legal significance of citizenship in our system. And the short of it is that its significance is international more than domestic, and domestic as a reflection of international. The citizen has a right as against the whole world to be here. The alien does not, and even the resident alien has a qualified one, although once he is permanently resident his right to remain, if qualified, is substantial and covered by many constitutional protections.[40] This is largely an international matter. The decision of who may enter and remain as of right is one that every nation-state must make in a world of nation-states, else it places its existence at risk. As to obligations, citizenship can be made, and is made, though rarely, the basis for the extraterritorial application of domestic law (such as the draft, the tax law, rules requiring appearance in court) and, most significantly, for the extraterritorial reach of the quintessential crime of allegiance, the crime of treason, which is very closely and narrowly defined in the Constitution itself.[41] Notably, treason is defined by the Constitution in terms of persons, not citizens; but allegiance is at the heart of it, and it is generally difficult to conceive of an alien committing treason against us extraterritorially.[42]

Justice Holmes was fond of saying, as he expressed it once when aroused by the prospect of a railroad strike just on the eve of war in 1917: "Patriotism is the demand of the territorial club for priority, and as much priority as it needs for vital purposes, over such tribal groups as the churches and trade unions. I go the whole hog for the territorial club—and I don't care a damn if it interferes with some of the spontaneities of the other groups."[43] No doubt, the territorial club has a great deal of power to impose its priorities, certainly in time of war. But note that Holmes speaks of the territorial club, not of any

39. Graham v. Richardson, 403 U.S. 365, 371 (1971) (term person in fourteenth amendment means "resident aliens as well as citizens of the United States and entitles both to equal protection of the laws of the State in which they reside").
40. *See* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953).
41. *See* Kawakiti v. United States, 343 U.S. 717 (1952).
42. *See* Powers, Jr., *Treason by Domiciled Aliens,* 17 MIL. L. REV. 123 (1962).
43. Letter from W. Holmes to Felix Frankfurter, March 27, 1917, *Holmes Papers,* on file in Harvard Law Library.

construct that implies something less physical, namely citizenship and a consequent duty of allegiance. And the territorial club does indeed impose all kinds of obligations regardless of citizenship as, for example, the duty to serve in the armed services by conscription. We draft aliens. We do give drafted aliens the opportunity for rapid naturalization, and there are some disabilities that may attach in respect of later naturalization if an alien refuses the draft, as he may, on the ground that service would be inconsistent with his allegiance to another country. But the fact remains that the duty to serve is not a function of citizenship.

While the Constitution itself and our past practice under it thus breathe very little life and minimal content into the concept of citizenship, Congress in exercise of its general legislative powers could impose special obligations of allegiance on the citizen, and obligations flowing from allegiance. But Congress has seldom exerted itself in this fashion, and on the rare occasions when it has, it has run into resistance from the courts, even to the point of a denial of power to require an oath of allegiance for issuance of a passport,[44] which is, after all, the document witnessing one of the few privileges of citizenship mentioned by Justice Miller in the *Slaughter-House Cases*, namely the privilege to claim the protection of our government when travelling in foreign lands. Most of the judicial decisions marking the resistance referred to have come in naturalization and expatriation cases.

The naturalization law has long provided that the prospective citizen must be "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States."[45] In 1943, the Supreme Court held that an admitted communist, who had a leadership position in the party and believed in the dictatorship of the proletariat, though somewhat disingenuously defined, could become a citizen.[46] The Court held that attachment to the principles of the Constitution did not mean attachment to any particular principle, such as the general form of government, any particular political philosophy that informs the Constitution, let alone notions of private property, or more detailed ideas of that sort. It was sufficient, the Court said, that the applicant was law-abiding, by which was meant that he did not advocate the violent overthrow of the government, although he assuredly advocated its overthrow.

Chief Justice Stone, dissenting, argued that there were, too, principles of the Constitution—a thought, one might have supposed, that

44. Woodward v. Rogers, 344 F. Supp. 974 (D.D.C. 1972); *cf.* Cole v. Richardson, 405 U.S. 676 (1972).
45. 8 U.S.C. § 1427(a)(2) (1970).
46. Schneiderman v. United States, 320 U.S. 118 (1943).

would have had some appeal to his colleagues, whose daily task it is, after all, to identify and proclaim the principles of the Constitution. There are principles, said Stone, and Congress may require the allegiance of prospective citizens to them. Among such principles are, he went on, "protection of civil rights and of life, liberty and property, the principle of representative government, and the principle that constitutional laws are not to be broken down by planned disobedience."[47] He said the Constitution was hostile to dictatorship and minority rule, and provided quite plainly the means for its own modification. "It can hardly satisfy the requirement of 'attachment to the principles of the Constitution,' " he concluded, "that one is attached to the means for its destruction."[48] But that was a minority view. And the majority, in truth, despite the surface paradox pointed to a moment ago, was holding that the principles of the Constitution of the United States have to do with people, and are not a means by which we establish some special relationship between an individual called a citizen and his government.[49]

Earlier, in the 1920's, the Court denied naturalization to a pacifist and to an applicant who reserved a right of selective conscientious objection to war. The pacifist was a lady named Rosika Schwimmer, who went with Henry Ford on his peace ship in 1916. She was Ford's house pacifist. The prospective selective objector, not a pacifist, was a Professor Macintosh of the Yale Divinity School. But these decisions are not authoritative. They encountered powerful dissents from such as Hughes, Holmes, Brandeis and Stone, and these dissents have prevailed and become the accepted law.[50]

This is not to suggest that no special qualifications for naturalization exist and are enforced. Good moral character is one, for example. The point is merely that qualifications that seek to pour ideological and political meaning into the concept of citizenship, by defining allegiance in its terms, meet with judicial resistance. Nor has Congress been permitted to define the allegiance of those who are already citizens by providing for their involuntary expatriation—the involuntary loss of citizenship—upon commission of acts inconsistent with allegiance. Such acts may be punished when committed by citizens and even by noncitizens, but loss of citizenship cannot be predicated on them. And the irony is that in the decisions that denied a power to impose invol-

47. *Id.* at 181.
48. *Id.* at 195.
49. There is a later, lower-court case involving a Nazi, which looks the other way, showing perhaps that, in the 1940's anyway, Nazis were thought to be worse than communists, but it is not an authoritative case. Sittler v. United States, 316 F.2d 312 (2d Cir. 1963).
50. United States v. Macintosh, 283 U.S. 605 (1931); United States v. Schwimmer, 279 U.S. 644 (1929). *See also* Girouard v. United States, 328 U.S. 61 (1946).

untary expatriation, and thus seemed to follow the tradition of denuding the concept of citizenship of any special role and content, the Supreme Court returned to a rhetoric of exalting citizenship which reminds of nothing so much as the Taney opinion in *Dred Scott.*

Voluntary expatriation has long been permitted by our law. In the early years of the Republic, Hamilton and his followers believed that Americans, like British subjects, should be tied indissolubly to the state. A right of voluntary expatriation would encourage subversion, they thought. Jefferson, on the other hand, supported such a right, and in the end Jefferson's view prevailed. In 1868, Congress, having for the first time just defined citizenship, passed a statute which is still on the books, providing in warm language that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness,"[51] and was not to be denied. We had, after all, fought in 1812 against British claims that immigrants from Great Britain who were sailors in our navy could be treated by the British as deserters because they had never lost their British nationality, and in the 1860's we were indignant at British treatment of naturalized Irish-Americans arrested in Ireland for participation in anti-British activities.[52]

In making a somewhat complementary provision for involuntary expatriation, Congress listed as expatriating behavior such acts as voting in a foreign political election, deserting from the armed forces in time of war or, for a naturalized citizen, taking up permanent residence in the country of his or her birth. There was some contrariety of views in the Supreme Court concerning these provisions through the 1950's, but in the end the Court held them all unconstitutional,[53] even though there is some slight evidence that the Court as now constituted might be willing to rethink the whole question.[54]

What the Court said, in effect, in these cases holding the involuntary expatriation statutes unconstitutional, was that Congress may not put that much content into the concept of citizenship and then draw the consequences. The Court thus by its action seemed to reaffirm the traditional minimal content of the concept of citizenship, the minimal definition of allegiance. But its rhetoric was at war with its action. "This government was born of its citizens," wrote Chief Justice Warren,

51. Act of July 27, 1868, ch. 249, § 1, 15 Stat. 223 [now 8 U.S.C. § 1481(a)(6)(7) (1970)].

52. *See* Gordon, *The Citizen and the State: Power of Congress to Expatriate American Citizens,* 53 GEO. L.J. 315 (1965).

53. Afroyim v. Rusk, 387 U.S. 253 (1967); Schneider v. Rusk, 377 U.S. 163 (1964).

54. *See* Rogers v. Bellei, 401 U.S. 815 (1971).

> it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its existence. I cannot believe that a government conceived in the spirit of ours was established with power to take from the people their most basic right.
>
> Citizenship *is* man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf. His very existence is at the sufferance of the state within whose borders he happens to be. [As if our government were in the habit of beheading people for not being citizens!] In this country the expatriate would presumably enjoy, at most, only the limited rights and privileges of aliens. . . .
>
> The people who created this government endowed it with broad powers. . . . But the citizens themselves are sovereign, and their citizenship is not subject to the general powers of their government. . . .[55]

Citizenship, Chief Justice Warren concluded, is "that status, which alone assures the full enjoyment of the precious rights conferred by our Constitution."[56] Justice Black for his part wrote ten years later, when these views came to command a majority: "In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship."[57] And: "Its citizenry is the country and the country is its citizenry."[58]

All this, we have seen, is simply not so. It is not so on the face of the Constitution, and it certainly has not been so since the *Slaughter-House Cases*. The rhetoric is a regression to the confusions that inhabited the mind of John A. Bingham, of happy but unclear memory and, what is worse, to the majority opinion in *Dred Scott*, of clear but unhappy memory. Who held that the terms "people of the United States" and "citizens" are synonymous, and that they "both describe the political body who, according to our republican institutions, form the sovereignty. . . . They are what we familiarly call the single 'sovereign people,' and every citizen is one of this people, and a con-

55. Perez v. Brownell, 356 U.S. 44, 64-65 (1957) (footnotes omitted) (Warren, C.J., Black & Douglas, J.J., dissenting). This dissent within the decade became the prevailing view. The Chief Justice took his clue from an unguarded comment by Justice Brandeis, made in a quite different context, to the effect that deportation of one who claims to be a citizen may result in the loss of "all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

56. Perez v. Brownell, 356 U.S. 44, 78 (1957) (Warren, C.J., Black & Douglas, J.J., dissenting).

57. Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

58. *Id.* at 268.

stituent member of this sovereignty?" Roger B. Taney did, and Earl Warren and Hugo L. Black echoed it a century later, unwittingly to be sure. Who said that noncitizens "had no rights or privileges but such as those who held the power and the government might choose to grant them?" Roger B. Taney, to the same curious later echo.

No matter to what purpose it is put and by whom, this is regressive rhetoric. Its thrust is parochial and exclusive. A relationship between government and the governed that turns on citizenship can always be dissolved or denied. Citizenship is a legal construct, an abstraction, a theory. No matter what safeguards it may be equipped with, it is at best something that was given, and given to some and not to others, and it can be taken away. It has always been easier, it always will be easier, to think of someone as a noncitizen than to decide that he is a nonperson, which is the point of the *Dred Scott* case.

More generally, emphasis on citizenship as the tie that binds the individual to government and as the source of his rights leads to metaphysical thinking about politics and law, and more particularly to symmetrical thinking, to a search for reciprocity and symmetry and clarity of uncompromised rights and obligations, rationally ranged one next and against the other. Such thinking bodes ill for the endurance of free, flexible, responsive and stable institutions, and of a balance between order and liberty. It is by such thinking, as in Rousseau's *The Social Contract*, that the claims of liberty may be readily translated into the postulates of oppression. It is gratifying, therefore, that we live under a Constitution to which the concept of citizenship matters very little indeed. It prescribes decencies and wise modalities of government quite without regard to that concept. And it subsumes important obligations and functions of the individual, which have other, more complex sources and foundations, moral, political and traditional, than the simple contractarian notion of citizenship. "The simple governments," wrote Burke, "are fundamentally defective, to say no worse of them."[59] Citizenship is at best a simple idea for a simple government.

59. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 70 (Library of Liberal Arts ed. 1955).