University of Canterbury

Is Mere Color Such a Fact?

American Citizens, British Subjects and the Struggle for African-American Citizenship

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Abstract

Citizenship is an easy concept for us to understand in the modern age. When a nation emerges into being, citizenship is an underdeveloped concept. This was the case with America. This thesis investigates the early development of American citizenship from the Constitution to the passing of the Reconstruction Amendments. This thesis explores how throughout this period, American citizenship was not actively defined but instead pieced together through a series of arguments, court rulings and wars. From the Revolution emerged a new nation and with it, new citizens. The American government was at first concerned with naturalisation but as European events began to cross the Atlantic, America's preoccupation with naturalisation gave way to an ongoing saga between America and Britain over the nature and longevity of allegiance. This difference had its roots in the Revolution but would come to the fore of American diplomacy in the early 19th century and greatly impacted the American conceptualisation of citizenship. The issue of allegiance was not solved by the two nations, but by end of the War of 1812 the matter no longer caused any tension. American citizenship, having been defined in part by external forces, was now shaped internally by the issue of admitting blacks to American citizenship. The process was arduous, involving discussions regarding rights, states' rights, comity, race and the Constitution. These issues collapsed into one question: were blacks fit for citizenship? America's black population resoundingly answered this by displaying the ultimate of sacrifices – dying for their country during the Civil War.

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Introduction

Citizenship is widely understood today. We have passports which proclaim our citizenship and laws which define it. In the 20th century history, nation and nationality have played a vital role in understanding events. The 20th century was a period where nations clashed in global wars. New nations emerged in the Balkans, Europe and Africa. The central role of nations and nationality meant that in the 20th century citizenship was well understood. But in the 18th and 19th centuries, the concept of citizenship was unclear. In America this was especially true. America was a new nation born of revolution. Its sense of nationality was uncertain let alone its conceptualisation of citizenship. This thesis examines early American citizenship in post-Revolutionary America all the way to the passing of the Reconstruction Amendments. The early development of American citizenship has inspired little scholarship, save for James Kettner's *The Development of American Citizenship, 1608-1870*, published four decades ago. Furthermore the study of development of African-American citizenship has had little emphasis placed upon it. Studies on African-American citizenship tend to use the Reconstruction Amendments as a starting point, focusing on the Jim Crow and Civil Rights eras and how these eras failed to meet the expectations of the Fourteenth and Fifteenth Amendments. Scholarship also focuses on the struggle and advancement of African-Americans rights during these eras, framing them as a move towards "true" or "complete" citizenship. Pre-Civil War African-American history is most often focused on the issue of slavery. This thesis will build on and reframe existing scholarship to investigate the amorphous nature of citizenship in two periods of American history. The first - the decades immediately succeeding the Revolution in which an understanding of American citizenship was formed which applied exclusively to whites. Second - the period from the 1820s to the Reconstruction Amendments in which arguments arose regarding allowing America's free black population admittance to the status of citizens. There are three themes which emerge when studying these periods: American citizenship's anti-colonial origins; the continued conflict with Britain; and the internal machinations of the states and states' rights.

America is an interesting case. Unlike when modern European nations were formed, such as Italy (1861) and Germany (1871), America did not possess a long recorded history. The Germans had a history that could be traced back to Roman antiquity. German dukedoms and city states had for centuries joined together under the Holy Emperor. German principalities had various dialects yet they all emerged from the same base language. America, by comparison,

was a nation that had largely been settled by Puritans from England yet was soon filled with immigrants from Scotland, Ireland and the German Palatine, amongst others. Unlike European nations, America had no shared culture or language. America had no long, rich history to help anchor unity. Nevertheless, immigrants to America coalesced to form their own identity and ideas which in part would lead to Revolution. Even at this point some refused to become "American" and instead identified as Englishmen, choosing to fight for the mother country. The Revolution did not mean that the definitive "American citizen" was found. Even after the ratification of the Constitution, many people identified not as Americans but New Yorkers, Virginians or Rhode Islanders. Not only the people struggled to define themselves in the new nation, but so did America's law makers. The Constitutional Convention made some gestures towards defining citizenship, but it was thought unnecessary to detail all its intricacies. America had gained independence and its inhabitants were now citizens. New immigrants would become citizens. Simple. If only so. After the Revolution the federal government did pass naturalisation laws, but failed to discuss the relationship between state citizenship and national citizenship. The ambiguities of this relationship mirrored the colonial relationship between colonial citizenship (naturalisation in the Thirteen Colonies) and English subjectship. The complicated relationship between London and the periphery of the Empire made its way into the state-national relationship of post-Revolutionary America.

The political rhetoric of the Colonies leading to the Revolution, focused on the rights of citizens and allegiance. The differing opinions on these issues from both British and American polemists partly explain the split between the Colonies and Britain. Though the British recognised America and American citizens by signing the Treaty of Paris, the dispute over citizenship was not solved until 1815 in the aftermath of another Anglo-American conflict: the War of 1812. The early Republic came into increasing conflict with the British over the issue of allegiance, citizenship and the practice of impressment by the Royal Navy. Though there were ulterior motives for this war, the clash of citizenship was held up as the principal reason at the time. Furthermore, by 1814 it was the last remaining obstacle to peace. During this period, America came to more clearly define a central tenet of American citizenship- the principle of volitional allegiance. The peace negotiations at Ghent did nothing to solve the disagreement over allegiance, but the lack of global wars and the Monroe Doctrine saw Anglo-American relations improve and the issue of allegiance was not raised again.

The end of the War of 1812 did not signal the definitive interpretation of American citizenship. While the concept of American citizenship had become clearer, it was only conferred upon

whites.[1] After the Treaty of Ghent the next major question was the position of Africans in American society. Americans had come to formulate citizenship but the question became - should free Africans be extended the full rights of citizenship? While previous issues of American citizenship had the Americans looking outward, the struggle for African-American required them to look internally. This, combined with a state-centric definition of rights, caused clashes in comity. Each state differed in the extension of rights to blacks and there were clashes when states refused to honour these differing rights. This effective lack of rights for blacks also saw them deemed unfit for citizenship. The lack of black political rights, especially at a time when the white franchise was expanding, led to debates on whether or not voting rights were necessary for admittance to American citizenship. Eventually with the famous Dred Scott case, a federal opinion on the question of African-American citizenship was known. This ruling did not stand long - with the outbreak of the Civil War. The previous debates regarding rights and black citizenship had left many convinced that free blacks were unsuitable for citizenship. Black men fighting and dying in the Civil War showed to the white population that their (white) fears were unfounded and the heroism of black soldiers made it difficult to deny them citizenship. The bravery of black soldiers saw that African-American citizenship would become a reality with the ratification of the Fourteenth Amendment, marking a major milestone in the development of American citizenship. The difficulty in defining American citizenship both then and now was that there were not often issues of citizenship that arose directly, but many issues that touched indirectly on citizens and citizenship. In this way, defining American citizenship was not an active, continuous process but rather a collection of rulings, discussions and events that came together to give shape to citizenship.

The historiography of the development of early American citizenship is thin. The most complete work is James H. Kettner's *The Development of American Citizenship, 1608-1870.* Kettner takes a legalistic approach, investigating the laws passed in Britain, the Colonies and America which defined citizenship and naturalisation. Kettner examines American intellectuals who began to define new ideas surrounding citizenship and allegiance. Kettner, despite the work's title, fails to fully examine American citizenship after 1805. The majority of the book

[1] Native Americans were not conferred citizenship. The status of Native Americans was ad hoc, though generally the principle of *Imperium in Imperia* (An empire within an empire) applied. It meant that Native American tribes were their own sovereign power. Native Americans could become American citizens in various ways, usually by renouncing their tribes or joining the U.S. Army. *The Indian Citizenship Act* (1924) gave all Native Americans born after the Act, citizenship. It wasn't until *The Nationality Act* (1940) that all persons born on U.S. soil automatically qualified for U.S. citizenship.

examines the history of English citizenship, colonial citizenship and the early naturalisation practices after the Revolution, but fails to cover African-American and Indian citizenship in any real depth. Despite any drawbacks, Kettner's work is the leading scholarship on the subject. The other major work is Rogers M. Smith's *Civic Ideals: Conflicting Visions of U.S. Citizenship*. Smith's work spans almost all of American history from the colonial period to the late 20th century. Smith steps away from citizenship laws and looks at the political changes throughout American history and comments on how they changed not so much citizenship, but civic identity. Smith contends that a period of liberal citizenship law was immediately followed by a period of reactionary backlash and discrimination. His main argument is that American civic identity is not founded in the liberal traditions of the Revolution or the American myth of its liberal origins, but rather as a series of ascriptive definitions of political membership to allow elites to build voting blocks. Smith's scholarship thus deals less with actually defining citizenship and more with the American political culture which defined civic ideals.

While there is little scholarship on early American citizenship itself, there are many sources which explore issues related to citizenship which will be used in this thesis. Works like Paul Finkelman's *An Imperfect Union* give overviews on the issues of slavery, rights and comity at the Constitutional Convention. The *Annals of Congress* which include the debates and reports of both the House and the Senate give access to the arguments over America's first naturalisation laws. The issues surrounding the War of 1812 are found in J.C.A Stagg's *Mr. Madison's War*, Braford Perkins' *Prologue to War* and C.T. White's *A Nation on Trial: America and the War of 1812*. The American and British positions on the issue of allegiance are found in two excellent treatises: *The Right and Practice of Impressment, as Concerning Great Britain and America Considered* whose author is unknown; and George Hay's *A Treatise on Expatriation*. The rights of blacks in the early Republic are examined in Leon Litwack's *North of Slavery*. The famous Dred Scott case has had numerous works written about it. Chief amongst them is Don E. Fehrenbacher's *The Dred Scott Case: Its Significance in American Law and Politics*. Furthermore there are two important treatises on the possibility of African-American citizenship by two Attorneys -General. The first is William Writ's *Rights of Free Negroes in Virginia*, the second Edward Bates' *Opinion of the Attorney General Bates on Citizenship*. Abraham Lincoln's record on slavery and politics has many works but the most recent scholarship of note is Eric Foner's *The Fiery Trial: Abraham Lincoln and American Slavery*.

Using this historiography, this thesis consists of two chapters. Chapter One explores the difficulties in defining American citizenship immediately after the Revolution. This chapter explores the debates of the Constitutional Convention, focusing on the concern of the delegates in ensuring the instilling of republican values within citizens seeking high political offices. Moreover, it goes on to examine how the American government's need to ensure loyalty to republican values influenced the Naturalisation Acts of the 1790s, leading to ambiguous definitions of citizenship. Lastly, the chapter advances scholarship by examining how the differing concepts of allegiance between America and Britain increased tensions between the two nations in the period leading up to the War of 1812. Chapter One having established the early outlines of American citizenship, Chapter Two focuses on the internal struggle over whether or not to award free blacks American citizenship. This chapter also documents the ambiguities of the Constitution, especially the Comity Clause - given that this Clause led to a series of cases involving rulings on black rights and citizenship. The chapter continues examining the rights of free blacks in the Northern states and how this affected the perceptions of black eligibility for citizenship. The chapter moves to build on existing scholarship by reviewing cases involving citizenship, rights and comity as well as the freedom suits of the 1830s and 1840s which led to the Dred Scott case. It continues by investigating Lincoln's stance on race, slavery and the possibility of black citizenship and argues that the ultimate breakthrough for African-American citizenship was the participation of black troops in the Union war effort. The chapter concludes by examining the passing of the Reconstruction Amendments and their effect on American citizenship.

By taking existing scholarship and re-examining it with citizenship in mind, this thesis brings new interpretations to the early development of American citizenship. Furthermore, by examining areas such as the role of allegiance in Anglo-American tensions, it explores new areas left untouched by historians, opening new avenues of inquiry.

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What Allegiance is it that we Forget?

From a historical perspective the American Revolution may be seen as a difference of opinion regarding citizenship. The American Colonies usually had a much more tolerant policy on granting citizenship or entrance into their communities than Britain. Originally born of necessity to allow immigrants access to property and trading rights, the concept of citizenship began to show hints of difference compared with British subjectship. This difference grew, most notably after the French and Indian Wars, until the outbreak of the Revolution. The Americans thought of it as a Revolution, the British as the revolt of disloyal subjects. America would win the right to be governed by its own citizens but the clash regarding the differences in citizenship and subjectship would not be solved until a second Anglo-American conflict: the War of 1812. The Treaty of Paris referred to 'American citizens' and 'British subjects' but the matter of who belonged to which group was not fully settled. This uncertainty moved to the fore of the relationship between America and Britain in the early 19th century, revolving around questions of allegiance and naturalisation and greatly increased tensions. In the interim, American law makers tried to give some definition to American citizenship. The most significant move was to pass naturalisation laws to accommodate the growing number of immigrants to the new nation. Congress' creation of a national citizenship however, created some confusion as to the importance of state citizenship. Congress did not feel the need to discuss nor define the relationship between state and national citizenship. The ambiguities involved in this relationship reflected the difficulties which Parliament, the colonial governors and colonial legislature had in previous decades in agreeing upon the relationship between the centre of the Empire and its periphery.[1] The ill-defined nature of the federal-state relationship did not cause problems immediately after the Revolution, but during the mid-19th century, when the question of African-American citizenship was broached, this uncertain relationship greatly confused the issues.

The Treaty of Paris in 1783 may well have differentiated between English subjects and American citizens but gave no definition of what the difference was. The Constitution offered little in the way of answers. The theme of the Constitutional Convention was ambiguity. The

[1] Michael Les Benedict, *The Blessings of Liberty: A Concise History of the Constitution of the United States* (Lexington, MA: D.C. Heath and Company, 1996), 67.

delegates had many issues to deal with and many were quickly solved with little debate, or more typically, the power to decide or legislate was left in the hands of the states. It was only at later dates when states clashed or appeals were made to a federal jurisdiction that many of the ambiguities left by the Constitution were clarified. The term 'Citizen(s)' only appears eleven times in the Constitution - four times in declaring the conditions for election into Congress or the Presidency and five regarding the jurisdiction of the Supreme Court. The other two mentions are in the Comity Clause. The Clause states 'the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.'[2] The Clause is a continuation of the Articles of Confederation's Comity Clause. The Articles of Confederation stated

> States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.[3]

The Article was thought to be too vague at the time. James Madison, arguing the usefulness in a national naturalisation law, claimed that the Clause continually confused the terms 'free inhabitant', 'free citizen' and 'people'. Madison argued

> The very improper power would still be retained by each State, of naturalizing aliens in every other State. 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; and thus the law of one State be preposterously rendered paramount to the law of another, within the jurisdiction of the other.[4]

Under the Articles of Confederation, citizenship could be obtained more easily by moving to another state with laxer requirements for citizenship.[5] The Constitution's Comity Clause thus

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[2] Article IV, Section 2, Clause 1, *The Constitution of the United States,* http://www.archives.gov/exhibits/charters/constitution_transcript.html

[3] Article IV, Section 1, *The Articles of Confederation and Perpetual Union* in *The Public Statutes at Large of The United States of America*, Vol.1, ed. By Richard Peters (Boston, MA: Charles C. Little and James Brown, 1845), 4.

[4] James Madison, *The Federalist Papers: No. 42*, http://avalon.law.yale.edu/18th_century/fed42.asp

[5] Madison's concern was if the Articles of Confederation stood then the sovereignty of the states was being infringed upon if forced to accept the laws and statutes of another. Madison was not so much concerned about state sovereignty but foresaw the legal difficulties in such a situation. Free inhabitants or aliens could claim rights

clearly used the word 'citizen' rather than 'inhabitant' or 'people.' The Articles of Confederation's Comity Clause also revealed a deeper element to American citizenship during the Revolutionary years. Under the Articles, citizenship was awarded by states but already it was taking on a national dimension.[6] The necessity of the states entering into partnership meant that Comity could overrule the sovereignty of states. States were bound to treat free inhabitants with the same respect as citizens. Citizenship in some way existed on a national scale.

The Constitution's concise Comity Clause engendered no major debate over it regarding citizenship.[7] Retrospectively this is strange given the ambiguity in the term 'privileges and immunities.' To this day this term still has no definitive interpretation. The Articles of Confederation had mentioned freedom of movement and trade. These freedoms together with the republican affinity for "natural rights" meant that it was widely accepted that under the Constitution citizens of one state could move freely throughout the states, conducting business or personal affairs without harassment. Citizens had the power to redress grievances through the law and in turn had to respect the laws of the states they found themselves in. What constituted privileges and immunities of a citizen would became a heated debate in the 19th century, but at that time the delegates paid little heed to the issue save as to one facet – the privilege of political office.

The delegates agreed that a rule or system for uniform naturalisation must be included in the Constitution. The disagreement was in deciding the political privileges of naturalised citizens versus natural-born citizens. The delegates feared the repercussion of allowing immigrants to obtain high office. They feared that England would send spies to gain office and that foreigners would overrun the government. However, it was unrealistic and against principle to forever exclude foreigners from political offices. The Committee of Detail had recommended that to be elected to the House one must have been a citizen for three years, to the Senate four. Gouverneur Morris argued the Senate should require a period of fourteen years, given that recently arrived foreigners would naturally favour their former nations in international affairs. On the other hand Madison, Oliver Ellsworth and James Wilson (himself Scottish-born), feared

in other states that would not have otherwise been afforded to them. Lawsuits were sure to follow. Madison was thus arguing for a federal naturalisation law. Of course an anti-federalist would argue that such a law was a breach of state sovereignty.

[6] James H. Kettner, *The Development of American Citizenship,* 1608-1870, (Chapel Hill, NC: University of North Carolina Press, 1978), 221.

[7] The Comity Clause of course sparked debate over the issues of slavery and would become a major flash-point in the journey for black citizenship.

that would alienate 'meritorious aliens' from emigrating.[8] Morris, though wary of foreign influence, proposed that naturalised citizens of the individual states should not have to wait for this period given they were already citizens. Roger Sherman and Charles Pinckney disagreed and thought that the new federal government should be unburdened by the promises of the states.[9] A period of naturalised citizenship of seven years for the House and nine for the Senate was finally agreed upon. It was reasoned that recently arrived pre-eminent immigrants could still be eligible to serve in Congress. The presidency was different. It was decided that those who were citizens of the U.S. i.e. those citizens of the states at the time of ratification, could assume the presidency but that no naturalised citizen could become president of the United States. The presidency would be reserved for natural-born citizens.

No attention had been paid to the emerging dual nature of American citizenship. The Comity Clause provided that states must respect the privileges and immunities of citizens from other states. Who determined privileges and immunities? It was deemed that citizens could run for office but the meaning of a citizen could differ from state to state. A man could run for office but according to his state's law may not be eligible to vote. The Convention had briefly touched on one privilege regarding naturalised citizens but had neglected to fully define the Privileges and Immunities. Congress was given the power 'To establish a uniform Rule of Naturalisation' but there had been no debate about the possible nature of this rule and once again an important facet of citizenship was left fluid and open to interpretation. [10] Edmund Randolph in the Virginia Plan proposed that the federal legislature had the right to legislate when it was deemed the states were incompetent or national harmony was at stake. Randolph indicated that naturalisation would fall under this rule. William Paterson's New Jersey Plan proposed 'the rule for naturalisation ought to be the same in every State.'[11] The Committee of Detail proposed a clause regarding the power of naturalisation which was inserted into the Constitution almost word for word. Did this mean that the states were deemed incompetent to legislate for citizenship and thus citizenship would be regulated via the federal government? Or was the federal government there to ensure that naturalisation in the individual states was approximately uniform? In the latter case would citizenship remain state based or would a national version of citizenship emerge? The concept of national citizenship was present even

[8] James Madison, *Notes of Debates in the Federal Convention of 1787*, (New York, NY, W.W. Norton & Company, 1987), 418-22.
[9] Ibid., 439-442.; Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*, (New Haven, CT: Yale University Press, 1997), 129.
[10] Article I, Section 8, Clause 4, *The Constitution of the United States*.
[11] Madison, *Notes of Debates…,* 121.

at this early stage of the Republic. Comity demanded it. Citizenship was still very much an undefined concept in the American mind. This uncertainty could not remain for a long time. Given that a rule of naturalisation was really the only tangible action to emerge from the Constitution regarding citizenship, it was inevitable this is where the federal government started.

The first move of the federal government was to write a law for admission to citizenship for foreigners. On the 26 March 1790 Congress passed such a law. The law allowed any free white persons of 'good moral character' to become citizens under certain conditions. Firstly a person must have lived in or under the jurisdiction of the U.S. for at least two years. Secondly, persons must have resided in the state in which they had applied for citizenship for at least one year. Thirdly, prospective citizens had to swear an oath to uphold the Constitution and its values.[12] The Act was a direct descendant of many of the state laws regarding naturalisation after the Declaration of Independence. Vermont, North Carolina, Pennsylvania and New York wrote naturalisation into their original state constitutions. These constitutions allowed for foreigners to be naturalised after one year's residence in the state. Pennsylvania and Vermont barred new citizens from holding office for two years. North Carolina demanded that foreigners swear allegiance immediately in order to gain property rights, then after a year they were deemed citizens. New York required that prospective citizens renounce their allegiance to any foreign powers either spiritual or temporal.[13] Georgia, South Carolina, Virginia and Maryland passed laws for naturalisation similar to the provisions in the state constitutions. In all of these states some type of oath of allegiance was required. In Georgia it was required of foreigners to gain a certificate from a county judge to prove their place of residence within the state. If the governor and the legislature accepted this then they were deemed citizens. Immediately after the war, Georgia moved to a system in which free white persons must enrol with a county court which allowed for property rights and after a year they gained the full rights of citizens. Naturalised citizens, however, had to wait for seven years to be eligible to vote for or to hold office and must have gained a special Act of naturalisation.[14] South Carolina required one year's residency for free white persons. After two years, new citizens could vote for the legislature or for Charleston's Council but were not able to stand for election unless they gained

[12] *The Public Statutes at Large…,* Vol.1, 103-5. The Act also allowed those under twenty one to be naturalised with their parents and the foreign-born children of American fathers.
[13] Kettner, *the Development of American Citizenship,* 214.
[14] Strangely Georgia appeared to be deeply suspicious of Scotsmen who had to swear allegiance immediately or else be deported.

that privilege by a special Act of naturalisation. Virginia deemed all free persons who had resided in the state, citizens. Aliens could be naturalised after proving their intent to reside in Virginia and an oath was administered. Initially, citizens were given full rights but in October 1783 these rights were restricted. A citizen could not stand for office unless he resided in the state for two years and had evinced permanent attachment to the state. Persons could bypass this period if they were married to a citizen or owned property worth at least one hundred pounds. Maryland required an oath of Christian belief with an oath of allegiance. Naturalised citizens were required to reside in Maryland for a further seven years before gaining the right to hold office.[15]

The remaining states of Massachusetts, Connecticut, New Hampshire, New Jersey, Delaware and Rhode Island more or less followed colonial procedure. Massachusetts, Connecticut, New Hampshire and Rhode Island admitted citizens on a case by case basis through the legislature - the same process the Colonies had operated under. Delaware also continued the same practice, although from 1788 it required an oath of allegiance to be witnessed. Delaware also required that a citizen must reside in the state for five years before seeking office. New Jersey is the only state where there is uncertainty regarding the procedure. No records of any naturalisation laws or Acts remain - or there were never any. New Jersey may well have followed colonial procedure. New Jersey, in any case, was highly liberal in granting political rights to foreigners. Aliens needed only to reside in the state for a year and be worth fifty pounds to vote in elections.[16] The Naturalisation Act of 1790 therefore was a continuation of state policies on the subject. The federal government's statute included the same ideas as could be found in the states - a need for white people of good character, who had resided in America for a set period and who were willing to foreswear allegiance to their birth nations and swear allegiance to America. The need for an oath of allegiance, linked together with the previous state time restrictions on political rights and the Constitution's criteria for federal offices, displayed the concern in the early days of the Republic regarding the influence of foreigners in public life. It was thought that the period of residency required for both citizenship and high office was necessary to allow foreign-born citizens to properly integrate with and support America's unique Republican ideals.

[15] Kettner, *the Development of American Citizenship,* 215-17.
[16] Ibid., 217-18.

The debate over the Naturalisation Act (1790) surrounded the question of the degree of political trust which could be afforded to foreigners.[17] This principle would be put to the test in the Senate no less. In 1793 Albert Gallatin of Pennsylvania was elected to the Senate. Gallatin was a prominent man. He had attended Pennsylvania's state Constitutional Conventional and had been a member of the state legislature since 1790. Eventually he would become U.S. Secretary of the Treasury and a leader in the Democratic-Republican Party. Gallatin was born to a prominent family- in Switzerland. He had emigrated to the U.S. in 1780 but Federalists in Pennsylvania claimed that he did not meet the nine year citizenship requirement for the Senate. Gallatin responded that he had been an inhabitant of the U.S. since 1780, fought in the War of Independence and that he had taken oaths of allegiance in both Massachusetts (1783) and Virginia (1785) - and owned property in both those states.[18] The Federalists maintained that Gallatin had not taken the two oaths required by Virginia and had made the one in front of a magistrate not a court.[19] Gallatin then shifted his defence and argued that the Revolution had completely changed allegiance. Gallatin argued that the Revolution had broken allegiance to the King and henceforth all

> the inhabitants of the States become mutually citizens of every State reciprocally; and they continued so until such time as the States made laws of their own afterwards respecting naturalisation […] Everyman who took an active part in the American Revolution was a citizen according to the great laws of reason and nature, and when afterwards positive laws were made, they were retrospective in regards to persons under this predicament, nor did these posterior laws invalidate the rights they had enjoyed under the Confederation.[20]

Gallatin appealed to higher laws, arguing not the technicalities of the law but the republican spirit on which America was founded. His appeal was denied. Gallatin's case is a microcosm of the issue of naturalisation in the early Republic and a sign of the continued confusion between state and national citizenship. Gallatin's case further displayed the distrust of foreigners serving in high office and the undefined relationship between state and national citizenship. The senators had no consistent view amongst them about the relationship between state and national citizenship and the vote had shown that not all citizens naturalised by the states were admitted to the national institution.[21] Yet, if Gallatin was recognised as a citizen in a number of states (at least *de facto*) it would seem strange that at the federal level he was not

[17] Kettner, *the Development of American Citizenship*, 236-38.
[18] *Annals of Congress*, 3rd Congress., 1st sess., 48-49.
[19] Ibid., 49-50.
[20] Ibid., 51.
[21] Kettner, *the Development of American Citizenship,* 235.

recognised as such. How could he be afforded rights, privileges and immunities in one state of a collective nation but not be deemed a citizen of the nation? Even if he was not *de jure* a national citizen, surely the Comity Clause *de facto* made him so? This confusion was because Congress still did not broach the subject of the nature, or the relationship between the state and federal governments on the topic, of citizenship. The Naturalisation Act merely admitted foreigners to the status of U.S. citizens and gave them the privileges and immunities of citizenship. This was problematic, given that neither Congress nor any court had defined privileges and immunities.[22] Doubly problematic was that Congress was content to allow the states themselves to define the rights of aliens and citizens. Madison argued that naturalisation was a rule of admission and that the states could deal with the details.[23] The states still oversaw the property and political rights of both aliens and citizens on a local level and in some cases naturalised under their own laws. The Naturalisation Act failed to clearly delineate between a new national citizenship and the pre-existing elements of state citizenship. If anything, the process was a mere continuation of revolutionary policies and had further been confused by allowing the states to, in many ways, define the substance of citizenship. This same problem continued through the 1790s as Congress refused to broach the subject of the state-federal relationship.

Congress throughout the 1790s continued to focus on the residence period required for naturalisation. America had wanted to divorce itself from Old Europe but Europe refused to let go. European events became American problems. The French Revolution and its subsequent wars saw an increase in immigration to America. The increase concerned Congress enough to seek to modify the 1790 Act. This Act was already viewed as too liberal and given the influx of the Germans, French, English, Scots and the Irish, it was believed that two years was an insufficient period for immigrants to properly integrate with republican values. Both the Federalist and Democratic-Republicans largely agreed. The only real debate surrounded the actual step-by-step process of naturalisation and its possible impact on people of various backgrounds and means.[24] The consequence of this debate was the Naturalisation Act of 1795. The Act lengthened the period of residency from two to five years and required an alien to declare his intent to become a citizen three years before admission. Aristocratic foreigners were required to forfeit any titles. The alien still had to be of 'good moral character' although an

[22] Smith, *Civic Ideals*, 152.
[23] *Annals of Congress*, 1st Congress. 2nd sess., 1149.
[24] *Annals of Congress*, 3rd Congress. 2nd sess., 51. 1021-23, 1033-58.

attempt was made to strike out the word 'moral.' It was thought by some Congressmen to imply a religious test on citizenship.[25] The oath of allegiance to the Constitution was also changed. This oath was joined by an oath 'that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly by name, the prince, potentate, state or sovereignty whereof he was before a citizen or subject.'[26] The oath, together with the extension of the period of residency, displayed the continued concerns of Congress that foreigners must spend longer periods in the U.S. to fully embrace American notions of democracy. The Act also eliminated the practices of state naturalisation under state laws, but under the status quo the states still defined rights/duties and privileges and immunities.[27] The Act simply was a tool in which Congress could ensure uniform admission to citizenship.

The Act would not stay untouched for long. The Federalists continued to raise the question of how long did an alien need to fully embrace American political ideals. They argued that five years was too short. This agitation was also politically motivated, as the overwhelming majority of immigrants supported, and when possible voted for, the Democratic-Republican Party. The Federalists turned the public anger from the fallout of the XYZ affair to push through the Naturalisation Act of 1798. This amendment to the original, extended the period of residency to **fourteen** years and required a declaration of intent five years before admission. The final Act was tame in comparison to the submissions of some Federalist Congressmen. Robert Harper of South Carolina and Harrison Otis of Massachusetts both harked towards British citizen/subjectship when they argued that the ability to gain any office should be exclusively reserved for natural born citizens.[28] The Act was repealed in 1802 with the Naturalisation Act reverting back to its 1795 form. This change to the Naturalisation Act was its last significant alteration. America thus had a set policy of naturalisation by the dawn of the 19th century. Congress, however, had declined to define the nature of national citizenship and the possible interaction between it and state citizenship. Naturalisation was merely a tool of admittance,

[25] Frank G. Franklin, *the Legislative History of Naturalisation in the United States,* (Chicago, IL: The University of Chicago Press, 1906), 53-54.
[26] *The Public Statutes at Large…,* Vol.1, 414-15.
[27] Ibid., 414.; Franklin, *The Legislative History of Naturalisation in the United States,* 64-67.; Kettner, *The Development of American Citizenship,* 244.
[28] *Annals of Congress*, 5th Congress., 2nd sess., 1567, 1570.; Otis argued for a system of ranked citizens similar to the British citizen/subjectship model. In Britain there were four status of inhabitant: alien, denizen, naturalised citizen and natural-born citizen. Denizens were effectively equivalent to modern day permanent residents. Naturalised citizens were afforded all the rights of citizenship but could not enter Parliament. Naturalised citizens were also treated with suspicion given they were not born into the monarch's allegiance.

with Congress happy to leave the states to define the intricacies of citizenship. While "privileges and immunities" were left to the states to define, a concept of American citizenship had emerged. Naturalisation had created a sense of national citizenship that was not reliant on the states. Immigrants must have especially felt this, given they were naturalised by the federal government and not any state government. This national citizenship implied the protection of the U.S. government while overseas. Furthermore given the emphasis on interstate travel and trade in the Articles of Confederation and at the Constitutional Convention, citizenship allowed an individual to travel and conduct trade internally without interference.

The sense of national citizenship was augmented by Congressional action. Congress did not define citizenship in its naturalisation policy but it did signal a vision for what a "proper" citizen should be. Firstly, by limiting naturalisation to 'free white persons', Congress explicitly signalled it thought Africans unworthy of citizenship. Decades later the dissenting judges in the Dred Scott case would opine that some states had allowed free blacks citizenship at the time of the Revolution. Regardless of the states, the federal government did not want black citizens. Secondly, Congress was saying it was necessary - to ensure loyalty to and integration with republican values - for citizenship and political office. While both required an adherence to republican institutions it should not be assumed that political rights were integral to citizenship. States such as New York required property qualifications for the franchise but those who did not qualify were still considered citizens. Once naturalised, new citizens had to wait for the right (or privilege) of entering Congress. Naturalisation did not confer immediately equal political rights. Lastly, Congress had stuck to these same republican principles. Congress had turned away from the possibility of creating a ranked system like the British. Naturalised citizens enjoyed all the rights and privileges as natural-born citizens, save for the possibility of becoming President. America's naturalisation process was indicative of its respect for freedom of choice. The role that freedom of choice played was revolutionary. American naturalisation allowed for a subject or citizen to effectively transfer his/her allegiance to a new sovereignty. The individual could opt in - or out - of citizenship.

This conceptualisation of citizenship would bring America into serious conflict with Britain through the British practice of impressment. Impressment was forcing men into naval service. The Admiralty or the captains of ships formed press gangs. These gangs roamed British ports looking for sailors to force into Royal Navy service. The prerogative for the practice was very much linked to the English concept of citizenship or what could be more accurately described as subjectship. Impressment was allowed because all men born under the King's (or Queen's)

jurisdiction owed the monarch allegiance. British subjectship had the same underlying theoretical framework as American citizenship. Citizenship is comprised of rights and duties, privileges and immunities. It is the duty of a sovereign to protect his/her people and in return the people have to owe allegiance.[29] This allegiance includes things as simple as paying taxes and obeying the law. Allegiance can also mean fighting in the service of the Sovereign or one's country if the need arises. Impressment was the embodiment of this principle. When the Sovereign needed men he could take them by force if necessary. The British and Americans came to clash over impressment. The American government never denied the right of the British to impress subjects. The American government, however, denied the right of the British to impress naturalised U.S. citizens. The British impressed naturalised U.S. citizens on the high seas because they followed the principle of indefeasible allegiance – allegiance that could never be removed. American naturalisation law allowed foreigners to repudiate their allegiance to the nation of their birth and pledge allegiance to the United States. Indefeasible allegiance stated, however, that allegiance could not be transferred at will. Thus the British were denying the right of America to naturalise foreigners. The Americans were naturally angered by this and embarrassed they could do little to stop it. The Americans continued to appeal to the British that they could naturalise citizens and that once naturalised the British could no longer claim them for naval service. The British responded with contempt to such an American ideal and continued to impress naturalised Americans and in the process often took natural-born American citizens - much to America's disgust. Both sides refused to compromise their stances on allegiance and subsequently impressment played a big part in the outbreak of war.

The practice of impressment was given legitimacy by historical precedent. Impressment dates back to the period of England under the Saxons.[30] The practice gained prominence under King John (1166- 1216) who required a steady influx of men, given his war with the rebel barons. The practice was deeply ingrained in the feudal system, where few questioned the right of the monarch to levy armed forces. There is evidence that Henry VIII used the practice in the face of a possible French invasion in 1545. Impressment expanded under Samuel Pepys as Clerk of Acts (1660-73) and Admiralty Secretary (1673-79, 1684-89). The increase in impressment was as a direct result of the Second and Third Anglo-Dutch Wars. Pepys was a noted diarist and his

[29] It could be said that one of the underlying differences between citizenship and subjectship is that in the former the rights of the individual are given much more consideration rather than the duties. In subjectship it is vice-versa.

[30] J.R Hutchinson, *The Press Gang: Afloat and Ashore*, (London: Eveleigh Nash, 1913), 4.; Denver Brunsman, "The Evil Necessity: British Naval Impressment in the Eighteenth Century Atlantic World" (Ph.D. thesis, Princeton University, 2004), 22.

entries regarding impressment are far out of step with a man who expanded the practice. Pepys wrote 'To the Tower several times about the business of pressed men [….] to see poor patient labouring men and housekeepers leaving poor wives and families, taken up on a sudden by strangers, was very hard […] It is a great tyranny.'[31] Captain Edward Brenton, who served during the French Revolutionary and Napoleonic Wars describes a similar scene 'It is impossible to describe the terror, the anxiety, the cruelty, the injustice and the grievous wrongs inflicted on society in general, by the continuance of this practice.'[32] Impressment was thus a "necessary evil." Pepys, a man responsible for impressment's expansion personally, disdained the practice. The British people may have hated the practice but widely accepted it as a duty of subjectship, a practice necessary for manning the navy as a centre-piece of British power and prestige.[33]

The Sovereign's right to impress men was widely accepted but this right was not relied upon exclusively. Laws were made to regulate and give legitimacy to the practice. In 1597 the first piece of legislation mentioning impressment was passed. The Vagrancy Act (1597) made it legal for vagrants to be pressed into the service.[34] The Recruiting Act (1703) forbade the impressment of boys under the age of eighteen and those who were apprenticed in a trade, while expanding impressment to those of no visible means. Another Act was passed in 1706 to allow debtors owing £20 or less to be released if they agreed to naval service. An Act in 1740 forbade the impressment of men over the age of fifty-five.[35] The Courts also passed judgment on impressment. Impressment was seen as a royal prerogative but this did not mean individuals did not put up a fight. Men tried to gain writs of *Habeas Corpus* and opposition to the practice led to rioting.[36] The case *Rex v. Broadfoot* contains the most extensive legal opinions regarding

[31] Samuel Pepys, "1 July 1666", *The Diary of Samuel Pepys for 1659 to 1669,* ed. by Lord Braybrooke (London: Fredrick Warne and Co., 1879).
[32] Edward Brenton, *Life and Correspondence of John, Earl of St. Vincent,* Vol. 2. (London: Henry Colburn, 1838), 82 quoted in N.A.M Rodger, *The Command of the Ocean* (London: W.W. Norton and Company Ltd., 2004), 500.
[33] The Cromwellian Era saw the emergence of the idea that standing armies were a sign of tyrannical government while navies protected freedom and liberties. This idea was expanded on during the eighteenth century by politicians and scholars who proclaimed the British Empire and her navy as an "empire of liberty" in comparison to the Spanish and Holy Roman Empires. See David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000), chps. 4-5.
[34] Hutchinson, *the Press Gang: Afloat and Ashore*, 5-7.
[35] Christopher Lloyd, *The British Seaman 1200-1860: A Social Survey* (London:Collins,1968), 125.; Sir Michael Foster, *A Report of Some Proceedings on the Commission of Oyer and Terminer and Gaol Delivery for the Trial of the Rebels in the Year 1746 in the County of Surry, and of Other Crown Cases...*3rd.edn, (London: E. and R. Brooke,1792), 172-74.
[36] Kevin Costello, "Habeas Corpus and Military and Naval Impressment, 1756-1816",*The Journal of Legal History,* 29 (2) (2008), 215-251.; Denver Brunsman, "The Knowles Atlantic Impressment Riots of the 1740s." *Early American Studies: An Interdisciplinary Journal,* 5 (2) (2007), 324-366.

impressment. Alexander Broadfoot was a merchant sailor serving on the *Bremen Factor*. A press gang attempted to force him into naval service. Broadfoot in response produced a blunderbuss and killed one of the gang. The judge, Sir Michael Foster, instructed the jury that the question was between murder and manslaughter. The verdict was returned as manslaughter on technical grounds because the Lieutenant who held the press warrant was not present at the time of the incident. Foster commented that it was allowable to subjugate individual rights in matters of national security. Impressment in Foster's opinion was 'a prerogative inherent in the Crown, grounded upon common-law, and recognised by many Acts of Parliament.'[37] The right of impressment may appear feudal in nature but it was inhered in the subjects' bonds of allegiance to the Sovereign. Foster admitted that it was unfortunate that such a duty fell to one occupational class but it did not make impressment illegal.[38] Foster's opinions were reinforced by the King's Bench in *Rex v. Tubbs*. Tubbs was a City of London waterman who claimed he was exempt from the press. Lord Mansfield and the other judges disagreed. They concluded that impressment was a vestigial prerogative power of the Crown, founded on 'immemorial usage.'[39] The practice of impressment was imbedded in British society, although generally disliked. What then did British impressment have to do with America?

America had wanted to step away from Europe, but European affairs would migrate across the Atlantic. The French Revolutionary War and the Napoleonic Wars could be considered as the first global conflict. The British needed a large amount of men to man their navy- the frontline in defence of the Empire. In 1792 British naval manpower stood at 17,361. In 1812 this figure had exploded to 144.884.[40] This large increase in manpower meant that the press gang was often used. The loss of America meant a loss of manpower and furthermore the American merchant service was an attractive option to British sailors. The American merchant service paid up to five times as much as its British counterpart and it was certainly better than the Royal Navy where pay was meagre and punishment legendarily harsh. British sailors would often desert in ports - to American merchant ships or slip away whilst on shore in America. The Admiralty claimed that 20,000 British seamen were serving on American ships by 1812. In one farcical episode, HMS *Phaeton* while carrying Anthony Merry, the English Ambassador to

[37] Foster, *A Report of Some Proceedings…,* 159.
[38] Ibid., 167.; Nicholas Rogers, "Impressment and the Law in Eighteenth Century Britain" in *Law, Crime and English Society, 1660-1830*, ed. by Norma Landau (Cambridge: Cambridge University Press, 2002), 75.
[39] Nicholas Rogers, *The Press Gang: Naval Impressment and its opponents in Georgian Britain* (London: Continuum, 2007), 20.
[40] N.A.M Rodger, *The Command of the Ocean,* 639.

America, had fourteen men desert whilst in Norfolk, Virginia.[41] The loss of these men prompted the British to stop American merchantmen and search them for British sailors. The stopping of neutral American vessels did not occur pre-1793 as Britain had no legal right to do so. Once Britain entered the conflict in Europe it was deemed legal by the standards of international law at the time. It was the right of belligerents of war (in this case Great Britain) to stop neutral ships (American) that were suspected of trading with the enemy (France) and search for contraband goods and agents of the enemy.[42] Even Madison, the staunchest opponent of impressment, conceded that the British held this right if the correct procedure was followed. The American government even allowed British seamen to be pressed from American ships docked in British ports.[43] The high seas, however, were a grey area. The British argued that their right to search and remove contraband was not denied by the Americans, so it was legal for them to remove their subjects as an extension of contraband

> If the right of search for *contraband* of war is not denied, why should the right of search for *man*,--*man*, which is, in truth, the highest species of contraband of war, because all other kinds are merely materials for his use, and useful to a belligerent in direct proportion to the number of men which it may have to employ these materials?[44]

An article in *The Edinburgh Review* enforced this, maintaining that 'the right of impressment which is invested in the sovereign […] which entitles him to annul and disregard all contracts entered into by our own merchants with persons using the sea, entitles him just as clearly to disregard any similar engagement into which such persons may have entered into with foreign merchants.'[45] Even American newspapers allowed the British right of search and seizure.[46]

The issue of search and seizure was not contested, but the issue of citizenship was. A British subject could be impressed. America agreed upon this fact. Yet what happened when a naturalised-American born in British jurisdiction was impressed? It was this scenario that was a festering wound between the two nations. Dual citizenship was a non-entity at the time and

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[41] Bradford Perkins, *Prologue to War: England and the United States, 1805-1812* (Berkeley, CA: University of California Press, 1961) 89.
[42] *The Right and Practice of Impressment, as Concerning Great Britain and America Considered* (London, 1814), 15.; Scott Thomas Jackson, "Impressment and Anglo-American Discord, 1787-1818", (Ph.D. thesis, University of Michigan, 1976), 88.; James Zimmermann, *Impressment of American Seamen* (Port Washington, NY: Kennikat Press, 1966), 19.
[43] Patrick C.T. White, *A Nation on Trial: America and the War of 1812* (New York, NY: John Wiley and Sons, 1965), 4.; Perkins, *Prologue to War,* 88-9.
[44] *The Right and Practice of Impressment…,* 16.
[45] *The Edinburgh Review or Critical Review Nov.1814… Feb. 1815* (Edinburgh: Archibald Constable and Company, 1815), 248.
[46] Zimmermann, *Impressment of American Seamen*, 173.

even had this been allowed the British still would have claimed the allegiance of a person born in the King's jurisdiction. The British used the principle of indefensible allegiance- an allegiance that could never be broken by the individual. The British saw this as a non-issue. Indefensible allegiance was the standard in Europe and American sailors had the chance to prove they were natural-born Americans.[47] Indefensible allegiance was the very antithesis of American naturalisation, which viewed citizenship as a contract where allegiance could be transferred. The British, citing the prominent philosopher and legal expert Emerich de Vattel, maintained that 'Each individual is bound to contribute his personal means to the common strength of the society or nation'.[48] The loss of citizens weakened a nation and thus a citizen was bound to his country of birth for life. British legal opinion was unanimous on the subject. The noted jurist Sir William Blackstone in his magnum opus *Commentaries on the Laws of England* wrote on individuals and allegiance

> Natural allegiance is such as it is due from all men born within the king's dominions immediately upon their birth […] Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled or altered, by any chance of, time, place, or circumstance […] LOCAL allegiance is such as is due from an alien, or stranger born, for so long a time as he continues within the king's dominion and protection […] Natural allegiance is therefore perpetual […] therefore the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for these reasons their allegiance due to him is equally universal and permanent.[49]

Blackstone's assessment echoed the ranked system of British subjectship. Subjectship had ranks - so did allegiance- natural and local. Local allegiance was merely when an alien resided in a British jurisdiction and he was protected by the Sovereign. Natural allegiance was an allegiance that could never be removed. Sir John Nicholl, the King's Advocate-General also shared Blackstone's opinion. Nicholl was asked his opinion on impressment during the Monroe-Pinkney negotiations. Nicholl opined that the right of expatriation rested solely with the State/Crown. Nicholl also agreed with Blackstone in stating that indefeasible allegiance

[47] The British argued that wrongly impressed Americans had a course for appeal. Seizures and prizes had to be cleared by an Admiralty Court first to ensure their legality. It would be unthinkable to detain an American ship because of the questioned status of a few sailors. The British argued that by taking "British" subjects the injury to America was minimal and that as part of a seizure a sailor could prove his birth-place in court. If found to be American he was paid wages and compensation by the Navy. Of course the British maintained that British-born naturalised Americans were fair game.

[48] *The Right and Practice of Impressment…,* 20.

[49] Sir William Blackstone, *Commentaries on the Laws of England*, Vol.1 (London: Dawsons of Pall Mall, 1966), 369-70.

voided any contract and went even further, by concluding there were no boundaries when enforcing the principle.[50]

The British continued to adhere to the principle of indefensible allegiance throughout the wars on the Continent. The British even showed their supposed magnanimity by stating that America could claim any American seamen in British naval service

> [there are] two distinct characters in every foreign seaman: -the one individual and personal, the other national. In the former character, any seaman may voluntarily enter the British service; and having thus, of his own accord, entered into an individual engagement, he is not permitted again to change his mind, and depart from that engagement. He voluntarily relinquishes his individual rights as a foreign citizen, and is not allowed, at his pleasure, to resume them. But the national character is not an individual, but a public right: it belongs less to the seaman himself than to the sovereign who has a claim to his service; and it is therefore admitted that even the voluntary entry of a foreigner into our navy cannot bar the right of his sovereign to reclaim him.[51]

Of course this was of little consequence, given American seamen were unlikely to be found in the Royal Navy. The British were consistent at the very least. A subject could not voluntarily change allegiance. A practice which allowed a subject to renounce his allegiance at will meant that 'the greatest crime known to the law of all countries, namely, HIGH TREASON, would be a safe and profitable practice.'[52] The British flatly refused to recognise those who had been naturalised as Americans (or in other nations), enraging American opinion. British heavy-handedness in the application of impressment undoubtedly meant that some natural born-Americans were forced into British naval service, only further angering the American government. Indefensible allegiance was not only seen as a moral and legal principle to the British but its practical effects were invaluable to the British at the time. Britain would be at war with France and other European Powers for an almost uninterrupted period of twenty-two years. Britain needed men not just for a European war but a global war. Allowing America to redefine the nature of citizenship by renouncing indefeasible allegiance would not only strike a theoretical blow against Britain but a practical one too.

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[50] Troy Bickham, *The Weight of Vengeance: The United States and the War of 1812* (Oxford: Oxford University Press, 2012), 60.; Perkins, Prologue to War, 127.; The Monroe-Pinkney Treaty was a proposed treaty between Britain and America settling a number of maritime issues. It was meant to be a continuation of The Jay Treaty of 1794. Terms were agreed upon but President Jefferson vetoed the Treaty.

[51] *The Right and Practice of Impressment…*, 20.

[52] Ibid., 5.

The American opinion of citizenship was of course very different from the British. Both nations viewed citizenship as a contract, but disagreed over who could break the contract.[53] The American principle was volitional allegiance- an allegiance born of the individual - not the state. The Acts of Naturalisation embodied this principle but the theory behind it had been developed in American political thought since before the Revolution and would be strengthened in conflict with the British. Volitional allegiance had its basis in the convoluted process of naturalisation found in the Colonies. The American Colonies had no real process for naturalisation. English subjects did not need to apply since they remained within the Sovereign's jurisdiction. The issue centred on non-English immigrants. Colonial naturalisation was part of a larger struggle between the legal systems in England and the Colonies. The validity of naturalisation by the American legislatures was never recognised by Parliament. If the American Colonies had been defined as dominions like Scotland then they could have used a separate legal system similar to the Scots. If the Colonies were a subject kingdom like Ireland then English law would apply. English jurists would later argue that the American Colonies fell under the latter category as a "conquered kingdom" given their willingness to accept English common law; a notion which offended the colonists.[54] These later developments did not stop the Colonies from naturalising almost as soon as they were founded.

The 17th century saw naturalisation applied ad-hoc in the Colonies. Naturalisation and denisation existed together. Denizens were still considered foreigners, but held some rights focused on the ownership of property and conduct of trade. The processes were non-uniform across the Colonies but a general trend emerged that both processes were treated on an individual basis. Furthermore, naturalisation was applied by the colonial legislatures while denisation was administered by the royal governors or executive action.[55] The legality of colonial governments admitting foreigners as English citizens was always in question, but because Parliament did not examine the subject until 1700, the Colonies continued this out of a practical necessity. The uncertainty of colonial naturalisation meant that some people (often in groups) preferred to be naturalised in England prior to settling in the Colonies. In 1621 a

[53] Theoretically the British Government could remove citizenship from its subjects but there is no historical record of this occurring. There are numerous instances of bills of attainder being used. A bill of attainder was a special bill in Parliament that stripped a subject of civil rights, especially property rights - and forfeited noble titles. The subject's wealth and titles went to the Crown, not to any descendants he/she might have. This effectively removed citizenship but technically not allegiance. This point is moot however, as bills of attainder were almost exclusively used in cases of high treason where the subject was executed.
[54] Kettner, *the Development of American Citizenship,* 80.
[55] Ibid., 83.

group of French and Walloon Protestants accepted an offer from the Virginia Company to travel to Company territory. Some of these Protestants were naturalised before accepting a better offer from the Dutch to settle in Leiden. In 1681 Charles II would extend denisation to French Protestants escaping persecution and many would seek naturalisation before settling in the Colonies.[56] Colonial naturalisation/denisation was left unchecked for the majority of the 17th century, due to the instability of England during the period and the practicalities of allowing foreigners to reside and trade in the Colonies. This changed in the 1680s and 1690s, when the Board of Trade looked to restrict the power of colonial naturalisation by denying that persons naturalised by the Colonies held rights in England. The Board maintained that trade rights obtained in the Colonies were localised and merchants looking to use these rights in England had no standing. In 1700 Westminster banned royal governors from issuing orders of denisation.[57] Despite these bans, colonial practices of naturalisation still occurred and the Colonies lobbied for official control of the naturalisation process. Westminster would eventually consent to this in 1740 when it decided that anyone who had resided in the Colonies for seven years could be naturalised without a special Act of Parliament. The prospective subjects, however, needed to pass a religious test in order to prove their Protestant values.[58] Once naturalised their rights were empire-wide. Westminster had allowed for some concession, but the Colonies still operated under local laws and customs until 1773 when all naturalisation in the Colonies was banned by Parliament.[59] This disregard for British policy stemmed from practical considerations more than any theoretical shift in thinking. The policies of the Old World simply could not keep pace with the realities needed in the New World.

The American Colonies would embrace the theoretical in the end. The colonists would become disillusioned after the French and Indian Wars. The colonists, proud as English subjects who had helped defeat the French, would argue that their rights had been violated by the burdensome taxes levied on them in the following decade. In the face of rising anger British intellectuals began to shore up the case for British dominion over the Colonies. They returned to the point that the American Colonies had accepted English common law and began to argue that the British Empire was a single state under the Crown. The King was sovereign of the Empire and all owed him allegiance. Furthermore, all subjects were under Parliament, thus America must

[56] Kettner, *the Development of American Citizenship,* 80.
[57] Smith, *Civic Ideals,* 56.
[58] Ibid.
[59] For a more detailed look at naturalisation in the American Colonies see Kettner, *the Development of American Citizenship,* chps. 4-5 and Smith, *Civic Ideals,* chp. 2.

be under Parliament.[60] American polemicists would dispute the British interpretation of the relationship between Parliament and the Colonies. The American Colonies would in fact proclaim their allegiance to the King until the end -separating it from their objections to parliamentary authority

> What allegiance is it that we forget? Allegiance to Parliament? We never owed- we never owned it. Allegiance to our King? Our words have ever avowed it, - our conduct has ever been consistent with it. We condemn, and with arms in our hands, - a resource which Freemen will never part with, - we oppose the claim and exercise of unconstitutional powers, to which neither the Crown nor Parliament were ever entitled […] Is it objected against us by the most inveterate and the most uncandid of our enemies, that we have opposed any of the just prerogatives of the Crown, or any legal exertion of these prerogatives? Why then are we accused of forgetting our allegiance? We have performed our duty […] The breach of allegiance is removed from our resistance as far as tyranny is removed from legal government.[61]

Even in the last moments before the Revolution, Americans still maintained that they were loyal subjects. Americans still pledged allegiance to the Crown as they called for George III to protect them from Parliament. American thought had come to this separation of Crown and Parliament by merging the theories of Sir Edward Coke and John Locke. Coke had written a report of *Calvin's Case*. Coke, in examining the case, agreed that Scotsmen were subjects even though they were not under the English Parliament and retained their own legal systems.[62] American theorists argued that the Scots eventually allowed the combination of both the Crown and Parliament under the Acts of Union (1707). The American Colonies had not assented to this and the Scots had representation in Parliament, leading to the famous cry 'no taxation without representation.'[63] The Americans reasoned that just because they owed allegiance to the King did not mean they fell under Westminster's jurisdiction. The Americans were also taken with the writing of John Locke - especially his *Two Treatises of Government*. Locke's social contract theory began to allow the colonists to envision citizenship as a contract. The colonists merged Locke's contract theory, together with the historical understanding that the

[60] See Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, M.A.: Harvard University Press, 1967).
[61] *Journals of the Continental Congress, 1774-1789*, Vol. 3 (Washington D.C.: Government Printing Office, 1905), 410.
[62] *The Selected Writings and Speeches of Sir Edward Coke,* Vol.1 [Reports] (Indianapolis, IN: Liberty Fund, 2003), 166-232. Robert Calvin (an alias of James Colville) inherited estates in England from a relative. Calvin was deemed unable to inherit because he was Scottish-born (an alien) thus he could not own English land. Calvin appealed to the King's Bench. The Bench deemed that Calvin could inherit as a *postnati*- that is he was born after 1603. 1603 was the year that James VI of Scotland inherited the Crown of England merging the two Crowns. Calvin was deemed to be born into the allegiance of James as a Scot. Calvin thus had allegiance to the King of England as well making him an English subject. Calvin was therefore entitled to English rights.
[63] Kettner, *the Development of American Citizenship,* 158.

King must protect his subjects. The colonists claimed that the King was reneging on his duty by not interceding with Parliament on their behalf.[64] If the King could not uphold his side of the contract then they, the colonists, could void the contract.

The move towards a Lockean framework did not signify that the ultimate objective of the colonists was rebellion. On the contrary, the colonists continually attempted to reconcile with George III until he declared them in rebellion. The early theories of volitional allegiance then were once again largely brought together by practical demands. Volitional allegiance thus fell out of public discussion after the Treaty of Paris. The British had recognised the United States as a sovereign nation and it was assumed by the Americans that emigration to their country fell under this umbrella. American theorists would be called upon to pick up the discussion once the issue of impressment had become a major issue between the two nations. The most complete refutation of the British was found in a treatise published in 1814 by George Hay entitled *A Treatise on Expatriation*. Hay was the U.S. attorney for the District of Virginia and was married to Eliza Kortright Monroe, the daughter of James Monroe. The treatise came at a time when impressment was the last obstacle to peace.[65] Hay attempted to show the fallacy of indefensible allegiance. Hay began his treatise by exploring expatriation. The word "expatriation" had its origins in the Roman period but to Hay it seemed that 'expatriation had its birth in the United States' due to the United States declaring the right to happiness and the pursuit of liberty.[66] Hay defined expatriation as 'the removal of an individual from a country of which he is a citizen or subject, by which he ceases to be a citizen or a subject of that country'[67] Hay postulates if a man is to be a citizen or ceases to be one, citizenship must be defined. Hay agrees with the British that a citizen has both rights and duties. If these rights and duties cease - so does citizenship. The connection between the state and the individual is severed. The people of the American Colonies severed their connection with Britain by renouncing their duties.[68] This severed connection was not one sided. The King had severed it

[64] Kettner, *the Development of American Citizenship,*,165.
[65] For the causes of the outbreak of the War of 1812 see. J.C.A Stagg, *Mr Madison's War* (Princeton, NJ: Princeton Press, 1983).; Perkins, *Prologue to War.* Impressment was seen as one of the major reasons for hostilities between the U.S. and Britain at the time. Historians now agree that impressment was more of rhetoric device used by the American government to show displeasure that Britain appeared not to take American sovereignty or military power seriously. Stagg for example focuses on the issues of trade and the push by Congressmen from the Western states for further expansion and to stop British sponsored Indian raids on the frontier. The breakdown of the House and Senate vote shows this quite clearly. Western Congressmen voted for war while Congressmen from the Northeast (the area most affected by impressment) voted no.
[66] George Hay, *A Treatise on Expatriation* (Washington, D.C.: A. & G. Way, 1814), 2.
[67] Ibid., 2.
[68] Ibid., 3-5.

when he refused to protect the rights of subjects from Parliament. The British government had also ensured the severance by signing the Treaty of Paris. Hay stated that a citizen has five basic duties

1. Allegiance
2. Obedience to the laws for the prevention of crimes
3. those which require a personal service
4. those which require the payment of taxes on person or property
5. those which require a respect for the rights of other citizens[69]

Hay admits that this list is not comprehensive but notes that neither did Blackstone 'the most methodical of English jurists.[70] Hay states that if a citizen or a subject of one nation moves to another, he surrenders citizenship because he cannot perform his duties. The duties are void on immigration because, simply put, he is not in the locale to perform them. A British subject who lives in Boston cannot be obedient to British law, personal service cannot be enforced nor can British taxes be collected. The social contract is void. Hay concludes based on this 'that expatriation is nothing more than emigration with an intention to reside, permanently, in another country.'[71]

Hay anticipated some challenge to such a stance and conceded that the *fact* of expatriation does not automatically allow for *right* of expatriation. Hay contends that the laws of England allow for the right of expatriation. The British government never passed a law forbidding emigration. Furthermore the English government had allowed for Acts that regulated emigration. One example was when Parliament granted the Highland Emigration Society an Act to increase the cost of emigrating from the Highlands. Parliament by passing such an Act, sanctioned emigration.[72] Hay goes on to reason that the British government is hypocritical in maintaining the principle of indefeasible allegiance, as the British themselves allowed for complete naturalisation. Hay reviews Blackstone's claim that allegiance is a matter of universal law; that if no British subject could become an American citizen then no natural-born American could become a British subject.[73] A British law passed in 1739 contradicts that assertion. This law

[69] Hay, *A Treatise in Expatriation*, 3-5.
[70] Ibid., 18-19.
[71] Ibid.
[72] Ibid., 21-22.
[73] Ibid., 31.

(13 Geo II. C3) naturalised foreign seamen who had served two years on a British ship or married a British subject.[74] The law states that all such individuals

> to all intents and purposes, be deemed and taken to be natural born subjects of His Majesty's Kingdom of Great Britain, and have and enjoy all the privileges, powers, rights and capacities which such foreign mariners or seamen could, should or ought to have had enjoyed, in case he had been a natural born subject of His Majesty and actually a native within the Kingdom of Great Britain.[75]

Hay extrapolated that this law displayed that the British allowed for naturalisation and did not distinguish between the allegiance created by naturalisation and natural-born allegiance. The British could not impress naturalised Americans if they themselves allowed naturalisation. The British responded to this in the treatise *The Right and Practice of Impressment, as Concerning Great Britain and America Considered*, claiming the law clearly referred to local allegiance while maintaining the perpetual nature of national allegiance.[76]

Hay attacked the British separation of local and national (indefeasible) allegiance. He maintained that the only difference between the two was the duration of time. Blackstone in his *Commentaries* had written 'As the prince affords his protection to the alien only during his residence in the realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence, and, in point of locality, to the dominions of the British empire.'[77] Hay imagined a scenario in which the French invaded England. A Frenchman who had lived in Britain for a number of years followed the doctrine of indefeasible allegiance. This Frenchman aided the French army as was his duty as a natural-born French citizen. The Frenchman however would be a traitor in the eyes of the British. The Frenchman could defend himself by claiming he was forever under allegiance to his native country. This defence would be dismissed by the British court and he would be sentenced to death. Hay asserts his claim is founded in British law. According to Foster, in a case the judges ruled 'that if an alien, seeking the protection of the Crown, having a family and effects here should during a war with his native country, go thither, and there adhere to the King's enemies for purposes of hostility he may be dealt with as a traitor'.[78] The British within their own laws, placed local allegiance over national allegiance. In addition the British were contradicting their own doctrine by condemning foreigners who followed it. Hay also considers a salient point regarding

[74] Zimmerman, *Impressment of American Seamen*, 22.
[75] *The Statutes at Large, of England and of Great Britain: from Magna Carta to the Union of Kingdoms of Great Britain and Ireland*, Vol. 9 ed. John Raithby (London: George Eyre and Stratchan, 1811), 661.
[76] *The Right and Practice of Impressment…*, 20.
[77] Blackstone, *Commentaries*, Vol.1, 370.
[78] Hay, *A Treatise on Expatriation*, 42.

impressment and citizenship: what about non-naturalised aliens? Hay dismisses aliens as irrelevant. British law does not distinguish between the two, because the British belief in indefeasible allegiance renders no distinction between non-naturalised and naturalised aliens.[79]

Hay only attacks the British by attempting to show their own internal contradictions. He never advances the American argument beyond that which can be found in the Naturalisation Acts or in the pre-Revolutionary debate. America, unlike Britain, had no long legal history to draw from, so the American position became entrenched together with the wider American principles of liberty, freedom and individual choice. This was reflected in the diplomacy regarding impressment. Impressment was left untouched by the Jay Treaty signed in 1794. It had not become a serious issue and the Federalists argued that perhaps the American government should recognise indefeasible allegiance.[80] American objections to impressment became more robust, coinciding with the election of the Democratic-Republican President Thomas Jefferson and the British resumption of the War against France in 1803. The Democratic-Republicans favoured France and looked towards the British with suspicion. In 1806, Jefferson refused to send the proposed Monroe-Pinkney Treaty to the Senate for ratification because it did not address the issue of impressment.[81] Shortly after American anger grew over the *Chesapeake-Leopard* affair and Congress passed embargoes against European trade.[82] After the embargoes, impressment ceased to be a mainstay of American diplomacy, overtaken by issues of trade. Even when impressment stood as the last obstacle to peace in 1814 the issue would not be resolved. At the peace negotiations at Ghent, the British refused to give up the right of impressment and Madison instructed the American plenipotentiaries to drop the issue altogether.[83] The American government would gently continue to seek an end to impressment for a decade but the British refused to give way. In the end America took no further action

[79] Hay, *A Treatise on Expatriation*, 47-48.
[80] Smith, *Civic Ideals*, 169. The Federalists' argument emerged from their concern that the flood of immigrants from Europe were not trust worthy; that they did not subscribe to republican values. Federalists then floated the idea that naturalised and native-born citizens were different, drawing from the English system.
[81] See Anthony Steel, "Impressment in the Monroe-Pinkney Negotiations", *The American Historical Review*, 57 (2), (1952), 352-369. Jefferson also rejected the treaty because he believed it did not secure the neutral trade rights of America.
[82] The *Chesapeake-Leopard* Affair was sparked when HMS *Leopard* was searching for recent deserters from HMS Halifax. The *Leopard* came across USS *Chesapeake*. The *Leopard's* captain Salusbury Pryce Humphreys asked to come aboard to search for deserters. The *Chesapeake's* captain, Commodore James Barron, refused. The *Leopard* then opened fire and the *Chesapeake,* completely unready for action, surrendered after only firing a single shot. The *Chesapeake* was then boarded and her English sailors taken off. Naturally such an act drew the anger of the American populace.
[83] See Alfred Burt, *The United States, Great Britain and British North America* (New Haven, CT: Yale University Press, 1940) chps.6-7.; Henry L. Coles, *The War of* 1812 (Chicago, IL: University of Chicago Press, 1965).

because it didn't need to. The end of the Napoleonic Wars meant that the British practice of impressment became virtually extinct with regard to other nations. No other war in the 19th century would require the British to impress individuals whose citizenship was a matter of contention.

The clash of citizenship displayed the fundamental differences between the subjectship of the Old World and a new emerging citizenship in the New World. Ultimately the issue remained unsettled, given that there were no further clashes in the succeeding years. If there had been further clashes, then a new form of international law could have emerged, dealing with issues of allegiance, expatriation and dual citizenship. The clash between American and British citizenship was one issue of many between the two nations. The fight over expatriation was part of a greater struggle for America to be given international respect. The introduction to the British treatise summarised the disdain of British thought

> America is a young nation, and her institutions are still younger, they have been formed on the speculative notions of the individual independence and inherent rights of man, without much reference to the experience of the ancient modes of government.[84]

The British were not entirely wrong. Madison, the staunchest campaigner against impressment, admitted that there were few sailors who had been naturalised under the law

> Should any difficulty be started concerning seaman born within the British dominions, and naturalised by the UStates since the of Treaty of 1783, you may remove it by observing; first that very few of any such naturalizations can take place; the law here requiring a preparatory residence of five years with notice of the intention to become a citizen entered into record two years before the last necessary formality.[85]

Similar sentiments were expressed by Albert Gallatin who admitted in 1807 that between 4,400 to 5,550 sailors in the American merchant service were Britons who had not been naturalised.[86] Frankly put, it was hard for sailors to meet the residency requirements for naturalisation when they were at sea.

The American government may have been guilty of acting on principle more than reality (the same can be said of the British) but refusal to back down had earnt the young nation

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[84] *The Right and Practice of Impressment…*, 6.

[85] "From James Madison to James Monroe, 5 January 1804," *The Papers of James Madison*, vol. 6, *1 November 1803–31 March 1804*, ed. by Mary A. Hackett, J. C. A. Stagg, Ellen J. Barber, Anne Mandeville Colony, and Angela Kreider,(Charlottesville, VA: University of Virginia Press, 2002), 282–308.

[86] "Gallatin to Jefferson", 16 April 1807", *The Writings of Albert Gallatin*, Vol.1, ed. by Henry Adams (Philadelphia: J.B. Lippincott, 1879), 352.

international respect. The Treaty of Ghent signified an end to a phase of the development of American citizenship. The internal struggle for African-American citizenship would soon become a focal issue, but by 1815 a picture of American citizenship had emerged. In 1815 American citizenship was exclusively the preserve of white people. It was based on the European idea of allegiance but was far more liberal in concept in that allegiance was transferable based far more on the right of the individual than the right of the state. Allegiance was also an issue internally given the nature of American citizenship. American citizens had allegiance and thus two forms of citizenship; national and state. Congress had banned naturalisation through state procedures by 1795, but its unwillingness to define the relationship between state and national citizenship had left the issue in limbo. National citizenship was created though naturalisation; it was merely the admission to a status. State citizenship was equally undefined since aliens could not be naturalised to or by their state of residence. What entailed state citizenship? The answer is the two concepts were joined. American citizenship had a national status in which the definition of rights lay with the individual states - save for the restrictions on holding federal offices. American citizenship in 1815 was a reflection of the early American system of government: that the federal government defined only what was necessary and deferred to the state for the status quo. The limited definition of American citizenship was further indicative of the necessity involved in its birth. Early American citizenship was not defined unless it had to be, unless external forces attacked. The tenets of American citizenship- volitional allegiance, individuality and the nature of the social contract were born out of external threats. Parliamentary tyranny saw American polemicists argue that allegiance to the King did not mean allegiance to Parliament and insisted the King move to protect their rights, which in their view he was obliged to do as part of a contract. When this tactic failed they extended their arguments regarding allegiance, to justify severing their allegiance. A similar pattern occurred during the 1800s. The British were an external threat so the American government once again began to emphasise volitional allegiance. The threat from outside America also informed the policies of naturalisation. Federalists, Anti-Federalists and Democratic-Republicans all agreed that immigrants from Europe must reside within the U.S. before they could become citizens, to ensure their love of republican principles. Lastly, American citizenship remained fluid because of the time. In the grand scheme 1763-1815 is a relatively short period, especially to define a concept as difficult as citizenship. The short time period explains why American citizenship upon reflection is not *so* different from British subjectship. Many facets of American citizenship come from the British. The residency period for naturalisation was a British idea and the rights and duties of a citizen/subject was a

European concept. American citizenship then is not as radical as it first appears. American citizenship in the early Republic was the New World interpretation of an Old World system.

[2]

Not Only a Man but an American Citizen

By 1815 the early phase of the development of American citizenship had ended with a loose definition of citizenship. This citizenship was for whites only. The next phase would be the struggle towards allowing America's African population to claim citizenship. The move towards African-American citizenship led to much discussion on the privileges and immunities of citizenship, especially the relationship between political rights and citizenship. The Attorney General Edward Bates, stated such when asked about the possibility of African-American citizenship

> Eighty years of practical enjoyment of citizenship, under the Constitution, have not sufficed to teach us either the exact meaning of the word, or the constituent elements of the thing we prize most highly. […] the argument has not turned upon the existence and the intrinsic qualities of citizenship itself, but upon the claim of some right or privilege as belonging to and inhering in the character of citizens. In this way we are easily led into errors both of fact and principle.[1]

The undefined nature of citizenship led to much confusion around the question of rights and their supposed necessity for citizenship. The ambiguities and differences among the states' legal treatment of blacks, created issues regarding comity which brought the relationship between voting rights and citizenship to the fore. The focus on this relationship underlined the question of the suitability or fitness of blacks for American citizenship. This question was asked in various forms in the courthouses of the states for decades. The various state positions meant that only a federal ruling would settle the question of African-American citizenship. The ruling the Supreme Court made would not stand for long. As it had been in 1812, the question for America was answered in a conflict. The participation of black men in the Civil War displayed their dedication to the Union and subsequently it was difficult to deny them citizenship in a country many had died for. The passing of the Reconstruction amendments not only meant the granting of African-American citizenship, but also theoretically secured voting rights for citizens and the confirmation of birthright citizenship in the United States.

America at the time of its founding offered the hope of a New World. No other nation seemingly, had been formed by a heady mixture of idealism, universal rights, political

[1] Edward Bates, *Opinion of the Attorney General Bates on Citizenship* (Washington D.C.: Government Printing Office, 1863), 4.

philosophy and force of arms. Yet, for a nation which was born out of a struggle of natural rights, it is a cruel irony that in its early history it denied rights to a section of its population. It is strange that a nation committed to the ideals of liberty would at its founding, allow for the continuation of slavery. When the Constitutional Convention met, it was attended by fifty-five delegates. Twenty-five of these attendees were slaveholders. There were also former slaveholders present. Many delegates, especially those from the New England States, were opposed to slavery but failed to act.[2] Pushing too strongly for abolition would have seen the walk out of Southern delegates. Lacking any way to abolish slavery, the anti-slavery delegates could only hope to curb its expansion.[3] A Compromise was reached where the importation of slaves could continue for another twenty years at which time Congress had the power to end the practice:

> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.[4]

Northerners felt that after twenty years, Congress would indeed outlaw the practice and hence slavery would end eventually.[5] The North laboured under the illusion that within the next three decades American slavery would be a thing of the past.

The remaining flash points for slavery were the Three-Fifths Compromise and the Fugitive Slave Clause. The Three-Fifths Compromise was another coup for Southern Delegates. The Northern states' higher population would allow for control of the House of Representatives. Control of the House could see the Southern states defeated on a number of issues: taxation, commerce and slavery. Thus when the Connecticut Compromise was accepted, it was necessary for the South to gain a measure of representation for its black population.[6] After

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[2] Staughton Lynd, *Class Conflict: Slavery & The United States Constitution* (New York, NY: Bobbs-Merrill, 1967), 180.

[3] Paul Finkelman, *An Imperfect Union*: *Slavery, Federalism and Comity* (The University of North Carolina Press: Chapel Hill, NC, 1981), 23.

[4] Article I, Section 9, Clause 1, *The Constitution of the United States*.

[5] David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York, NY: Hill and Wang, 2009), 132-33.; Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (Oxford: Oxford University Press, 2007), 52.

[6] Prior to the official start of the Constitutional Convention there was discussion regarding how government would operate. Two major plans were put forth, the Virginia Plan and the New Jersey Plan. The Virginia Plan called for a bicameral legislature in which the states would have representation based on population. It also introduced the three branches of U.S. government and the system of checks and balances. The New Jersey Plan proposed a single body where each state had one vote similar to the Articles of Confederation. The Connecticut Compromise joined both plans, allowing for a lower house based on population and an upper house in which all states were equal.

representation based on half and three-quarters had been rejected, Madison proposed that three-fifths be the figure. This was unanimously agreed upon. The Three-Fifths Compromise was thus written into the Constitution as Article I, Section 2 Clause 3.[7] The clause also meant that Slave states would pay more taxes because of their slave populations. Of course these taxes were never levied. Once again the Free states acquiesced - to the benefit of the Slave states. Fredrick Douglass would comment that the Three-Fifths Compromise 'lean[ed] to freedom, not to slavery, however, in the end the Free states gained nothing from the clause, while the Slave states acquired greater representation in Congress.[8] The Fugitive Slave Clause was to be the most important part of the Constitution related to slavery. Pierce Butler and Charles Pinckney, both from South Carolina, suggested that Article IV, Section 2, Clause 2 should be rewritten to include the phrase 'to require fugitive slaves and servants to be delivered up like criminals.'[9] Objections to the clause were based on the claim that it was unfair that states should have to pay for the incarceration and maintenance of escaped slaves. These objections fell by the wayside when the very next day Butler simply introduced the Fugitive Slave Clause as a separate clause.[10] It was agreed upon with debate and became Article IV, Section 2, Clause 2 which read 'No Person held to Service or 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 up on Claim of the Party to whom such Service or Labour may be due.'[11] Luckily for many escaped slaves, this clause along with the Fugitive Slave Act (1793), was largely unenforced by Free states until the more severe Fugitive Slave Act (1850) was passed.

The possible clash between various state laws was intensified by the next clause: the Comity Clause. Comity is the principle that one nation, state, dukedom, territory etc. extends its rights to the citizens of another. The Comity Clause stated 'The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.'[12] The combination of both

[7] Article I, Section 2, Clause 3, *The Constitution of the United States*.; Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

[8] Philip S. Foner, *The Life and Writings of Fredrick Douglass, Vol 2.* (New York, NY: International Publishers, 1952). 372; Finkelman, *An Imperfect Union*, 25.

[9] Article IV, Section 2, Clause 2 reads 'A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.'

[10] Finkelman, *An Imperfect Union*, 26-27.

[11] Article IV, Section 2, Clause 3, *The Constitution of the United States*.

[12] Article IV, Section 2, Clause 1, *The Constitution of the United States*.

clauses could have foreseeably created a situation in which a state passed a law bestowing citizenship on free black men and thus all other states would be forced to recognise these men as citizens. Again this could be turned around. Free states might be expected to recognise the Privileges and Immunities of the slave owner and his "property". The ambiguity was increased, because at the time no absolute definition of citizenship existed. If Rhode Island made a black man a citizen under Rhode Island law, did this automatically qualify him for national citizenship? In the case of a white man it certainly seemed that being a citizen of a state conferred with it national citizenship but for the black man who faced racial prejudice, who had brothers kept in chains, no such certainty existed. If a free black man of Massachusetts was a citizen and had the vote - was South Carolina under obligation to treat him with the same courtesy? The ambiguity was not settled at the Convention. The Founding Fathers, as with so much of the Constitution, decided against clearly defining the nuances or how each article or section directly ruled on the issues of their time. Perhaps they thought they had indeed settled all of the pertinent issues. Perhaps the sectional tensions made it impossible to continue without leading to a massive breach. History more often than not is in the middle of two extremes, therefore the Founding Fathers believed that they had sufficiently addressed the major issues and any unsettled ones were minor enough and not worth a possible walkout.

The triumph of pro-slavery at the Convention had an impact on the possibility of black citizenship. Citizenship had generally remained untouched at the Convention. It was left undefined because Americans themselves were unsure of its meaning. The Founders only knew whites were citizens. The relationship of other ethnic groups to American citizenship was amorphous. The delegates in their minds had more pressing concerns. The best hope for black citizenship lay in the individual states. The Founders may have intended this situation to occur, given the wording of the Comity Clause. 'The Citizens of each State' implies that citizenship was to be dealt with by the states. Delegating power to individual states was their default position. It was possible to see at this point that more liberal states might allow for free black men to become citizens. This could allow for former slaves to be recognised as citizens throughout the United States, or at least allow the issue to gain momentum at the federal level. On the other hand the general leeway that the states acquired, meant they could equally pass laws prohibiting black citizenship or rights commonly associated with citizenship. It also appeared troubling that in any dispute pro-slavery/racist forces won out. If there were future clashes between states over the status of free blacks it appeared that the side in favour of denying rights would win. Lastly, the Constitution's allowance of slavery hurt black

citizenship. If slavery was ended and thus created a great number of free blacks, then the issue of black citizenship may have been dealt with early in the preceding decades or at the Convention itself. The continuation of slavery, however, hurt most because it allowed blacks, both slave and free, to be questioned about their suitability for citizenship. As slavery continued, people in both the North and the South saw the degraded status of the black slave. People wondered if any African having endured such degradation would be able to properly vote or carry out any of a citizen's duties without prejudice. A cruder line of thought maintained that slavery was proof that Africans could never be morally, intellectually or politically equal to the white man - therefore could never be raised to citizenship. Ideas such as these would inject themselves heavily into the debate in the following decades.

The ambiguities of the Convention were left to be dealt with by the states. The New England States contained the highest agitation for abolition.[13] At the Convention, the Delegates had been most vocal in opposing any expansion of slavery and it was in these states slavery was the first to disappear. Rhode Island in 1774 passed an Act forbidding the importation of slaves and granting immediate freedom to any illegally imported slaves. During the Revolution, Rhode Island went on to declare that a slave must give consent if he/she were to be sold out of state, before finally passing a statute for gradual emancipation in 1784. Connecticut had banned the importation of slaves even earlier than Rhode Island, in 1771. In 1784 Connecticut passed a bill for gradual emancipation in which the children of slaves would be free, once twenty five. It was not until 1792 that Connecticut banned the exportation of slaves and it would not interfere in matters of slave transit until 1830.[14] Pennsylvania also carried out gradual emancipation starting in 1780. All slaves in the state had to be registered and thus their children were emancipated. In addition all slaves brought into the state and remaining there for a period of six months would be freed. The law had one exception: 'domestic slaves' belonging to members of Congress. New Hampshire's remote location and lack of case law mean that historians are unable to trace the state's abolition - except that by 1800 no slaves remained in New Hampshire. Vermont wrote abolition into its 1777 State Constitution.[15] It also passed a law in 1786 re-stating Vermont would not tolerate the practice of slavery from its citizens. This

[13] Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago, IL.: The University of Chicago Press, 1967), 112.
[14] Finkelman, *An Imperfect Union*, 40-43.
[15] Zilversmit, *The First Emancipation*, 116.

was in response to the unseemly practice of some citizens of Vermont deceiving liberated slaves back into bondage and then transporting them out of state to be sold.[16]

The largest New England State, Massachusetts, known for being the state most stridently against slavery, ironically never officially ended slavery by governmental statutes. Instead it was ended *de facto* by its citizens and a number of law cases. A slave called Elizabeth Freemen also known as Bett was one of the first slaves in Massachusetts to file a freedom suit. Her contention was that under the Constitution of the Commonwealth of Massachusetts her bondage was illegal. The first Article of Massachusetts' Constitution read

> All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.[17]

Bett's lawyers argued that under this article, slavery was unconstitutional in Massachusetts. The jury agreed and Bett was set free. The other major case in Massachusetts was the Quock Walker case. Quock Walker was promised his freedom at age twenty five by his master James Caldwell. Caldwell died but Mrs Caldwell agreed to keep her husband's promise, allowing Walker freedom when he was twenty one. Mrs Caldwell, however, married Nathaniel Jennison who refused to manumit Walker. In response Walker fled to the farm of James Caldwell's brothers Seth and John. Jennison sued the Caldwells for enticing a slave to flee. Walker at the same time sued Jennison for assault on the basis that Walker had effectively been wrongly imprisoned. Walker contended that his former master's promise made him a free man. *Jennison v. Caldwell* was heard first. The jury agreed with Jennison and he was awarded damages. In *Quock Walker v. Jennison*, Walker's lawyer argued slavery was against both Christian teaching and the Massachusetts Constitution. The jury found in favour of Walker. He was set free with damages. Both decisions were appealed. Jennison was unsuccessful but the Caldwells won because it had been deemed that Walker was a free man and thus could choose to work where he pleased. The last case *Commonwealth v. Jennison* was filed by the Attorney-General against Jennison for assault and battery stemming from Walker's illegal imprisonment. He was found guilty. The decisions of the Massachusetts Supreme Court set a clear precedent that slavery was not welcome in Massachusetts. By 1790 slavery in Massachusetts had ceased.[18] By the

[16] Finkelman, *An Imperfect Union*, 40-43.
[17] *The Constitution of the State of Massachusetts (1780)* (Boston, MA: Richardson & Lord, 1826), 3
[18] *Finkelman, An Imperfect Union,* 41.

turn of the 18th century slavery was abolished or was set to be abolished in New England. New England therefore had a significant free black population. Slaves were not only set free by laws. There were already some free blacks before the Revolution and many slaves across the United States in the chaos of war took the opportunity to flee their masters, often settling in the Northern states. In the South the number of free blacks was much smaller and when slaves were freed, in the end they tended to migrate north. The free black population in the North created a challenge. No longer slaves, they were by no means automatically citizens of either state or country. This issue would raise questions in both the North and the South and affect American politics for the next sixty years.

The growing number of free blacks in the North meant something had to be done. They were free but not citizens. Free states, despite the absence of slavery, would not grant freed men citizenship. Instead, these states would allow free black persons some legal protection under the law but would refuse them social and political equality. Leon Litwack covers the extent of this problem in his work *North of Slavery*. The problem was that no state constitution or court decision could erase in the mind of white Americans the idea that Africans were a lesser people. Racism lessened the need for a discussion about free blacks and citizenship. Massachusetts, a proud Free state in 1800, ordered a ban on interracial marriages. Further, Massachusetts deported 240 people of African descent under the premise that they were not citizens of one of the states - yet most were from Rhode Island, Pennsylvania and New York.[19] Anti-slavery advocates recognised that this version of white supremacy would be the most indomitable barrier to a better quality of black life in America. Northern antislavery forces set out to rectify this by aiming to improve black education, helping freed men gain employment and instilling in Africans a sense of moral virtue. Delegates from the American Convention of Abolition Societies, a congress of state abolitionist societies declared that[20]

> They [the Convention] wish to see you act worthily of the freedom you have acquired as freemen, and thereby do credit to yourselves, and to justify the friends and advocates of your color in the eyes of the world. As the result of our united reflections we have concluded to call your attention to the following… We earnestly recommend to you, a regular attention to the important duty of public worship… We advise

[19] Leon F. Litwack, *North of Slavery* (The University of Chicago Press: Chicago, IL, 1961), 15-16.

[20] The American Convention was an informal umbrella group for many abolitionist societies from both the North and South. Starting in 1794 it met every year yet the number of delegates and societies represented greatly varied from year to year. New York and Pennsylvania societies tended to dominate the Convention. The Convention never moved towards any legislative change, preferring the individual societies to take on this task. They mainly focused on passing resolutions and moralising. The societies stopped meeting in 1831 and in 1838 disbanded the Convention believing they could not achieve their original goals.

> such of you, as have not been taught reading and writing and the first principles of arithmetic to acquire them as early as possible… early and frequently read the holy Scriptures… Teach your children useful trades... Be diligent in your respective dealings… Refrain for the use of spirituous liquors… Avoid frolicking… We recommend to you, at all times and upon all occasions, to behave yourselves to all persons in a civil and respectful manner.[21]

Statements such as these would be standard amongst the abolitionists. Abolitionists tended to be deeply religious and of the more puritanical sects, especially Quakers in New England. The abolitionists' puritanical outlook on life influenced the formation of black improvement. These abolitionists believed heavily in the value of individual responsibility and self-reliance.[22] It stood then, that a belief in black self-improvement would feature prominently with the abolitionist movement. Abolitionists, in line with their religious values, believed in moral persuasion. If black men and women could improve themselves it would show the rest of white Americans that they deserved some legal protection, if not full citizenship. Black self-improvement was also hoped to have run - on effects regarding slavery. If freed men and women could be shown to lead productive lives, then this would counter the racist narrative that the African race was not fit for the American life. The racist narrative would be discredited and slavery would start to crumble. This could be seen as the beginning of a type of respectability politics - that black men should act to white standards in order to gain wider societal acceptance.[23] The abolitionists would find that changing peoples' opinions would be a much harder task than envisioned.

The majority of Northerners, though in favour of emancipation, still held prejudicial views on race. The Northern black community would therefore find itself restricted in political and social

[21] *Minutes of the Proceedings of the Third Convention of Delegates for the Abolition Societies,* (Philadelphia, 1796), 12-15.

[22] Ning Kang, "Puritanism and Its Impact on American Values", *Review of European Studies*, Vol. 1, (2), Dec. 2009, 149-150.

[23] Respectability politics in its modern form is where people from an ethnic minority (not the majority) attempt to convince /police the others in that ethnic minority to act and conduct themselves in certain ways widely acceptable to the majority. In the modern era, responsibility politics is a particularly divisive issue seen as forcing African-Americans to "act white" and for excusing and/or failing to acknowledge systematic racism and discrimination. One such example is Bill Cosby's "Pound Cake" speech. In 2004 Cosby, a prominent African-American entertainer (who has since become the subject of unrelated controversy in his personal life) gave a speech in Washington D.C. at an NAACP celebration of the 50th anniversary of *Brown v. Board of Education*. In it he admonished black society for not speaking "proper English", for gang violence and the supposed number of absentee African-American fathers. He implored African-Americans to take personal responsibility, stating they could no longer blame systematic oppression. Bill Cosby, "50th Anniversary commemoration of the Brown v. Topeka Board of Education Supreme Court Decision", Address delivered at the NAACP Awards, Washington D.C., May 2004.

equality whether at the hands of the law, extrajudicial measures or even mob violence.[24] Northerners, bigots or friends, disliked black immigration. The states of the Upper East, however, declined to ban black immigration. The newer Free states differed. These states (Ohio, Illinois etc.) bordered Slave states. This meant that both escaped and manumitted slaves would make these states their first destinations. Illinois in her 1848 State Constitution declared: 'The general assembly shall, at its first session under the amended constitution, pass such laws as will effectually prohibit free persons of colour from immigrating to and settling in this state; and to effectually prevent the owners of slaves from bringing them into this state for the purpose of setting them free.'[25] Indiana and Oregon also placed similar provisions in their Constitutions.[26] These provisions had strong support. In Indiana, there was more support for the clause on black immigration than the State Constitution itself. In the face of this support it is surprising that these provisions were not, for the most part, enforced.[27] An Ohio senate committee suggested such laws were never meant to be enforced: 'It was never believed that the law would ever be complied with, nor was it intended by the makers that it should ever be. Its evident design was to drive this portion of our population into other states. It was an unrighteous attempt to accomplish, indirectly and covertly, what they would shrink from doing openly and frankly.'[28]

The lax enforcement of these laws did not mean that they were toothless, especially in the hands of the mob. In 1821 there were only 135 black residents in Cincinnati. In 1829 Cincinnati had an estimated 2,258 'blacks or mulattos'[29]. The white population, alarmed at this increase, urged that there be a law forcing black residents to have a certificate of freedom and to pay a $500 bond for good behaviour. The authorities gave black leaders time to visit Canada to look for a place to relocate. Impatient white mobs roamed Cincinnati's black quarter harassing and terrorising its inhabitants as well as destroying their property. When the delegation returned from Canada, 1,100 black residents choose to cross the border. A great irony occurred only a few months later when *The Cincinnati Gazette*, a paper that advocated the enforcement of the law, bemoaned the loss of so many black residents. Its editor, suddenly keen to assail the law

[24] Zilversmit, *The First Emancipation*, 222-23.; Litwack, *North of Slavery*, 64.
[25] Article XIV, *Constitution of the State of Illinois, 1848*, http://www.idaillinois.org/cdm/ref/collection/isl2/id/211
[26] Litwack, *North of Slavery*, 70.
[27] Ibid., 71-72.
[28] *Journal of the Senate of the State of Ohio*, Vol. 36 (Columbus, OH: Samuel Medary, 1837.), 562.
[29] Richard C. Wade, "The Negro in Cincinnati, 1800-1830", *The Journal of Negro History,* Vol.39, (1), Jan. 1954, 43-44.

wrote: 'the rank oppression of a devoted people may be consummated in the midst of us, without exciting either sympathy, or operative indignation.'[30] The incidents in Cincinnati showed that while laws were laxly enforced - in the blink of an eye and with the help of a roused white population - these same laws could be used to harass black populations. This was seen not only in Ohio and Illinois but also in New York, Boston and Pennsylvania. Even when the immigration laws did not provide a convenient excuse for mob violence, their mere existence was a constant reminder to the black population of its inferior status.

Free blacks were further reminded of that inferior status at the polls. By 1840, 93% of the North's black population was forbidden to vote or faced heavy restrictions that made voting almost impossible.[31] Arguments against black suffrage stemmed from the familiar idea that Africans were mentally inferior to whites. Politics was perceived to require superior intellect: an intellect that Africans did not possess. If black men obtained the vote then they could control voting blocs and then black men could be found in the House and the Senate. Moreover, what if a Southerner found a former slave of his sitting next to him in the House? Would this not constitute a 'gross insult to the South and threaten the Union?'[32] When white suffrage was expanded in the early 18th century, black disenfranchisement was justified on the basis that the electorate could not absorb so many new voters. Of course, when universal white suffrage was attained by the early 1820s, blacks were met with the old inferiority line and charges they would corrupt the ballot box. However, as one New Yorker argued

> It is said these people [free blacks] are incapable of exercising the right of suffrage judiciously; that they will become the tools and engines of aristocracy, and set themselves up in market, and give their votes to the highest bidder [...] if this be a sufficient reason for depriving any of your citizens your just rights, go on and exclude the also many thousands of white fawning, sycophants who look up to their more wealthy and more ambitious neighbours for direction at the polls, as they look to them for bread.[33]

From The Missouri Compromise of 1820 until the Civil War, each new State Constitution (save for Maine's) disenfranchised free black males. By the outbreak of the Civil War only five states allowed for complete black enfranchisement: Massachusetts, Maine, Rhode Island, New

[30] *The Cincinnati Gazette,* August 17, 1829, quoted in Wade, "The Negro in Cincinnati, 1800-1830," 56-57.
[31] Litwack, *North of Slavery*, 75.
[32] Ibid., 76-78.
[33] *Reports of the Proceedings and Debates of the Convention of 1821, Assembled for the Purpose of Amending The Constitution of the State of New York* (E. and E. Hosford: Albany, NY, 1821), 188.

Hampshire and Vermont allowed for universal black suffrage.[34] New York also allowed black voting, but only if a person owned more than $250 worth of property, a measure which barred most black residents.[35] Thus, only 7 percent of the North's free black population or a total of 4 percent of America's free black population could vote.[36] The lack of voting rights only further informed black society that they were deemed a lesser people and not wanted as citizens of the United States. The message could not be starker. Blacks were not simply left off the franchise, but actively excluded. Years later Justice Curtis would note this. Curtis, writing in his dissenting Dredd Scott opinion, stated that there was clear evidence that some states had allowed blacks to vote

> To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation at the time of the adoption of the Constitution.
>
> Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.[37]

New Jersey and North Carolina had allowed black men to vote at the time of the Revolution but had chosen to actively legislate against them. Pennsylvania was the same. The lack of black enfranchisement was a two pronged issue. Firstly, it did not allow blacks to bring political pressure to attempt to gain assurance for their rights. Secondly, their lack of political rights placed them further away from citizenship. The right to vote had been linked strongly to citizenship in republics since the ancient Greeks. The American Revolutionary ideal had held that men should govern amongst themselves and not through monarchy and aristocracy. Furthermore, the rise in "Jacksonian democracy" during the period only strengthened this connection. The inability to exercise the right to vote, meant blacks (through no fault of their own) were not living up to this ideal - they were not able to show white America they could indeed be "good citizens."

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[34] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States,* (Philadelphia, PA: Basic Books: 2000), 44.
[35] Howe, *What Hath God Wrought*, 305.
[36] Ibid., 90.; Keyssar, *The Right to Vote, 44.*
[37] *Scott v. Sandford,* 60 U.S 393 (1856), 572-573.

The need to show that they were worthy of citizenship meant that amongst the Northern black population, education was held high in importance. Black children were entitled to education in New England, New York and Pennsylvania, though very few schools allowed for white and black children to be educated together. Legislatures enacted laws that directed separate schools be built for black children. The western Free states such as Ohio and Indiana would be slower on the uptake, refusing black education until the 1840s. By 1850 almost all Northern states allowed for black education.[38] Objections to black education varied. People argued that Africans did not have the mental capacity for higher intellectual pursuits, others argued that allowing black and white children to learn side by side would lead to violence and undermine public education in general. Opponents also argued that it would only antagonise Southerners and encourage black emigration to the North. Opposition to integrated education was not merely confined to public schools, but to private institutions as well. When the abolitionist Charles B. Ray enrolled in Wesleyan University in Connecticut, several students objected and he agreed to leave just two months later.[39] When the Noyes Academy in Cannan, New Hampshire admitted black students the townspeople objected. They feared an influx of fugitive slaves and vagabonds. Such was their opposition, that at a town meeting they agreed the school must be removed. They gathered 100 oxen and pulled down the school from its foundations. Incidents of this nature, however, were limited, given that there were very few schools which admitted both white and black students.[40]

Non-integrated schools were not enough for some. When black-only schools were founded they were often harassed to close. When a black college opening was announced in New Haven, Connecticut the town strongly opposed it, claiming that not only would it scare the girls at neighbouring schools but it would dent the prestige of Yale (which happened to have many Southern students).[41] Further down the road in Canterbury a Quaker, Prudence Crandall, was headmistress of an all-girls boarding school. Crandall admitted a black student - to the chagrin of the local populace. In response Crandall travelled to Boston to consult William Lloyd Garrison the prominent editor of *The Liberator* about the possibility of opening an all-black, all-girls school. Once this was discovered, the township responded with threats. Crandall and

[38] Litwack, *North of Slavery,* 113-115.
[39] Charles Bennet Ray would go on to become a prominent activist. He became a Methodist minister and in 1838 co-founded the weekly newspaper *The Colored American* with Philip A Bell. He was a member of many abolitionist societies including The American Anti-Slavery Committee and co-founded founded The New York Vigilance Society.
[40] Litwack, *North of Slavery,* 117-120.
[41] Ibid., 123-124.

her abolitionist friends refused to back down. Canterbury, unlike Cannan, did not escalate the situation with mob violence, but appealed to the State legislature. The legislature agreed that no good could come from the school, so passed a law forbidding the establishment of schools for free blacks who were not inhabitants of Connecticut. Miss Crandall refused to be silenced however, and continued to operate her school and was arrested.[42] The jury in the resulting case could come to no decision. In a second trial Justice Daggett advised the jury that the defence's notion that the law violated the Privileges and Immunities Clause was false. Daggett explained that the Clause only applied to citizens and that free blacks were not citizens.[43] On this basis the jury found Crandall guilty. (This would be reversed on appeal on a technicality).

Despite the implications of this trial, black schools were largely allowed to continue or be founded - though not without harassment. Black schools, however, were inferior; they had difficulty finding good teachers and maintaining buildings. In response, black leaders increasingly called for integration in the 1840s and 1850s. The number of black students at colleges and schools did increase, yet some places, such as Boston, remained stubborn. The policy of school segregation in Boston was challenged in 1849 by Benjamin Roberts. He filed a lawsuit on behalf his daughter Sarah. Sarah attended a black school but walked past five white schools on the way there. All of them had rejected her application for entry. Charles Sumner took on the case.[44] He argued that American history, ideals and institutions allowed for no racial distinctions, that school segregation injured all parties and that maintaining black and white schools were equal was laughable. The defence kept its argument strictly legal, asserting the City of Boston had every legal right to run its schools how it saw fit. The Judge agreed and thus "separate but equal" entered the American lexicon.[45] Throughout the 1850s black attendance at both white schools and colleges increased but there was certainly no widespread integration and black schools saw little improvement in their circumstances.

These restrictions in rights gave credence to the feeling that free blacks were inferior, second class citizens – except, of course, in many places they were not considered citizens. The

[42] Litwack, *North of Slavery,* 125-131.
[43] *Reports of the Trial of Miss Prudence Crandall Before the County Court for Windham County* (Brooklyn, CT, 1833).
[44] Charles Sumner would go on to become a Senator and an important anti-slavery voice in Washington. In 1856 he gave a speech entitled "The Crime against Kansas". In it he railed against the Kansas-Nebraska Act and its authors including Andrew Butler, a Senator for South Carolina. Two days later he was severely beaten by Preston Brooks, a Congressman from South Carolina and cousin of Butler. This beating caused outrage in the North especially when Brooks was returned to the House by his constituents. The event is considered one causative factor of the Civil War.
[45] *Roberts v. Boston*, 59 Mass.198 (1850).

restrictions on black society - from movement to education to voting rights - only reinforced the notion that they were not citizens. The vast majority of Americans had made it clear that they wanted the two races to remain separate; that Africans could never truly be integrated into American society. They could never truly be citizens. These restrictions only hurt the case for black citizenship. The difficulty in blacks having their children educated in sub-standard schools meant they were less prepared for college, only adding to the myth that Africans could never reach the intellectual level of the white man. This lack of education added support for the argument that free blacks were not fit to exercise the right to vote - a true sign of citizenship. What must have been frustrating to the black community was the lack of consistency. Blacks in Massachusetts could vote, yet the state's largest city refused to allow their children to be educated alongside white children. There was no real statement on their status at a national level and the states' attitudes varied wildly. As it was thought that Africans could never truly integrate and that they would be separate forever, there emerged the idea of colonisation - this idea being that if the races could not remain in such close proximity, then all of America's African population would be better served elsewhere. The free blacks of the North struggled for equal rights while many Southern freemen and slaves alike laboured under horrible conditions. The number of legal cases or opinions surrounding equality and oppression far outweigh any direct commentary on the citizenship status of America's black population. Commentary was not needed, given that almost every American knew that no black man could truly be a citizen. Despite the perceived inferiority of blacks in American society there were times when it was necessary in the legal realm to define the legal status of black men. The status of free blacks became even more important as, at the same time, from the 1820s onwards, another legal phenomenon was occurring - freedom suits.

A trend regarding citizenship in American history is that it is often only defined when it needs to be. The history of American citizenship is a collection of discrete events. Citizenship is the accumulated effect of these outcomes. The earliest coherent opinion on black citizenship came from one of these seemingly insignificant events. In 1821 Attorney General William Wirt was asked to consider if 'free persons of color were, in Virginia, citizens of the United States.'[46] The question was brought to his attention as Treasury collectors in Norfolk, Virginia, were

[46] William Wirt, *Rights of Free Negroes in Virginia*, 1 Ops. Atty. Gen. 506.

unsure whether or not free black men could command ships.[47] Wirt went straight to the Constitution. He argued that

> the Constitution as the standard of meaning, it seems very manifest that no person is included in the description of citizen of the United States who has not the full rights of a citizen in the State of his residence. Among other proofs of this, it will be sufficient to advert to the constitutional provision, that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."[48]

He continued that, based on the Comity Clause, if a person resided in Virginia with 'none of the high characteristic privileges of a citizen of the state' but was a citizen by the law only, then if he/she moved to another state he/she would inherit all the privileges and immunities of that state. The person thus had privileges and immunities he/she didn't hold in his/her resident state. Wirt stated that he did not believe the Constitution Convention could have intended this to be the case.[49] He noted that if this were the case then freedmen could easily become eligible for high office as free blacks could easily meet the residence and age criteria. Wirt for this reason opined that the Constitution had intended that the description of 'citizens of the United States,' meant only those who enjoyed the full and equal privileges of white citizens in the state of their residence. Earlier in his opinion, Wirt had linked the Constitution and subsequent Acts of Congress. Wirt was of the opinion that the definition of citizen found in the Constitution was thus the definition in all of Congress' Acts. In light of this he had no choice but to declare that freedmen of Virginia were not citizens of the United States. Wirt reasoned that Virginian freedmen had very few privileges allowed to the citizens of Virginia; they could not vote, enrol in the militia, marry white women and could not testify against white people in court. Freedmen did not possess the rights of citizens of Virginia hence under Wirt's interpretation of the Constitution they could not be citizens of the United States.

Wirt's opinion - the first of its kind - did not often enter the argument against citizenship for freedmen and freedwomen. Firstly, Wirt limited the scope of his decision with his final statement :'Upon the whole, I am of the opinion that free persons of color in Virginia are not citizens of the United States, within the intent and meaning of the acts regulating foreign and coasting trade, so as to be qualified to command vessels.'[50] Wirt it would seem was

[47] U.S. Maritime law regulated that only U.S. citizens could command vessels involved in coastal trading. If it were deemed that free black men were not citizens then they *de jure* could not command vessels.
[48] William Wirt, *Rights of Free Negroes in Virginia* 1 Ops. Atty. Gen. 506, 507.
[49] Ibid.
[50] Ibid., 508.

commenting only on the status of free blacks in Virginia and with regard to shipping. Furthermore, if one follows his logic he does not claim outright that free blacks could never be U.S. citizens. Wirt said only that freedmen in Virginia could not be citizens because they did not have the rights of citizens in their home state. It stood then under Wirt's opinion - that if free blacks had rights in a state similar to those of the white populace, they could be considered full citizens of that state, the Comity Clause could be applied and free blacks could be considered U.S. citizens in New England. Of course even in New England, free blacks had difficulty in obtaining rights and they constituted only 6% of the free black population in the U.S.[51] Wirt's opinion also signalled the difficulty of black citizenship in the succeeding decades. Wirt, like many, argued that to be a citizen one needed the 'high characteristic privileges' i.e. the rights associated with citizenship and the intelligence to use these rights. Freedmen would continually face arguments they were not intelligent enough to exercise these rights. This in turn made it difficult to obtain rights. Freedmen were unfairly trapped. They had to obtain rights to become citizens - yet these same rights were bestowed upon whites *precisely because they were citizens.*

The Comity Clause would be a battlefield for citizenship. Citizenship was a fluid concept and without a federal ruling its definition was left in the care of the states. Contests over the Comity Clause came about because the states had differing definitions of citizenship. The Comity Clause demanded that the states respect each other's citizens. Clashes occurred when a state refused to recognise a citizen of another state because of skin colour. Evidence of this is found in the Prudence Crandall case. After the County Court jury in this case could not come to a decision, it was sent to Superior Court which found against Crandall. The case was then heard before the Connecticut Supreme Court.[52] The prosecution of Crandall aimed to close her school based on the inter-state movement of her students.[53] The law passed to hamper Crandall's school forbade Connecticut schools to admit black students from out-of-state without licence. Crandall's lawyers argued that the law was unconstitutional because it violated the Comity Clause. William Ellsworth, one of those lawyers, in arguing that there were 'two heads' to the

[51] Donald E. Fehrenbacher, *The Dred Scott Case* (New York, NY: Oxford University Press, 1978), 69.

[52] Judicial and Court personnel in the case had conflicts of interest. Chief Justice David Daggett of the Supreme Court was the very same judge to have ruled on the Crandall case in Superior Court less than a year ago. He had also both spoken and written against the school. Andrew T Judson, the State's attorney had also done the same. For an excellent overview of the Crandall case see Donald E. Williams Jr., *Prudence Crandall's Legacy: The Fight for Equality in the 1830s, Dred Scott, and Brown v. Board of Education* (Middletown, CT: Wesleyan University Press, 2014).

[53] The majority of Crandall's students were from neighbouring states and it was thought if they were unable to attend then closure would shortly follow.

case, submitted firstly, that 'these pupils are *citizens* of their respective states' and secondly '[as] *citizens*, the constitution of the United States secures them the right of residing in Connecticut, and pursuing the acquisition of knowledge, as people of color may do, who are settled here.' Crandall's lawyers argued that the Constitution made no mention of excluding the black population from citizenship. Furthermore that black men had undertaken the duties of citizenship by fighting for the Continental Army during the Revolution.[54] Ellsworth also strongly argued against the notion that because 'Men of color cannot vote in Connecticut, […] therefore they are not citizens of Connecticut'.[55] He argued that voting was not a necessary right conferred by citizenship, pointing out that it was possible for non-citizens to vote and that few people believed in universal and absolute suffrage. Ellsworth stated

> The oft choosing of one's ruler is a valuable right: but perhaps is not a natural so much as an artificial one, originating in and regulated, by the sense of community in which we live. Many considerations enter into its existence and enjoyment such as age, property, residence, paying taxes, doing military duty. The right is founded in notions of internal police, varying and shifting everywhere, even in the same government; whereas citizenship grows out of allegiance which is everywhere the same, and is unchanging.[56]

Ellsworth drew attention to the fact that Connecticut, New York and Rhode Island amongst other states, once had age and property restrictions on voting. He posed the question that if a Connecticut man went to jail thus losing his voting rights under Connecticut law - was he still not a citizen? Was he to be an alien? In that case, were women not citizens because they lacked the franchise?[57] Ellsworth concluded that free blacks were not Indians or slaves, thus any arguments to that effect were void and that those who classed blacks as paupers to prosecute them as such had no standing as 'Neither the existence of present nor the apprehension of future poverty, can strike out of the constitution the word "citizen;" and a citizen has universal right, title and immunity to a *residence* and other fundamental rights.'[58]

Andrew T. Judson and Chauncey Cleveland the State's attorneys in the case responded in a similar vein to Wirt's earlier opinion. They argued that central to the question of citizenship

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[54] *Report of the Arguments of Counsel in the Case of Prudence Crandall, Plantiff in Error v. State of Connecticut Before the Supreme Court in Error*s, (Boston, MA: Garrison & Knapp, 1834), 6-9.
[55] Ibid., 10.
[56] Ibid.
[57] Ibid.
[58] *Crandall v. State* 10 Conn. 339 (1834).

was the '*intention* of those who framed the Constitution.'[59] Judson brought up the Comity Clause and its meaning. He proclaimed

> we may be allowed to enquire also, what was then meant by the term *"immunity,"* or *"privilege?"* Privilege then, as now, signified *"any particular benefit, advantage, right or immunity not common to others of the human race."* "Immunity," as there used, is synonymous with privilege, so that *the* privileges and immunities to be enjoyed by *these citizens,* was something over and above what all the human race could enjoy. We must now advert to the condition of the country, and the circumstances of the human race, then upon the face of this country. The white men and the colored men composed the grand divisions of the human family.[60]

Judson argued that all states at the founding had been Slave states and thus all agreed that holding Africans in bondage was correct. Furthermore, Judson pointed to the Fugitive Slave Clause arguing that the term 'persons held in bondage' (i.e. slaves) was clearly in contrast to the term 'citizen'. All Africans were held in bondage, thus the founders meant that they were never to be citizens.[61] Judson went on to further note that the naturalisation laws passed by Congress during the 1790s had explicitly stated that only free *white* men could be naturalised, clearly indicating that the government considered other races unworthy of citizenship.[62] To finish, Judson and Cleveland rebutted Ellsworth's notion that voting and citizenship were not mutually exclusive. The State's attorneys argued the U.S. was special because it was the only nation to vote for its rulers. Voting was the 'the highest privilege which freemen can enjoy; it is an immunity at the very foundation of republican government'.[63] The lawyers contended that voting, taxation and representation formed the very basis on which Americans had rebelled against George III. It was at the centre of American existence. It was an *immunity* of the states themselves and one which they could never surrender. Judson concluded that because this had not been extended to the black population by the framers, or even subsequently, blacks lacked the privileges and immunities of citizenship (most especially voting privileges) - thus they could not be citizens.[64] The verdict was returned in favour of Crandall and quashed the verdict of the lower court. The overturning of the verdict, however, rested on a legal technicality.

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[59] *Report of the Arguments of Counsel in the Case of Prudence Crandall…*, 17.; *Crandall v. State* 10 Conn. 339 (1834), 342.
[60] *Report of the Arguments of Counsel in the Case of Prudence Crandall…*, 17.
[61] Ibid., 18.; Judson's argument of course ignores the fact that at the time of the Constitutional Convention there was a free black population whether because slaves had fled their masters or were legally manumitted by their owners.
[62] *Report of the Arguments of Counsel in the Case of Prudence Crandall…*, 19.
[63] Ibid., 19-20.
[64] Ibid., 21.

Justice Williams writing the verdict, said that the prosecution's fatal omission was that in the lower court it had failed to prove that the school was unlicensed and had violated a penal statute.[65] The Justices did not opine on the merits of the case - thus the law was not overturned, nor were they forced to issue a ruling on black citizenship.

The Crandall case was representative of the discussion surrounding blacks and citizenship. The lawyers on both sides argued over the relationship between political rights and citizenship. The issue of political rights as a necessity for citizenship would continue on until after the Dred Scott case. Crandall's case was heard in the ascendance of "Jacksonian democracy" a period in American history that saw the broadening of the white franchise. The move towards allowing all white men to vote saw the idea that America was living up to its founding civil values. At a time when black rights were precarious and black men disenfranchised, the increase in white political rights strengthened the connection between political rights and citizenship. The appearance of white citizens holding political rights allowed people against African-American citizenship to argue that political rights were a necessity for citizenship. The response was that political rights were not necessary for citizenship - if anything, political rights were conferred by or after being admitted to citizenship. Women and children were considered citizens and given protection under the law but could not vote. However, a lawyer would hardly deny them citizenship. The uncertainty in discussing rights and citizenship was an overhang from the aftermath of the early republic in which the rights and duties of citizens were ill defined. This confusion allowed opponents of black citizenship to point to the lack of rights free blacks held through the various states, clouding the fact that citizenship was an admission to a status that held basic rights but not political rights.

Four years after the Crandall case, the Supreme Court of North Carolina commented on black citizenship. North Carolina was a Slave state, although it did have a small free black population. A free black man by the name of William Manuel was convicted of assault in Sampson County. He was fined twenty dollars. Manuel did not have the money so the court ordered the sheriff of Sampson County to hire out Manuel until his debt was paid. This was allowed under a statute passed in 1831. The order amounted to indentured servitude and Manuel's attorney appealed

[65] *Crandall v. State* 10 Conn. 339 (1834).; Williams, Jr. in *Prudence Crandall's Legacy* maintains that the three Associate Justices came to this conclusion because they did not want to embarrass Chief Justice Daggett who in the Superior Court had given his forceful opinion to the jury that the Statute or "Black Law" was constitutional. Williams claims that all three Associate Justices thought that the Black Law was unconstitutional. The Justices, therefore, decided on the various technicalities instead of on the merits of the case. Williams Jr., *Prudence Crandall's Legacy,* 200-203.

to North Carolina's Supreme Court that the law was unconstitutional under North Carolina's Constitution and was only applied because of Manuel's colour.[66] Judge William Gaston in his judgement examined North Carolina's Constitution and ruled that its protection of civil rights extended to both citizen and foreigner. Gaston, however, went further into the citizenship status of Manuel and free blacks as a whole, saying that, according to the laws of North Carolina, those who were not slaves fell into two categories: citizen or free inhabitant. Gaston looked back to when North Carolina was a British colony. At this time all free persons born within the British dominion were native born subjects and those who were born out of the monarch's allegiance were aliens. Slaves were neither - they were property. Slaves who were manumitted became persons. These freemen and freewomen were British subjects if born in the Colonies or aliens if elsewhere.[67] Gaston ruled that when the Revolution had broken out, no change in North Carolinian law occurred. The colony simply transitioned to a free and independent state. In Gaston's opinion

> Slaves remained slaves. British subjects in North Carolina became North Carolina free-men. Foreigners until made members of the State continued aliens. Slaves manumitted here become free-men- and therefore if born within North Carolina are citizens of North Carolina-and all free persons born within the State are born citizens of the State.[68]

Thus free blacks born within North Carolina could be citizens. Gaston also headed off any appeals. He looked at the power of naturalisation which lay with Congress alone. The answer to this was 'But what is naturalisation? It is the removal of the *disabilities* of *alienage.* Emancipation is the removal of the *incapacity* of *slavery*.'[69] Emancipation was the privilege of the individual states while naturalisation belonged to the federal government. Gaston's ruling meant this separation was not being violated. When emancipated slaves became citizens it was not through an act of naturalisation but through legal precedents. Gaston also addressed political rights. He noted that some would contend that because free blacks could not vote, this disqualified them from citizenship. Gaston, like Ellsworth, argued voting rights were not a requirement for citizenship. Gaston cited that in its past, North Carolina had a high property threshold for the franchise and furthermore children and women were denied the vote, yet they

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[66] *Reports of Cases at Law, Argued and Determined in The Supreme Court of North Carolina. From June Term 1838, to December, 1839, Both Inclusive, Vols. III & IV.* Ed. By Thomas Devereux and William Battle (Raleigh, NC: Turner and Hughes, 1840), 20-22.
[67] *Reports of Cases at Law, Argued and Determined in The Supreme Court of North Carolina*, 24
[68] Ibid., 24-25.
[69] Ibid., 25.

were still considered citizens.[70] Gaston's opinion together with his refutation that indentured servitude was a legal punishment, meant that the 1831 statute was struck down. William Manuel was free to pay off the debt, employed as a free man.

The cases of Crandall and Manuel show the difficulties of African-American citizenship. Citizenship, like the struggle for black rights, was uneven and left to the discretion of individual states. A supposedly liberal New England State had allowed a judgement to stand that denied Africans American citizenship. North Carolina, a Southern Slave state, had a State Supreme Court judgement which clearly ruled that free black men could be citizens in North Carolina. It stood under the Comity Clause that these men had all the privileges and immunities across the U.S. which were afforded to them in North Carolina. The bigger issue was the structure of American government. Under the Constitution, Virginia was required to extend the same courtesies to North Carolina's free blacks as they experienced in North Carolina. Virginia *de facto* could make this difficult by passing her own laws and ignoring federal law. Only when the federal government chose to enforce federal law would black citizenship have a more concrete foundation. What was sorely needed rather than the opinions given in various lawsuits in individual states, was a binding opinion or case which would force the federal government to give an answer to the question: could black men and women be citizens of the United States?

This question was answered in the Dred Scott case but that was almost two decades away. The journey of Dred Scott began with freedom suits in Missouri and Kentucky. The Freedom suits owed a lot to the famous *Somerset v. Stewart* (1772) decision. The Somerset Case was an important precedent in the freedom suits of the mid-19th century. Though it was an English case it had inspired much discussion in colonial America and some freedom suits were launched in Massachusetts because of it. Its precedent meant it garnered heavy attention amongst the Founding Fathers in regard to slave transit. American judges would accept the Somerset case as American case law and follow its ruling at least in the 1830s and early 1840s. As a result the majority of freedom suits would find in favour of the slave, leading to agitation regarding slavery and citizenship. The continued agitation from freedom suits led to the ruling of Chief Justice Taney in the Dred Scott case.

James Somerset was a slave who had undergone the middle passage. He was bought in Boston in 1749 by Charles Stewart, a customs officer who resided in Norfolk, Virginia. By all accounts Somerset was highly intelligent and Stewart allowed him to do business on his behalf. In 1769

[70] *Reports of Cases at Law, Argued and Determined in The Supreme Court of North Carolina*, 25-26.

Stewart returned to England with Somerset. In England Somerset was baptised. In 1771 he attempted to flee slavery but was quickly caught and brought back to Stewart. Stewart was enraged that the slave he had shown favour to would attempt to escape, thus Stewart placed Somerset into the care of Captain Knowles of the ship *Ann and Mary.* The *Ann and Mary* was bound for Jamaica and Stewart instructed Knowles to sell Somerset, once in Jamaica. Somerset's godparents upon hearing this, and knowing what terrible fate awaited him in Jamaica, appealed to the King's Bench for a writ of Habeas Corpus.[71] It was granted and after his appearance he was released on his own recognisance. The subsequent court case boiled down to the question: Did positive law in Great Britain permit slavery in England and Scotland? Somerset's lawyer, Hargrave, argued that no law in England allowed slavery and that there were laws in Scotland against indentured servitude for life.[72] Hargrave also argued that no man could enter into a contract that enslaved him. Hargrave did not contend that slavery was illegal in Britain's colonies - merely that when Somerset was brought to England he could not be held in bondage, because there was no slavery in Britain itself. Stewart's lawyer, Dunning, countered that Somerset had been a slave in Africa, then under British law, when he was sold and transported to the colonies. Stewart was therefore 'a slave in both law and fact.'[73] Furthermore, the Royal African Company was heavily involved in the slave trade. The company operated under Royal authority - thus Dunning argued that the Crown implicitly allowed for slavery. Dunning also pointed to cases in which men had been placed into contracts of servitude without their consent before - therefore Somerset's "contract" between himself and Stewart was legal and recognised within England.[74]

The judge, Lord Mansfield, asserted that the central question in this case was 'if the owner had a right to detain the slave, for the sending of him over to be sold in Jamaica.'[75] Lord Mansfield urged the parties to come to an agreement. When they could not, he delivered his verdict which was very short- less than a page. Much of the verdict summarised the arguments of the case and case law on the status of baptised slaves.[76] Mansfield's verdict came down to the statement

[71] The King's Bench was not the final appellate court but its jurisdiction was significant and its opinions highly regarded.
[72] *Somerset v. Stewart*, Lofft 1, 17, 98 Eng. Rep. 499, 500-502.
[73] Ibid., 505.
[74] Ibid., 506-507.
[75] Ibid., 509.
[76] There were arguments between Dunning and Hargrave on slaves who had been baptised. Hargrave pointed to cases where baptised slaves had been considered manumitted or there was an intent to manumit. Mansfield referred to the Yorke-Talbot Opinion. This Opinion was written by Sir Philip Yorke (Attorney-General) and Charles Talbot (Solicitor-General) in 1729. Merchants grew concerned when Lord Chief Justice John Holt made several

> the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognised by the law of this country where it is used […] The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only in positive law, which preserves its force long after the reasons, occasion and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it but positive law. Whatever inconveniencies, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.[77]

James Somerset was free. In a technical sense the verdict was limited. It simply ruled that English law did not allow for the imprisonment of a slave so he could be returned to the colonies. The scope of the decision was limited to England and not her colonies. The effect of the decision was little in England save that some English jurists nurtured the idea that it ended slavery in England based on Mansfield's strong moral repudiation of slavery.[78] The verdict had wide ranging implications far beyond the case itself, however. Its effect came through its place in American legal history. Americans viewed the case as a possible guideline into the manumission of slaves, should they enter territories that forbade slavery i.e. Southerners travelling to Northern states.[79] It certainly made Southerners nervous enough for the issue to be raised in great detail at the Constitutional Convention.[80] Southerners were right to be nervous, as the *Somerset* decision was to be cited in almost every freedom suit from the 1820s onwards. What is more, in the beginning, judges in Missouri and Kentucky did use it as a guideline to render verdicts more often than not in favour of the plantiffs.[81]

One of the first freedom suits in Missouri was *Winny v. Whitesides* (1824). Winny was a slave owned by Phebe Whitesides and her husband. They resided in Carolina and in either 1794 or 1795 they moved to Illinois taking Winny with them. In 1798/99 the Whitesides moved again to St Louis, Missouri. Mr. Whitesides died in 1814 and Phebe became Winny's owner. In 1818 Winny sued Phebe Whitesides for assault and battery. The charge for 'assault and battery' fell under the 1807 statutes for the Missouri Territory (then known as part of the Louisiana

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rulings that baptised slaves were considered manumitted. This was on the basis that slavery was justifiable because Africans as non-Christians were heathens. Yorke and Holt issued an Opinion that baptism did not free slaves. Furthermore they were of the opinion that there was no change in a slave's status travelling between the colonies and England and that a master could compel a slave to return. Mansfield's verdict undid much of this Opinion.

[77] *Somerset v. Stewart*, Lofft 1, 17, 98 Eng. Rep. 499, 510.

[78] Fehrenbacher*, The Dred Scott Case,* 53-54.; Finkelman, *An Imperfect Union,* 39-40.

[79] Ibid.

[80] See Finkelman, *An Imperfect Union,* 34-40.

[81] Missouri and Kentucky are interesting cases. Freedom suits were numerous there because those States boarded States or Territories in which slavery was forbidden under the Northwest Ordinance or the Missouri Compromise of 1820, which had forbidden slavery in the Louisiana Territory north of the 36°30' parallel.

Territory).[82] These statutes allowed for "paupers" (slaves) to sue for freedom if they believed they were being "unlawfully restrained." In the circuit court Whitesides denied the charge because Winny was her slave and thus could not be unlawfully imprisoned. Winny's case was based on the assertion that when the Whitesides had resided in Illinois she was free, because slavery was forbidden in Illinois under the Northwest Ordinance of 1787, issued by the Confederation Congress.[83] The Court found in favour of Winny. Whitesides had asked the judge to instruct the jury that their residence in Illinois did not free Winny. He refused and instructed the jury that if they believed that the Whitesides had intended to reside in Illinois, then they must find Whitesides guilty.[84]

Whitesides then took the case to Missouri's Supreme Court. Whitesides' lawyer argued three central points: Firstly, that the Confederation Congress under the Articles of Confederation had no authority to purchase the Louisiana Territory nor to forbid slavery in it; Secondly, it was contended that even if Winny were free in the Northwest Territory, she had not sued for her freedom there and subsequently had resided in Missouri as a slave for some twenty years. Counsel argued that the states were independent and sovereign, much like foreign nations - thus laws in one state did not hold power in others; Lastly, Whitesides' counsel argued that just because the Northwest Ordinance had forbidden slavery, did not necessarily make slaves from other states free. The verdict was unanimously returned- the Circuit Court's ruling stood. Justice Tompkins writing the verdict, dismissed Whitesides' three points. On the first, Tompkins gave some credence to the submission that the Confederation Congress may not have had the power to purchase and legislate for the Northwest Territory.[85] Tompkins, however, declared this point was moot. Firstly, the states had never complained to the Congress about the Northwest Territory and secondly, the Northwest Ordinance had been confirmed in 1789 by Congress after the ratification of the Constitution. On Whitesides' second point, Tompkins rejected the notion that the states were effectively foreign from one another. The states were joined by their union under the Constitution and this obligated them to respect laws that the Federal Government had passed. Tompkins also decided that rights gained in one Nation or Territory followed persons when they moved to other Territories. The Court thus concluded that Winny had not given up her right to freedom. At the same time Whitesides had

[82] Winny filed the suit in the Superior Court of the Missouri Territory. When Missouri become a State in August, 1821, the suit was transferred to the Circuit Court of St. Louis County.
[83] The Ordinance was confirmed in 1789 by Congress. The Northwest Territory was comprised of Ohio, Indiana, Illinois, Michigan, Wisconsin and an eastern portion of Minnesota.
[84] *Winny v. Whitesides, Phebe*, Case No. 120, April 1821, Circuit Court of St. Louis, Missouri.
[85] *Winny* v. *Whitesides,* 1 Mo. 472 (1824), 476-78.

lost her right to property when she resided in Illinois and this right was not restored when she moved to Missouri.[86] On the last point Tompkins also rejected Whitesides' notion that the forbidding of slavery in the Territory was not akin to freeing visiting slaves. Tompkins reasoned

> When the States assumed the right of self-government they found their citizens claiming a right of property in a miserable portion of the human race. Sound national policy required that the evil should be restricted as much as possible. What they could, they did. They said, by their representatives, it shall not vest within these limits, and by their acts for nearly half a century they have approved and sanctioned this declaration.[87]

To the Court, the clear intent of the U.S. was to limit slavery and therefore it must be assumed when Congress forbade slavery in the Ordinance it wanted to "roll back" slavery, not merely stop its expansion. The verdict also set the precedent "once free, always free." Tompkins did, however, limit the scope of this decision

> The sovereign power of the United States has declared that 'neither slavery nor involuntary servitude shall exist' there; and this court thinks that the person who takes his slave into said territory, and by the length of his residence there indicates an intention of making that place his residence and that of his slave, and thereby induces a jury to believe that fact, does, by such residence, declare his slave to have become a free man. But it has been urged that by such a construction of the ordinance every person traveling through the territory, and taking along with him his slave, might thereby lose his property in his slave. We do not think the instructions of the Circuit Court can be, by any fair construction, strained so far; nor do we believe that any advocate for this portion of the species ever seriously calculated on the possibility of such a decision.[88]

The precedent was thus set that, like the Judge's instruction in the Circuit Court, the jury must believe that the owner had *intended* to make a Free state his place of residence. This precedent therefore allowed for the transit of slaves to go on, untouched. *Winny v. Whitesides* was the first suit of its kind in Missouri and it paved the way for future suits. It established the precedent "once free, always free," of transit v. residence and for the next two decades both Missouri and Kentucky Courts under its guidance ruled in favour of slaves in most cases.

A decade after *Winny v. Whitesides* there was *Rachel v. Walker*. This case would be an almost carbon copy of the Dred Scott case. Rachel was a slave owned by Thomas Stockton. Stockton was an army Lieutenant. He was ordered by the army to Fort Snelling, then Fort Crawford.

[86] *Winny* v. *Whitesides,* 1 Mo. 472 (1824), 478-82.
[87] Ibid., 483.
[88] Ibid., 486.

Both Forts were in free Territories. Stockton then went to St. Louis where he sold Rachel and her son James Henry to a slave trader, William Walker.[89] It was at this point that Rachel sued for her and her son's freedom. The case proceeded similarly to Winny's case, Rachel's lawyer cited that decision as a precedent for Rachel's freedom. Walker's defence differed from that of Whitesides'. The "once free, always free" doctrine was too clearly set in stone. Walker's lawyers argued that it was unfair to apply to this case the residence verdict in *Winny v. Whitesides*. Counsel argued that because Stockton was an army officer, he was not free to reside where he pleased. It stood that he could never truly *intend* to live anywhere, thus Rachel could not be free. The Circuit Court agreed and ruled Rachel and her son the property of Walker. The case was taken to Missouri's Supreme Court where the verdict was overturned. The Supreme Court opined

> Shall it be said, that because an officer of the army owns slaves in Virginia, that when as officer and soldier, is required to take command of a post in the non-slave holding States or territories, he thereby has a right to take with him as many slaves, as will suit his interests or convenience? It surely cannot be the law […] that the convenience or supposed convenience of the officer, repeals as to him and others […] the ordinance and the act of 1821 admitting Missouri into the Union, and also the prohibitions of the several laws and constitutions of the non slave-holding States.[90]

The Court thus rejected Walker's argument and made no distinction between civilian and military personnel. The Court also commented that Stockton should have expected this, since he was a resident of a Free state when he bought Rachel.[91] At the same time as Rachel was in Missouri's Supreme Court, Dred Scott was moving to Illinois and beginning his long trek to America's highest Court.

The Dred Scott Case was originally another of several hundred freedom suits that were filed in Missouri. Scott's case was almost identical to Rachel Walker. He had been taken by his owner John Emerson, an army officer from Missouri, into Illinois then into the Wisconsin Territory.[92] Scott was not just suing for his freedom but the freedom of his wife Harriet and their two daughters. Scott's case appeared strong - he had *Somerset, Winny* and especially *Walker* as precedents. Scott's case could have been a routine one if not for his owners' determination to keep him and the fact that his (new) owner John Sanford was a resident of New York. Sanford's

[89] James Henry had been born at Fort Snelling.
[90] *Rachel v. Walker,* 4 Mo. 350 (1836), 354.
[91] V.C Hopkins, *Dred Scott's Case* (New York, NY: Russell & Russell, 1967), 152. Stockton had purchased Rachel through an agent from a Major Brant. At the time he resided in a free territory.
[92] Paul Finkelman, *Dred Scott v. Sandford: A Brief History with Documents* (Boston, MA: Bedford Books, 1997), 14.

citizenship in New York meant that he filed a brief contending that Scott had no right to sue him across state lines because Scott was not a citizen of Missouri. The opinion of the Supreme Court was not called upon due to a dispute regarding citizenship within the case, but because of a procedural error. This error, however, forced the Supreme Court to directly confront the question of whether blacks could be citizens of the United States. By the time the Scott case had reached the Supreme Court it had ceased to be a mere freedom suit. The case had become a moment in which it seemed that American history could pivot. Chief Justice Taney's opinion reflected that feeling. The opinion sought to firmly solve the question of black citizenship and went even further ruling on the limits of congressional power. It was a ruling on citizenship which had to occur at some point, though if Taney hoped to unite the country behind the decision he certainly failed. The Dred Scott case was another example concerning American citizenship where a clarification of the concept only came about because of small events rather than any longer term assessment. The War of 1812 had thrust the issue of who was an American citizen into the national spotlight and the Dred Scott Case would do the same. In both cases the last word was not in the halls of government but on the battlefield.

Dred and Harriet Scott sued for their freedom in St. Louis Circuit Court on 6 April 1846. Scott's counsel, in order to use the legal precedents of previous freedom suits, had to establish two things: - that Scott had resided on free soil and that he was owned by Mrs. Emerson. The Blow family testified that they had sold Scott to Dr. Emerson. Samuel Russell, who had hired Scott from Irene Emerson, testified to that fact. Yet on cross examination, Russell admitted his wife arranged it and he had paid the money to Alexander Sanford, Irene Emerson's father who was handling her affairs.[93] Everyone knew Irene owned the Scotts, but because it was not conclusively proven, the jury returned a verdict in favour of Emerson.[94] A re-trial was ordered but was much delayed - the second trial did not get underway until 12 January 1850. At trial, Adeline Russell (Russell's wife), testified that she had hired Scott from Irene Emerson. Emerson's lawyer then tried to argue that Dr. Emerson had been under military, not civil, jurisdiction but *Rachel v. Walker* nullified this argument. In light of this the verdict was returned in Dred and Harriet's favour.[95] Irene Emerson had moved to Massachusetts and married Dr. Calvin Chaffee by this time but appealed to Missouri's Supreme Court. Unfortunately for the Scotts the political winds were changing and these influenced the

[93] Alexander Sanford spelt his name with only one "d" but because of a clerical error the Supreme Court case is *Scott v. Sandford.*
[94] V.C Hopkins, *Dred Scott's Case,* 13.
[95] Fehrenbacher, *The Dred Scott Case*, 256-257.

Supreme Court decision. The early freedom suit precedent had been given by liberal judges at a time when the issue of slavery was not a national one. In the early 19th century Southern slavery carried on with little opposition, becoming known as the South's "peculiar institution." A few freed slaves were unlikely to affect the status of slavery in the South. The Presidential election of 1848 and the rise of the Free Soil Party had suddenly made slavery an uncomfortable political issue.[96] Missouri was especially sensitive to this changing political climate, given that it bordered three Free states and had a vocal anti-slavery minority.[97] Furthermore, one of Emerson's attorneys Lyman Norris filed a brief arguing against comity, especially in cases in which Missouri's citizens would lose property. Norris, sensing the political tide, also railed against 'the black vomit' of antislavery forces. It was under these conditions that Missouri's Supreme Court, on a vote of two against one, reversed the lower Court decision. Judges Scott and Ryland agreed with Norris that comity meant respecting other states' laws, but not necessarily enforcing them. The judges then left the legal debate altogether and proceeded to sing the praises of the civilising nature of American slavery. Judge Gamble, in his dissenting opinion, argued that Missouri's long list of judicial precedents in similar cases had made the question very easy, before taking some not so subtle digs at his colleagues for involving politics in the decision.[98] Dred Scott was no longer a free man.

Scott would file a suit in the United States Circuit Court in St. Louis on 2 November 1853. In the previous cases Irene Emerson had been the defendant but that was now John Sanford, her brother. Irene had transferred ownership to him while the case was before Missouri's Supreme Court.[99] Scott again claimed that he, Harriet and his daughters Eliza and Lizzie were

[96] The political fallout extended to Missouri's Supreme Court. Missouri's Democratic Party had split along pro and anti-slavery lines, with many leaving to join the Free Soil Party which opposed the expansion of slavery west. In 1851 Missouri's law changed whereby the Governor no longer appointed the Supreme Court Judges. They were elected. Due to the Democratic split the pro-slavery Democratic Judge William Barclay Napton lost his position on the Supreme Court Bench.

[97] Fehrenbacher, *The Dred Scott Case*, 258-260.

[98] *Scott v. Emerson*, 15 Missouri 576 (1852).; Fehrenbacher, *The Dred Scott Case*, 260-265.

[99] There is some controversy over this sale. Walter Ehrlich in "Was the Dred Scott Case Valid?" argues that there is no evidence to support that the transfer occurred, given Scott was not listed on Sanford's estate (Sanford died before the trial was over). Furthermore, Scott was sold back to the Blow family (who freed him) by the Chaffees *not* by Sanford. Ehrlich concludes that Sanford thought he owned Scott because he was the executor of Dr. Emerson's will and had been handling his sister's affairs, especially since her residence in Massachusetts. Both Ehrlich and Fehrenbacher agree this was not the case. Dr. Emerson had died in Iowa Territory which required executors to appear in the Territory within thirty days. Sanford had not, but still believed he was an executor because Emerson had named him so. Fehrenbacher, however, disagrees that Sanford was not Scott's owner. Fehrenbacher argues that that evidence was lost to history and if Sanford was not Scott's owner then why would he put himself through the cost of a long legal process. Furthermore, during the trial, Sanford testified several times he was Scott's owner. Ehrlich argues that Scott had accrued a large amount of money, given he was hired out during the entire legal process and Sanford did not want to lose this.

wrongfully imprisoned by Sanford. In the suit he declared himself a citizen of Missouri. Sanford responded with a plea in abatement. A plea in abatement is where the defendant does not dispute the merits of the plaintiff's case but notes there has been a procedural error. Sanford contained that no man descended from enslaved Africans could be a citizen. Article III, Section 2, Clause 1 of the Constitution ruled when the Federal courts had jurisdiction which included disputes between citizens of different states. Sanford was a citizen of New York. If Scott was found not to be a citizen of Missouri then he could not sue in Federal court. Judge Robert W. Wells dismissed this argument ruling that for the purposes of filing a suit, citizenship implied only residence in that state and the ability to own property.[100] The arguments of the case remained the same. The verdict remained the same- Scott was still a slave. The case would be taken to the U.S. Supreme Court - but it would be 3 years before it would be heard.

Once the case reached the Supreme Court, Sanford's lawyers again argued Scott was not a citizen and thus not entitled to sue in Federal court. Scott was represented by Montgomery Blair, a Missourian whose father was editor of *The Washington Globe.* Sanford's lawyers were Henry S. Geyer, a Senator from Missouri and Reverdy Johnson a Marylander who was considered one of the best constitutional lawyers in the country. Blair, both in his brief and oral arguments, spent a lot of his time defending black citizenship in Missouri and heavily borrowed from Judge Gamble's earlier dissenting opinion. Geyer and Johnson argued against black citizenship. Furthermore, they introduced a new facet to the case- they argued that the Missouri Compromise was unconstitutional.[101] If Geyer and Johnson succeeded in this argument, then Dred Scott could not be free because any of the Compromise's slavery prohibition provisions would be invalid. The Justices in discussing the verdict, were at a stalemate and so asked for the cases to be reargued with special attention to be given to two questions. Firstly, was the plea in abatement properly before the Supreme Court? Secondly, if it was, did the U.S. Circuit Court's decision on the validity of black citizenship stand correct?[102] This time Blair was joined by George Curtis the brother of Justice Benjamin Curtis. In re-arguments, Blair marched over familiar ground focusing on "citizen" merely meaning "inhabitant" or "free inhabitant" in many instances of state and federal law. Blair, like Gaston (*Manuel v. State)* and Ellsworth (*State v. Crandall)*, argued the lack of political rights amongst Africans was no impediment to

Ehrlich is of the opinion that larger anti and pro slavery forces were driving the Dred Scott case forwards.; see Walter Ehrlich, "Was the Dred Scott case Valid?", *The Journal of American History*, Vol. 55, (2), 1968, 256-265.

[100] Fehrenbacher, *The Dred Scott Case*, 277.

[101] Ibid., 287-288.

[102] Ehrlich, *They Have No Rights: Dred Scott's Struggle for Freedom* (Westport, CT: Greenwood Press, 1979), 107.

citizenship, nor was public opinion of the African race any concern of the law.[103] Geyer responded that citizens of the United States were so because they were citizens of the state in which they resided. Citizens were born to that status or they acquired it by naturalisation. Scott was born a slave and had never been naturalised. This power lay with Congress. If Scott was free because of his residence in Illinois argued Geyer - manumission did not make him a U.S. citizen. Geyer was forming two separate groups: slave-born free Africans; or free Africans descended from freedmen. Geyer argued that the former were excluded from U.S. citizenship more so than the latter but ultimately both groups were excluded. Geyer, by separating state (resident) and federal (naturalisation) citizenship and focusing mostly on federal citizenship presented some hard questions to the Court's bench[104]

Besides the question of black citizenship, the other major issue was the constitutionality of the Missouri Compromise, or more narrowly: the ability of the Federal government to regulate slavery. During arguments, Blair and Curtis relied on historical legal precedents which, they submitted, decided Congress could acquire and regulate new territories. Geyer and Johnson argued that the Constitution did not allow for this. They argued that in Article IV, Section 3, Clause 2 'territory' meant only land and did not imbue Congress with the power to legislate regarding personal property. [105] Blair and Curtis responded that the Clause clearly made mention of 'all needful Rules and Regulations.' Geyer conceded that Congress indeed at the time needed to create local government but prohibiting slavery did not fall into this category. Scott's counsel replied that many, including Southerners, had accepted the Missouri Compromise. However, Geyer countered they had only done this for the sake of continuing the Union and that the Compromise barred citizens from accessing new Western states. Curtis in turn replied that was simply false - given that many Northerners and Southerners had migrated west. Geyer and Johnson also resorted to the old line that Congress could not prohibit slavery because this was *not expressly conferred* on Congress. Curtis argued the mirror line that prohibiting slavery was in Congress' power because this was *not expressly forbidden* in the Constitution.[106] It was reported that Geyer and Johnson throughout the trial, vigorously

[103] Fehrenbacher, *The Dred Scott Case*., 287-288.
[104] Ibid., 295-297.
[105] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."
[106] Fehrenbacher, *The Dred Scott Case*, 300-302.

defended both the South and her peculiar institution. At the end of it all the Court had four questions before it

1. Was a plea in abatement before the Court?
2. Was Dred Scott a citizen of Missouri
3. Was Scott free because he had resided in Illinois?
4. Was Scott free because he had resided at Fort Snelling in Minnesota Territory?

On the first question if the answer was no, then the Court would accept the lower Court's verdict on Scott's citizenship and move on to deciding if Scott was free (questions 3 and 4).If yes, then the Court would be forced to make a ruling on Scott's status as a Missouri citizen. If he was declared a citizen, then the Court would move on to the merits of the case. If Scott was found not to be a citizen of Missouri then the case would be dismissed due to a lack of jurisdiction. If the Court considered question 3 then it would have to decide if Scott had been a resident. If yes, then Scott was free. If not, his last recourse was in question 4. Question 4 was effectively about the constitutionality of the Missouri Compromise. If the Compromise was found constitutional then the law setting Scott free would hold. If not, Scott would be a slave - his last legal recourse exhausted.[107]

The verdict was returned. Dred Scott remained a slave by a count of seven to two.[108] The Court held that it could review the plea in abatement, that Africans could not be U.S. citizens, thus could not sue in Federal court, the Missouri Compromise was unconstitutional therefore Scott was not freed at Fort Snelling and nor was he freed by way of Illinois, because his status resided entirely upon Missouri's law and not Illinois' law. This meant that Scott's status was decided by Missouri's Supreme Court ruling in *Scott v. Emerson*. This case had declared him a slave and because he was a slave in Missouri it was impossible for him to be a citizen of Missouri. The Court therefore deemed the case must be returned to the U.S. Circuit Court in Missouri and dismissed for lack of jurisdiction. Amongst scholars of the Dred Scott case there is considerable controversy over the "majority" nature of Taney's opinion. It has been noted that only four Justices agreed the plea in abatement was before the Court. Taney did not hold a majority on this question. Furthermore Taney, Wayne and Daniel ruled that Africans could not be citizens. All three though, commented on the Missouri Compromise and the issue of comity between Illinois and Missouri. Legally this was unnecessary. The three Justices had opined that

[107] *Scott v. Sandford,* 60 U.S 393 (1856), 393-396.; Fehrenbacher, *The Dred Scott Case*, 302-303.
[108] Chief Justice Taney and Justices Wayne, Nelson, Grier, Daniel, Campbell and Catron were the majority. Justices McLean and Curtis dissented.

Scott was not a citizen, thus could not sue.[109] The Justices need not have examined these merits of the case. The Justices reading the nation's political temperature, hoped that by commenting on the case's merits they could help unify the country. Eight of nine Justices would comment on the constitutionality of the Missouri Compromise and all nine on the issue of comity regarding Illinois and Missouri. In comparison, only six Justices commented on the plea in abatement - while only five commented on the issue of citizenship.

Taney dedicated almost half of his majority opinion to the issue of black citizenship. Sanford's lawyer Geyer had been perceptive. He had attempted to separate state and federal citizens and Taney agreed. Taney stated

> The question is simply this: can a negro whose ancestors were imported into this country and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen, one of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution? […] The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State in the sense in which the word "citizen" is used in the Constitution of the United States.[110]

By framing the issue in the "political community" under the Constitution, Taney went beyond the question before the Court. The Court only needed to pass verdict on the question - was Scott a citizen of *Missouri*? The Court did not need to discuss the merits of Scott's U.S. citizenship.[111] It stood that under the Comity Clause, if Scott was a citizen of Missouri then he was also a citizen of the United States. Taney, however, was of the opinion

> 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. He may have all of the rights and privileges of the citizen of a State and yet not be entitled to the rights and privileges of a citizen in any other State.[112]

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[109] Ehrlich, *They Have No Rights,* 169-173.;Hopkins, *Dred Scott's Case*, chp. 6.; Fehrenbacher, *The Dred Scott Case,* 324-326. Fehrenbacher concedes that while the majority opinion was heavily tangled, the merits could be discussed *even if* the individual Justices had ruled against black citizenship or they had made no mention of the issue.

[110] *Scott v. Sandford,* 60 U.S 393 (1856), 403.

[111] Fehrenbacher, *The Dred Scott Case,* 343.

[112] *Scott v. Sandford,* 60 U.S 393 (1856), 405.

In saying this Taney blatantly ignored the precise wording of the Comity Clause and created state and national citizenship independent of one another. Taney would move on to say that

> Each State may still confer them [privileges and immunities] upon an alien, or anyone it thinks proper, or upon any class or description of persons, yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them.[113]

Taney thus again limited the reach of state citizenship and the power to create U.S. citizens - to Congress and its power of naturalisation. In Taney's opinion no state law or court ruling could extend state citizenship and U.S. citizenship to Africans after the Constitution's ratification in 1789.

Taney's ruling left a question - what about before 1789? Taney conceded once the Constitution was ratified, all state citizens became federal citizens. It stood that if freedmen were considered citizens of their respective States then they became U.S. citizens in 1789. Taney concluded this would be false, as state citizens became such once independence was declared and it embraced those whose rights had been violated by the English.[114] Taney stated that freedmen did not qualify under this definition because

> They [Africans] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit. […] This opinion was at that time fixed and universal in the civilized portion of the white race. […] And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa and sold them or held them in slavery for their own use, but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.[115]

In short, Taney used the simple argument that Africans were inferior and unsuitable for political rights and therefore could not have been state citizens prior to 1789. For the next ten pages Taney cited a deluge of cases and laws which confirmed that Americans believed the African race inferior. To hammer the final nail into the coffin of African-American citizenship, Taney rounded upon Congress' power of naturalisation. He proclaimed that it was widely understood

[113] *Scott v. Sandford,* 60 U.S 393 (1856), 406.
[114] Ibid., 408.
[115] Ibid., 407-408.

that Congress' power to naturalise only applied to foreign citizens of foreign nations. Congress had no 'power to raise to the rank of a citizen anyone born in the United States who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class.'[116] Taney shut the door on the possibility of Congress naturalising freed slaves. To finish, Taney noted that the Naturalisation Laws of the 1790s had been for whites only, cited maritime law that separately referred to "citizens" and "persons of color" and misrepresented Wirt's 1821 opinion to make it appear that Wirt had categorically ruled Africans could never become citizens.[117] In the end Taney declared that this was reason enough to find that Scott was not a citizen of Missouri yet in his argument Taney had done much more: he had declared African-American citizenship an impossibility.

Justice Daniel concurred with Taney on black citizenship. He argued that a slave was property and his emancipation did not qualify him for automatic citizenship. Daniel said this power lay only with Congress. States could give free blacks civil rights but they could not make citizens of men who the Founders regarded as lesser beings. Justice Wayne completely concurred with Taney on the issue of citizenship. The other Justices who commented on citizenship were the Dissenters Curtis and McLean. Both spent little time on the issue of citizenship. McLean would chide Taney by stating 'In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law.' McLean pointed to the treaties bringing Louisiana, Florida and parts of Mexico into the Union. These treaties had guaranteed citizenship with no thought to race.[118] Curtis argued directly against Taney's decision. Curtis cited a number of cases, including a Supreme Court decision under John Marshall that citizenship merely meant residence. He concluded that Scott's residence in Missouri was without question and that only Scott's race could preclude him from citizenship. On this point Curtis pinpointed U.S. citizenship as being created at the time of the Articles of Confederation - not the Constitution. The states had come together to form a national body at this stage. Curtis continued that the Articles had not given the national Congress any power to regulate citizenship. He concluded that power was left up to the states - thus state citizens in 1789 became U.S. citizens. The Constitution did not define citizenship, nor did it expressly forbid any race or class from becoming citizens. Furthermore, Article IV of the Articles of Confederation charged any 'free inhabitants' of the states to be given comity in the other states.

[116] *Scott v. Sandford,* 60 U.S 393 (1856), 417.
[117] Ibid., 417-423.
[118] Ibid., 531-533.

Curtis noted there were free blacks in the states at this time, thus Africans could be U.S. citizens. He went on to frame Congress' power of naturalisation as applying to aliens only, thus - according to Curtis - the states still maintained the power to dictate citizenship. He could find five states which allowed free blacks to be citizens; Massachusetts, New York, New Jersey and New Hampshire, based on their constitutions. North Carolina also allowed black citizens on the basis of *State v. Manuel.*[119] He ruled Africans could be U.S. citizens but this came with a caveat. Curtis, similarly to Wirt, ruled that only free Africans born into a state which allowed them citizenship could be U.S. citizens. A free African from New York carried with him U.S. citizenship to Virginia but a free black Virginian did not gain U.S. citizenship by moving to New York.[120] Five judges had commented on citizenship, what of the other four? Their silence on the issue of citizenship meant that they implicitly agreed with Taney. They had proceeded to comment on the merits of the case, indicating they believed Scott could sue. Yet in this case the Justices all commented on the merits, regardless of their position on the plea in abatement or citizenship. In the end, the four Justices who made no mention of citizenship ultimately did not feel the need to refute Taney's opinion on a position they knew would have serious ramifications. What is more, given their view that the Missouri Compromise was unconstitutional and their refutation of the "once free, always free doctrine," it can be assumed that they were no friends of the Africans race.

The verdicts in the Dred Scott case overturned some twenty five years of Court precedents in Missouri. Why? The most obvious reason was politics. The *Rachel v. Walker* case was one of the last freedom suits filed in Missouri. The reason behind this was that all slaves who thought themselves free had already filed suits in the preceding decade. Again, these decisions had been handed down at a time when the continuation of slavery was guaranteed. Scott's was not helped by the long delays. If Russell had not muddled his testimony, then Scott's case would have been decided before the election of 1848. The re-trial may have been heard before 1848 but Irene Emerson and her lawyers spent a year and half pleading a writ of error before the Missouri Supreme Court. Furthermore, once a re-trial was ordered the case was again delayed by a cholera outbreak in St. Louis followed by a city-wide fire.[121] Slavery was never a quiet issue, but in 1846 - the same year as Scott filed his suit - America declared war on Mexico. Out of this war came the Wilmot Proviso which sought to prohibit slavery in any territory gained. Two

[119] *Scott v. Sandford,* 60 U.S 393 (1856), 571-588.
[120] Fehrenbacher, *The Dred Scott Case*, 408.
[121] Ibid., 256.

years later, the elections of 1848 saw the Democratic Party split on the issue of slavery. The anti-slavery faction headed by Martin Van Buren and Salmon P. Chase founded the Free Soil Party in which anti-slavery Whigs also joined. The party campaigned on a single issue: prohibiting slavery in the Western territories. It had little chance of winning but its platform made slavery a major issue increasing sectional tensions. The Missouri Compromise of 1850, though featuring heavy debate, especially regarding the Fugitive Slave Act, did much to calm the mood of the country. Four years later, just as Scott was making his way to the U.S. Supreme Court, bitter sectional conflict again sprang up with the Kansas-Nebraska Act. The Democratic Party, now platforming the idea of using popular sovereignty to decide if new states should be Slave or Free, introduced the Act on this basis. The result was the effective repeal of the Missouri Compromise and the founding of the anti-slavery Republican Party. The Act would see an increasingly bloody conflict in Kansas between pro and anti-slavery forces. The Supreme Court, hoping to settle the conflict, thus gave opinions on the regulation of slavery in the territories and the issue of comity between Free and Slave states. The cruel irony is that its opinions further stoked sectional passions.

The Court was not only influenced by the political climate, but by politicians directly. James Buchanan, then President-elect, wrote to Justices Catron and Grier whilst the Court was devising its verdict. Buchanan was nervously writing his inaugural address and hoped the Court would decide the issue before it.[122] Buchanan wrote to Catron asking about the case. Catron responded that the Court had split on the issue of the Missouri Compromise; the five Southern Justices v. the Four Northerners. Buchanan, knowing how this would appear to the public, then wrote directly to Grier a fellow Pennsylvanian and successfully persuaded him to side with the Southern Justices on the case.[123] Buchanan's actions were improper, more so given that the Executive and Judicial branches of government were supposed to be separate. Furthermore, both branches were also supposed to "check and balance" one another - not work in tandem. The compromising of judicial impartiality does not explain the Court's ruling on citizenship. This ruling can be seen as a product of public sentiment. Only two Justices declared Africans could be American citizens. Even Curtis, who had put forth an eloquent argument on African-American citizenship, could only find five of thirty-one states which had declared free Africans citizens. Furthermore, Curtis felt it important to note that citizenship did not mean equal civil

[122] Fehrenbacher, *The Dred Scott Case*, 408.
[123] Ibid., 311-312.

liberties - thus the Justice did not challenge racial discrimination.[124] Given the discrepancies in the treatment of free blacks among the states it is not hard to understand why the Supreme Court did not rule favourably. The North may have, in general, been a more hospitable place for free blacks, but the same North often denied them educational rights and treated them as lesser beings. Even the abolitionists were undecided on African-American citizenship after emancipation. The American nation as a whole was unable to see free Africans as a societal group equal to others. The nation could not bring itself to unequivocally extend to Africans the same privileges and immunities others enjoyed. Free blacks, like the greater America populace in 1812, would only see their clash for citizenship settled by force of arms.

The issue of black citizenship, like the issue of volitional v. perpetual allegiance, would take a backseat to the larger issues of the day. The Supreme Court had ruled that no free black man or women could be a citizen. The Court's decision on the status of the Missouri Compromise was the far more contentious issue in an already divided nation. When the Civil War broke out in 1861 the primary concern of the Union was to defeat the Confederacy and reunify the country. It would not be until 1862 that the issue of black citizenship was once again taken up. An incident would lead to Edward Bates, then Attorney General, to write an exhaustive opinion on whether or not blacks could be American citizens. Bates was forced to consider the issue, like his predecessor Wirt, when Salmon P. Chase, then the Secretary of the Treasury, asked him to consider if black men could be citizens and thus under maritime law command American ships. Captain Martin of the U.S Revenue Steamer *Tiger* boarded a schooner *Elizabeth & Mary* off the coast of New Jersey. He discovered that its Master was a black man, David. M. Selsey. Maritime law stated that the captain of any U.S. ship operating in U.S. water must be a U.S. citizen. Martin asked Lawrence Boggs, a Treasury collector in Perth Amboy New Jersey, if a black man could be captain of a ship because he was not considered a citizen. Both Martin and Boggs were unsure. Boggs noted in a letter 'her master being a *Coloured Man*, and according to the "Dred Scott decision" cannot be a Citizen of the United States.'[125] On the other hand Boggs noted 'This man has been a master for his present owners in this District for more than [then] twelve years, and ther[e] are some eight or ten others masters (coloured) in this distri[ct].'[126] Boggs was certainly nonplussed enough to give the ship temporary passage to her

[124] *Scott v. Sandford,* 60 U.S 393 (1856), 582-584.

[125] *J. Laurence Boggs to S.P. Chase*, "Circumventing the Dred Scott Decision: Edwards Bates, Salmon P. Chase and the Citizenship of African-Americans", *Civil War History*, Vol. 43, (4), 1997. 286.

[126] Ibid*.,* 'This man has been a master for his present owners'. This does not indicate that Selsey was a Slave. He was a freeman, a fact confirmed by Bates. Boggs means Selsey was the master of the ship while others owned the ship.

destination in Norwich, Connecticut.[127] The issue would be moved through the Treasury department until Chase asked Bates for an opinion. Bates' opinion would argue against much of the contentions in Dred Scott and would conclude that black men could be citizens of the United States.

Bates considered Chase's question to be "Is a man legally incapacitated to be a citizen of the United States by the sole fact that he is a *colored*, and not a white man?"[128] In his search for definitions of citizenships Bates proclaimed

> Eighty years of practical enjoyment of citizenship, under the Constitution, have not sufficed to teach us either the exact meaning of the word, or the constituent elements of the thing we prize most highly. In most instances, within my knowledge, in which the matter of citizenship has been discussed, the argument has not turned upon the existence and the intrinsic qualities of citizenship itself, but upon the claim of some right or privilege as belonging to and inhering in the character of citizens. In this way we are easily led into errors both of fact and principle.[129]

Bates argued that too many people confused the issue of voting rights. White Americans saw that they had voting rights and assumed that a person must possess them in order to obtain citizenship. Bates pointed out that this was true and in fact citizenship preceded voting rights in many situations. Furthermore there was no doubt that women and children were citizens but without the vote. The same applied to the ability to hold office. [130] In Bates' mind, the argument applied to free blacks in the same way as women and children. Bates moved on to naturalisation. He noted the argument that pro-slavery forces had used. Africans were not natural-born citizens, having been held in bondage, but they could not be naturalised. Bates claimed this argument faulty, saying that in America two classes were present: citizens and aliens. America, unlike England, had no middle category of denizen. Bates argued that according to pro-slavery arguments, Congress only ordered the naturalisation of *free white* men, thus free blacks could not be naturalised, on account of their colour. If they could not be naturalised then they must stand as citizens.[131]

Bates continued to bemoan the fact that

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[127] *J. Laurence Boggs to S.P. Chase*, *J. Laurence Boggs to S.P. Chase*, "Circumventing the Dred Scott Decision: Edwards Bates, Salmon P. Chase and the Citizenship of African-Americans", *Civil War History*, Vol. 43,(4), 1997. 286-287.
[128] Bates, *Opinion of the Attorney General Bates on Citizenship*, 3.
[129] Ibid., 4.
[130] Ibid., 4-6.
[131] Ibid., 8-9.

> the discussion of this great subject of national citizenship has been much embarrassed and obscured by the fact that it is beset with artificial difficulties, extrinsic to its nature, and having little or no relation to its great political and national characteristics […] these difficulties, it seems to me, flow mainly from two sources: First the existence among us of a large class of people whose physical qualities visibly distinguish them from the mass of our people […] who, for the most part, are held in bondage. This visible difference and servile connection present difficulties hard to be conquered.[132]

Bates saw that the problem with the citizenship debate was that it was too often seen through the lens of race. Bates had argued that all born in America obtained citizenship through birth and that those who denied this fact must do so on an individual basis. Using this framework, Bates looked through the lens of race to dismiss these individual cases. On slavery Bates admittedly ducked the issue, claiming that Chase had not asked him whether or not a slave could be a citizen.[133] Bates showed in reality that he actually saw three classes of people: slaves, citizens and aliens. In light of this it can be assumed that if Bates was pushed, he would have declared slaves could not be citizens. A slave when freed was another issue. On the point of colour, Bates argued that the Constitution said nothing on the issue. Bates asked - if you could exclude people from citizenship there needed to be a fundamental fact on which to base this exclusion. Bates asked 'Is mere *color* such a fact?'[134] Bates laughed at the idea that a man's colour could disqualify him from 'bearing true and faithful allegiance to his native country and for demanding the protection of that country […] these two things, allegiance and protection constitute the sum of the duties and rights of a "natural-born citizen of the United States"'.[135] The last objection was race. Bates again stated the Constitution was silent on race. Bates stated 'such persons [Africans], born in country, must be citizens unless the fact of African descent be so incompatible with the fact of citizenship […] I am not able to perceive any antagonism, legal or natural, between the two facts'. Bates then addressed those who claimed the African race was so degraded that it disqualified its members from citizenship. He sarcastically noted 'I can hardly comprehend the thought of the absolute incompatibility of degradation and citizenship. I thought they often went together.'[136] Bates illustrated his point by claiming there were plenty of examples where citizens had degraded fellow citizens. Bates stated that some states handed out 'the most humiliating punishments […] the lash, the pillory, the cropping of the ears and the branding of the face […] in several states the common punishment […] was

[132] Bates, *Opinion of the Attorney General Bates on Citizenship*, 9
[133] Ibid., 14.
[134] Ibid., 14.
[135] Ibid., 15.
[136] Ibid.

sale into bondage yet I have not read that such unfortunates thereby lost their natural born-citizenship, or their descendants are doomed to perpetual exclusion and degradation.'[137] He concluded that it would be wrong to think of citizenship as hereditary. Bates would continue by stating the superiority of national law. He addressed Wirt's opinion. Wirt's decision only applied to Virginia said Bates, because he had not considered national law. Bates gave an answer to such arguments that 'Every citizen of the United States is a component member of the nation, with rights and duties, under the Constitution and the laws of the United States which cannot be destroyed or abridged by the laws of any particular state. 'The laws of the State, if they conflict with the laws of the nation, are of no force.'[138] Lastly, Bates addressed the Dred Scott case. Bates did not argue the merits of the case but stayed away from controversy by claiming the action of the Supreme Court was confined to the plea in abatement and not the merits.[139] Bates thus produced his final opinion 'that *free man of color*, mentioned in your letter, if born in the United States, is a citizen of the United States.'[140]

Despite Bates' attempts to tread very lightly around Dred Scott, his opinion overturned virtually all of its arguments. Bates' opinion has barely registered with historians until recently. It has been overtaken by the Emancipation Proclamation which was announced just three months after Bates' opinion was published. The noise of the Civil War drowned out Bates' voice. The Civil War, like the War of 1812, obscured the issue of citizenship and it was only returned to in the last stages of the War. Its outbreak did not immediately signal the end of slavery or the possibility of African-American citizenship. For the newly elected Abraham Lincoln, the foremost issue was how to end the Southern rebellion and to preserve the Union. The abolition of slavery and the possibility of African-American citizenship were not at the fore of Lincoln's mind when shells began to hit Fort Sumter. Eric Foner wrote 'Much of Lincoln's career can fruitfully be seen as a search for a reconciliation of means and ends' while on the other hand his career was also 'a process of moral and political education.'[141] Lincoln's own doubts over slavery were indicative of those of many Northerners who saw slavery as an injustice, but feared the effect abolition would have on America in terms of racial equality,

[137] Bates, *Opinion of the Attorney General Bates on Citizenship*, 15-16.
[138] Ibid.,, 17.
[139] Ibid., 24-26.
[140] Ibid., 27.
[141] Eric Foner, *The Fiery Trial: Abraham Lincoln and American Slavery*, (New York, NY: W.W.Norton & Company Inc., 2010), *xx*

disunion and labour. Lincoln may not have wanted to solve the issue of slavery or citizenship but circumstances forced him and America to confront the issue head on.

Lincoln was born in Kentucky, a Slave state, but moved to Indiana before settling in Illinois. Lincoln became a member of Illinois' lower house where, in his early days, he distanced himself from the growing abolitionist movement. Lincoln did, however, take the opportunity to repudiate slavery when given a chance. In 1837 he voted against a motion confirming the right of the Southern states to continue slavery. Lincoln wrote that 'the institution of slavery is founded both on injustice and bad policy.' Lincoln displayed his moral objection to slavery but tempered it by stating that 'the promulgation of abolition doctrines tends rather to increase than to abate its [slavery's] evil.'[142] Lincoln would also claim that Congress had no right to restrict slavery in the states **but** it did hold that power in the District of Columbia. Lastly, Lincoln also did not opine that owning slaves was a right. Lincoln's stance on this issue would be emblematic of his stance leading up to the Civil War. Lincoln believed slavery morally wrong - but he held the Constitution sacred and didn't wish to destroy national harmony. Lincoln by acknowledging that the federal government should not interfere with the states' positions on slavery, signalled his belief that the nation must endure and for it to do so, Northerners would have respect its Constitution. In 1847 Lincoln was elected to the U.S House of Representatives. In 1849 he, together with Joshua R. Giddings of Ohio, introduced a bill that would halt slavery in the District of Columbia. Lincoln proposed from 1850 onwards that slave children be "apprenticed" to their masters until reaching adulthood.[143] Present slaves would remain as such unless freed by their masters, who would receive monetary compensation. The District of Columbia would also give every effort to capture and return fugitive slaves. Lincoln could not find enough support for the bill and never introduced it. Lincoln's bill further illustrates his position on slavery: that it should be stopped but in such a way that did not fuel the North-South divide. The bill would also later allow Giddings (a founding member) to convince the Republican Party that Lincoln was an anti-slavery man. Not everyone approved. Wendell Philips, the abolitionist, in 1860 would deem Lincoln 'the slave-hound of Illinois' because of the bill. Lincoln would only serve one term in Congress and would return to Springfield, Illinois

[142] *The Collected Works of Abraham Lincoln*, Vol. 1, ed. By Roy P. Basler (New Brunswick, NJ: Rutgers University Press), 75.

[143] The idea of apprenticing slave children was likely borrowed from the British who used a similar plan when abolishing slavery in the colonies in 1833.

to continue practising law. The issue of slavery would not leave Lincoln alone however. It would be Lincoln's stance on slavery that would reinvigorate his political career.

The Kansas-Nebraska Bill of 1854 was engineered by Stephen Douglas, a senator from Illinois who from this point on would become forever associated with Lincoln. Douglas' bill allowed Kansas and Nebraska to enter the Union with the issue of slavery in each state being decided by popular sovereignty. Northerners decried that the bill effectively repealed The Missouri Compromise of 1820 and allowed for the westward expansion of slavery. Lincoln would argue against the bill strongly, giving a memorable speech in Peoria, Illinois on 16 August 1854. The speech was his longest ever. Lincoln in his opening salvo said

> This *declared* indifference, but as I must think, covert *real* zeal for the spread of slavery, I cannot but hate. I hate it because of the monstrous injustice of slavery itself. I hate it because it deprives our republican example of its just influence in the world---enables the enemies of free institutions, with plausibility, to taunt us as hypocrites---causes the real friends of freedom to doubt our sincerity, and especially because it forces so many really good men amongst ourselves into an open war with the very fundamental principles of civil liberty---criticising the Declaration of Independence, and insisting that there is no right principle of action but *self-interest*.[144]

Lincoln as in 1837, attacked the injustice of slavery but this time attacked slavery as violating the core tenets of American exceptionalism. Despite his strong opening polemic, Lincoln continued to be non-antagonistic towards Southerners

> Before proceeding, let me say I think I have no prejudice against the Southern people. They are just what we would be in their situation. If slavery did not now exist amongst them, they would not introduce it. […] When Southern people tell us they are no more responsible for the origin of slavery, than we; […] I acknowledge the fact. When they remind us of their constitutional rights, I acknowledge them, not grudgingly, but fully, and fairly; and I would give them any legislation for the reclaiming of their fugitives, which should not, in its stringency, be more likely to carry a free man into slavery, than our ordinary criminal laws are to hang an innocent one.[145]

Lincoln continued to adhere to the Constitution and avoided the abolitionist rhetoric on the evil of Southern slaveholders. Lincoln instead put forth the case against the expansion of slavery. Douglas' idea of popular sovereignty appealed to the American ideal of self-government. Lincoln countered that

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[144] *The Collected Works of Abraham Lincoln*, Vol. 2, ed. By Roy P. Basler (New Brunswick, NJ: Rutgers University Press), 255.
[145] Ibid.

> The doctrine of self-government is right---absolutely and eternally right---but it has no just application, as here attempted. Or perhaps I should rather say that whether it has such just application depends upon whether a negro is *not* or *is* a man. If he is *not* a man, why in that case, he who *is* a man may, as a matter of self-government, do just as he pleases with him. But if the negro *is* a man, is it not to that extent, a total destruction of self-government, to say that he too shall not govern *himself*? When the white man governs himself that is self-government; but when he governs himself, and also governs *another* man, that is *more* than self-government---that is despotism. If the negro is a *man*, why then my ancient faith teaches me that "all men are created equal;" and that there can be no moral right in connection with one man's making a slave of another.[146]

Lincoln argued that Douglas' push for popular sovereignty was defeating its underlying tenet. Lincoln was not preaching the Constitution this time, but appealing to its ideals.

Lincoln may have found a clearer voice on the morals of slavery but he still remained unsure of its solution. It was clear that Lincoln's position on the Constitution meant that he wanted to solve the issue of slavery within the Constitution's framework.[147] Beyond this, Lincoln acknowledged that he had no clear plan of what would become of America's slave population

> My first impulse would be to free all the slaves, and send them to Liberia,---to their own native land. But a moment's reflection would convince me, that whatever of high hope, (as I think there is) there may be in this, in the long run, its sudden execution is impossible. […] What then? Free them all, and keep them among us as underlings? Is it quite certain that this betters their condition? I think I would not hold one in slavery, at any rate; yet the point is not clear enough for me to denounce people upon. What next? Free them, and make them politically and socially, our equals? My own feelings will not admit of this; and if mine would, we well know that those of the great mass of white people will not. Whether this feeling accords with justice and sound judgment, is not the sole question, if indeed, it is any part of it. A universal feeling, whether well or ill-founded, cannot be safely disregarded. We cannot, then, make them equals.[148]

Lincoln laid bare the simple question: if we ended slavery what then? Lincoln himself had no clear response. Lincoln throughout his life clung to the hope of colonisation. Lincoln would even give government funds to the American Colonisation Society during the Civil War. Lincoln's speech indicated even at this stage he knew in his heart that colonisation was a pipe dream. The radical abolitionist position on the equality of the race however, did not sit well and as always with Lincoln, the feelings of a large part of the nation could not be brushed aside. Lincoln concluded 'Let us turn slavery from its claims of "moral right," back upon its existing legal rights, and its arguments of "necessity." Let us return it to the position our fathers gave

[146] *The Collected Works of Abraham Lincoln*, Vol. 2, 265-266.
[147] Foner, *The Fiery Trial*, 68.
[148] *The Collected Works of Abraham Lincoln*, Vol. 2, 255-256.

it; and there let it rest in peace.' Lincoln's Peoria Speech saw him place great emphasis on the moral destitution of slavery. It was a break for Lincoln who up until this point had primarily focused on economic matters.[149] Lincoln's disgust at slavery could not however move him from his staunch protection of the Constitution. Lincoln did not seek the imminent end of slavery, only to stop its westward expansion. Furthermore, Lincoln's remarks in 1854 demonstrated that he could not consider white and blacks to be equal. Lincoln views, like those of many other white Americans, meant that was only more unlikely, once free former slaves had little hope of becoming fellow citizens.

Lincoln's Peoria Speech reignited his political career but he failed to gain a Senate seat in that same year, as a Whig candidate. The Kansas-Nebraska Act had split the Whig Party so Lincoln joined the newly formed Republican Party. He would finish second in the vice presidential nomination at the Republican National Convention in 1856. In 1858 Lincoln won the Republican nomination for the U.S. Senate at the Illinois convention, in large part due to his "A House Divided" speech. Positively short compared to his Peoria Speech, A House Divided crystallised an important moment in American history. Lincoln put it as

> A house divided against itself cannot stand. I believe this government cannot endure, permanently half *slave* and half *free*. I do not expect the Union to be *dissolved* -- I do not expect the house to *fall* -- but I *do* expect it will cease to be divided. It will become *all* one thing or *all* the other. Either the *opponents* of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its *advocates* will push it forward, till it shall become alike lawful in *all* the States, *old* as well as *new* -- *North* as well as *South*.[150]

America could not continue its factional fighting; it must be one or the other. It was not slave or free in Lincoln's mind. America would be all for slavery or would halt its westward expansion. Lincoln's address raised the fear of disunion. Political fighting, so heavy after the Dred Scott decision a year before, could become actual war. Stephen Douglas, Lincoln's old sparring partner and his competition for the Senate seat, would charge Lincoln with fermenting civil war and being a radical abolitionist. Douglas' rhetoric did not line up with the truth. Lincoln did not call for abolition in his speech just (as always) for a halt to slavery's westward expansion. The line 'Either the *opponents* of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate

[149] Foner, *The Fiery Trial*, 65.
[150] *The Collected Works of Abraham Lincoln*, Vol. 2, 461-462.

extinction' displays that Lincoln had no definite plan for the ending of slavery. The line does reveal one thing. Lincoln, having seen the fallout of the Dred Scott decision and years of increasing tension, knew that it would be public opinion which would lead to slavery's 'ultimate extinction'. Neither Congress nor the Supreme Court, nor any branch of government could solve the issue of slavery. Public opinion would.[151] Lincoln armed with this knowledge and the fears of disunion, would launch into a speaking campaign against Douglas pitting his belief in the Founding Fathers' republicanism against Douglas' popular sovereignty.

Lincoln and Douglas would campaign by undertaking seven famous debates throughout Illinois. Douglas fiercely attacked Lincoln as a man who believed in racial equality. Lincoln remained silent on the issue until the fourth debate. Lincoln had been receiving letters from Republicans in southern and central Illinois who had urged him to make a definitive statement, less he suffer the political impact.[152] Lincoln responded at the fourth debate in Charleston

> I will say then that I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races, [applause]-that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people; and I will say in addition to this that there is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race.[153]

Lincoln's strong statement was meant to show that he was no radical abolitionist. He went on further to say that 'I am not in favor of negro citizenship.' Immediately after this statement Lincoln did clarify his position. He asserted 'Now my opinion is that the different states have the power to make a negro a citizen under the Constitution of the United States if they choose.'[154] Thus Lincoln left the door open for the possibility of black citizenship. It was wholly in line with Lincoln's belief in the Constitution. The Constitution (in Lincoln's opinion implicitly) allowed for states to do so. What did Lincoln really believe in terms of racial equality and perhaps the possibility of black citizenship? His public statements throughout the 1850s said he was against racial equality and only interested in stopping the western expansion

[151] Foner, *The Fiery Trial*, 100.
[152] Ibid., 107.
[153] *The Collected Works of Abraham Lincoln*, Vol. 3, ed. By Roy P. Basler (New Brunswick, NJ: Rutgers University Press), 145-146.
[154] Ibid., 179.

of slavery. Douglas repeatedly charged that Lincoln said one thing in southern Illinois but another up North.[155] There is evidence of this. At a speech given in Chicago, Lincoln urged the audience to 'discard all this quibbling about this man and the other man- this race and that race and the other race being inferior, and unite as one people throughout this land, until we shall once more stand up declaring all men are created equal.'[156] Lincoln was noted to be extremely loyal to his party. He may have truly believed in racial equality but hid it to keep to the Republican line. Historians to this day still struggle to consistently define Lincoln's view on race and slavery. Regardless of Lincoln's true views on the matter, the question remains how did a man who publicly throughout the 1850s argued for the possibility of gradual emancipation, though remaining unsure of the practicalities, go on to sign the Emancipation Proclamation?

In the early days of the Civil War a number of slaves appeared amongst Union lines believing Lincoln intended to free them. These slaves did not find freedom.[157] They were returned to their owners or taken back to Confederate lines. The Fugitive Slave Act continued to remain in effect and was enforced. Lincoln purposefully left the Administration's stance on slavery undefined. His purpose was not to alienate the Border States - fearing they would follow the Confederate states into disunion. In November 1861, Lincoln would begin to propose to Delaware then the other Border States a plan for gradual emancipation. It was the first time a President had committed the government to abolition.[158] Lincoln proposed emancipation over thirty years, with monetary compensation to slave-holders. The proposal was very much in line with Lincoln's pre-war thinking, but Lincoln remained unsure of the post-emancipation position of slaves. He continued to hope that colonisation was still a possibility.[159] To Lincoln's surprise, the Border States were not as receptive as he had anticipated but he continued to struggle to convince those states. Elsewhere, events were beginning to overtake Lincoln. In August, even before Lincoln had approached the topic of gradual emancipation, Major-General

[155] Douglas' charge was based on the geo-cultural make-up on Illinois. Northern Illinois was more "liberal" and thus tended to oppose slavery. Southern Illinois bordered slave states. This meant that the residents of southern Illinois came into contact with slavery far more than their northern brethren. Furthermore many residents of southern Illinois at one point or another had lived in these bordering states. Thus southern Illinois was more opposed to abolition. Douglas charged that Lincoln was for racial equality but denied it in southern Illinois lest he upset voters.

[156] *The Collected Works of Abraham Lincoln*, Vol. 2, 501.; James Oakes "Natural Rights, Citizenship Rights, States' Rights and Black Rights: Another Look at Lincoln on Race" in *Our Lincoln*, ed. by Eric Foner (New York, NY: W.W.Norton & Company Inc., 2008), 109.

[157] James Oakes, *The Radical and the Republican* (New York, NY: W.W. Norton and Company Inc., 2009), 203.

[158] Foner, *The Fiery Trial*, 183.

[159] Ibid., 184.

John. C Fremont, Commander of the Department of the West, issued an emancipation edict. It stated that Confederates found in Missouri would have their property confiscated including slaves who would then be set free. Alarmed, Lincoln revoked the order and fired Fremont.[160] On 9 May, 1862 Major-General David Hunter, the recently appointed commander of the Department of the South, ordered that all slaves in his jurisdiction were forever free and encouraged his officers to accept black volunteers.[161] Lincoln again revoked the order. At this time Hunter had raise an all-black regiment and even after Lincoln revoked his decree, continued to recruit former slaves.[162] While Lincoln was calling for gradual emancipation, the Union army was quickly increasing in abolitionist sentiment. As encounters with slaves became increasingly frequent, Union soldiers saw the desperation of slaves and cruelty that accompanied the practice. Union soldiers were also taken by the loyalty slaves showed towards the Union. Army commanders noted that sympathy for slaves was on the rise.[163] It was not just the army. The radical side of the Republican Party had always pushed for complete emancipation, but now even the moderate Republicans began to think about joining their radical brethren, with some concerned that Lincoln was not prosecuting the war with enough vigour. This was a crucial moment for Lincoln. He had always looked to the Constitution, but had also realised that public opinion was key in ending slavery. The increasing turn in public opinion saw a shift in Lincoln's policy direction.

Lincoln still remained committed to emancipation via the Border States. He hoped that when these states agreed to emancipation the Southern states would follow after reacceptance into the Union. Yet, given the rise in abolitionist sentiment, he became more urgent. Outside events once more influenced Lincoln. By July 1862 it was clear that General George B. McClellan's campaigning in Virginia was in serious trouble. Lincoln visited him on 7 July. McClellan, the commander of the Army of the Potomac, had always stressed the need for 'civilised' war to Lincoln, but Lincoln came away from this meeting believing that more of a 'total war' was needed.[164] This total war could mean the confiscation of slaves. Furthermore a day after Lincoln returned to Washington, Congress, after a long debate, decided to amend the Militia Act of 1795 and introduce the Second Confiscation Act. The Militia Act now allowed for black men to be engaged in labouring for the army e.g. digging ditches or constructing roads. The

[160] John David Smith, *Lincoln and the U.S. Colored Troops,* (Carbondale, IL: Southern Illinois University Press, 2013), 11; James Oakes, *Freedom National* (New York, NY: W.W. Norton & Company, 2013), 157-59.
[161] James Oakes, *Freedom National*, 213-8.
[162] Foner, *The Fiery Trial*, 206-208.
[163] Ibid., 208-209.
[164] Ibid., 217.

Second Confiscation Act allowed the Union to confiscate the property of rebels, including slaves who would be deemed forever free. These acts spurred Lincoln to discuss with his Cabinet a draft order containing certain premises. Firstly, the rebels had sixty days to cease their rebellion or face the confiscation of property. Secondly, that he [Lincoln] continued to support gradual emancipation. Thirdly that on 1 January, 1863 all slaves in Confederate states that had not been returned to the Union were free. Lincoln's own Cabinet was divided by his provisions. This division, coupled with not wanting to look desperate and possibly Lincoln's own hesitation, meant the orders were put to one side.[165] Months later on the 17 September McClellan defeated Lee at Antietam - the single bloodiest day in American history. The victory allayed fears about the Union looking weak and gave Lincoln confidence to proclaim what is known as "The Preliminary Emancipation Proclamation."

The Proclamation meant that within a few months America's free black population could significantly expand. The issue still remained: what would become of them? Lincoln continued to push for colonisation. An expedition to Colombia was planned to survey its suitability as a place for former slaves to settle. It was called off at the last minute. Edward Bates, the man who just two months later would declare former slaves U.S. citizens, voiced his opinion that colonisation should be forced. Lincoln maintained that any colonisation should be voluntary. The problem for Lincoln was that black leaders and the majority of the black population opposed colonisation.[166]Again the army was influential in shaping Lincoln's policy. Army commanders had often employed freed slaves and the Preliminary Proclamation had only emboldened their recruiting. Army commanders spoke of the need for more solders and labourers. In December, the Union was defeated heavily at Fredericksburg. Furthermore, Lincoln could find little support for his proposals for colonisation. It was due to the sum of these factors that when the Emancipation Proclamation was read on 1 January 1863, it allowed for blacks to be recruited into the Union Army.

The Emancipation Proclamation was the point of no return. The Proclamation did not end slavery completely. The Border States were allowed to keep it because they remained in the Union and of course the Union Army only controlled a small area of the South. The Proclamation however signalled a momentous shift in the war aims of the Union. It seemed that no longer was slavery a separate issue from disunion.[167] Lincoln, once in a public letter to

[165] Foner, *The Fiery Trial*, 219-220.
[166] Ibid., 232-235.
[167] Oakes, *The Radical and the Republican* (New York, NY: W.W. Norton and Company Inc., 2009), 226.

Horace Greely of the *New York Tribune*, proclaimed that if he could save the Union by allowing slavery's continuation, he would. The Emancipation changed this. It confirmed that America would reform as a slave free-nation.[168] The Proclamation was also crucial to African-American citizenship - though not immediately so. The fact was, however, that blacks could now serve in the Union Army. Citizenship worldwide was defined by rights and duties. The highest duty of a citizen was to fight for one's country. From the citizens-soldiers of Ancient Greece to knights and men-at-arms of the feudal age, to the men of the *Grandee Armee* - all had been called on to do their duty as citizens. As 1863 dragged on and black recruitment rose, many Americans began to question a post-war situation in which black men who had fought and bled for the Union, could be denied certain rights. Fredrick Douglass recognised this.[169] He help recruit for Massachusetts' all-black regiments. He cried

> The white man's soul was tried in 1776. The black man's soul is tried in 1863. The first stood the test, and is received as genuine-so may the last. The broad eye of the nation is fixed upon the black man. They are half in doubt as to whether his conduct in this crisis will refute or confirm their allegations against the colored race. They stand ready to applaud, or to hurl the bolt of condemnation […] we have no time to lose. To hold back is to invite infamy upon ourselves, and upon our children. All the Negro hating vermin of the land may crawl over us, if our courage quails at this hour. ***[…]*** The black man, in arms to fight for the freedom of his race, and the safety and security of the country, will give his countrymen a higher and better revelation of his character. The case stands thus: We have asked the nation for a chance to fight the Rebels- to fight against slavery, and to fight for freedom. Well, the chance is now given us. We must improve it, or sink deeper than ever in the pit of social and political degradation, from which we have been struggling for years to extricate ourselves. When the nationality of the United States is set in safety, in part of your hands, the whole world would cry shame upon any attempt to denationalize you. To fight for the Government in this tremendous war is, then to fight for nationality and for a place with all other classes of our fellow-citizens.[170]

In America, bearing arms also had a special significance. It was enshrined in the Constitution and linked to the War of Independence. It was closely linked to American citizenship.[171] Douglass again knew this

> You are however, not only a man, but an American citizen, so declared by the highest legal advisor of the Government, and you have hitherto expressed in various ways, not only your willingness but your

[168] Foner, *The Fiery Trial*, 247-250.
[169] Oakes, *The Radical and the Republican*, 206.; Nathan Irvin Huggins, *Slave and Citizen: The Life of Frederick Douglass* (New York, NY: HarperCollins, 1980), 107.
[170] Fredrick Douglass, *Another Word to Colored Men,* Douglass Monthly, April 1863, http://www.frederick-douglass-heritage.org/another-word-to-colored-men/
[171] Smith, *Lincoln and the U.S. Colored Troops,* 9.

> earnest desire to fulfil any and every obligation which the relation of citizenship imposes […] You should enlist to learn the use of arms, to become familiar with the means of securing, protecting and defending your own liberty. […] Whether you are or are not, entitled to all the rights of citizenship in this country has long been a matter of dispute to your prejudice. By enlisting in the service of your country at this trial hour, and upholding the National Flag, you stop the mouths of traducers and win applause even from the lips of ingratitude. Enlist and you will make this your country in common with all other men born in the country or out of it.[172]

White Americans had won their citizenship in 1776.[173] By fighting and dying for the Union, black men would prove their ultimate credentials for citizenship. Lincoln would acknowledge the special place of men who had died in service to their country in the Gettysburg Address

> We have come to dedicate a portion of that field as a final resting-place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this. But in a larger sense, we cannot dedicate, we cannot consecrate, we cannot hallow this ground. The brave men, living and dead who struggled here have consecrated it far above our poor power to add or detract. […] It is rather for us to be here dedicated to the great task remaining before us--that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion[174]

America would eventually come to recognise this sacrifice and specifically the role of black men had to play in it. Blacks would eventually receive what was due but the war was far from over.

The Union Army now accepted black soldiers but they were not equal to their white counterparts. They received less pay and could not be commissioned as officers. The situation of black soldiers reflected the nation at large; slaves might be freed but they were still not equal, even if the mood of the country was shifting.[175] The question brought Lincoln into contact for the first time with prominent black leaders including Fredrick Douglass. The question of the status of America's black population now became part of a larger issue- Reconstruction. Lincoln had talks with Southern Unionists throughout 1863 about writing new state constitutions.[176] It was Lincoln's wish to have the Southern states readmitted one by one under

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[172] Fredrick Douglass, *Why Should a Colored Man Enlist?,* Douglass Monthly, April 1863, http://www.frederick-douglass-heritage.org/why-should-a-colored-man-enlist/

[173] Of course black men had fought in these wars too.

[174] Abraham Lincoln, *Gettysburg Address*, http://avalon.law.yale.edu/19th_century/gettyb.asp

[175] Oakes, *Freedom National*, 379.

[176] This was part of Lincoln's Ten Percent Plan. Lincoln would allow states to be readmitted to the union if ten percent of their population (based on the number of voters in 1860's election.) swore an oath to the Union. The definition of population excluded black enfranchisement and while Lincoln stated that the new state constitutions must abolish slavery, laws could be made regarding the free black population helping with 'the revolution of labor'.

new state constitutions. Lincoln envisioned that the states themselves would have a largely free hand in the matter. Radicals and abolitionists viewed this as a serious issue, fearing that the white Southern Unionists would attempt to re-introduce slavery or at the very least write laws restricting the rights of freedmen. These concerns were not without cause. In March 1864 Lincoln had to personally step in, to ensure a proposed constitution in Louisiana did not attempt to re-establish slavery.[177] Lincoln's plan was very much a product of his reverence for the Constitution. The states should have continued power over their own affairs. When Congress sat again at the end of 1863, many Republicans looked for a different path. They proposed an amendment to the Constitution, prohibiting slavery for all of the country. A petition was organised by feminist campaigners Susan B. Anthony and Mary Cady Stanton. By the middle of 1864 it had 400,000 signatures. Lincoln refused advice to publicly support an amendment during his State of the Union speech. In the beginning some Democrats supported the amendment but as the election loomed, support fell away. The Thirteenth Amendment which outlawed slavery in America was passed by the Senate in April but could not pass the House in June. Congress did however in June abolish the Fugitive Slave Law. Congress further allowed for equal pay for black soldiers, for blacks to carry mail and testify in court. Congress' 38th Session spent much of its time arguing over what rights should be extended to blacks. The Congress had made strides in the right direction but there were to be further obstacles.

While the Radical Republicans were advancing their agenda in Congress, the Union Army was suffering. In March 1864 Ulysses S. Grant had become the commander of all Union armies. Grant, unlike his predecessors, was heavily aggressive and set about attacking Lee in Virginia. Grant's tactics left the Army of the Potomac with some 40,000 casualties.[178] Union morale plummeted and Lincoln sent peace proposals to Jefferson Davis. Lincoln was so worried he believed he would lose the upcoming election. At the end of May, Fremont, the former Commander in the West, was nominated by the Radical Republicans as a Presidential candidate because they thought Lincoln too conciliatory towards the Confederacy and feared he was not radical enough on the issues of free black rights. In the face of this party split, Lincoln called for the ratification of the Thirteenth Amendment. He also called off peace proposals, fearing that if the Union Army did not control the Confederacy by war's end, complete abolition could not occur. Lincoln now dreaded that slavery might survive the war.[179] Luckily for Lincoln, in

[177] Foner, *The Fiery Trial*, 283.
[178] Ibid., 302.
[179] Foner, *The Fiery Trial*, 306-307.

late August General Sherman won a great victory and occupied the vital hub of Atlanta. A few weeks later Lincoln made a deal that ensured Fremont dropped out of the race and a prominent critic, Montgomery Blair, was removed from Cabinet. Lincoln was still nervous of the election result but in the end won a resounding victory. After his victory, Lincoln threw himself into convincing the Border Unionists to ratify the Thirteenth Amendment. The Thirteenth Amendment would be passed on 31 January 1865 - to much applause. The day afterwards the new Attorney-General Salmon P. Chase admitted John Rock, a black lawyer, to the Bar of the Supreme Court. In the same month Lincoln commissioned the first black Army officer Martin Delany. Racial barriers were being broken down. Lincoln would give a speech on 11 April endorsing black voting rights. Three days later he would be assassinated.

Reconstruction would move ahead without Lincoln. His successor Andrew Johnson, a Southern Unionist, would split from the Republicans and oppose their plans for black citizenship and suffrage but in the end Congress passed the Fourteenth and Fifteenth Amendments, allowing for both. The passing of the Fourteenth Amendment conferred citizenship upon American's black population. Its first section stated

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[180]

This section conferred citizenship on not only blacks but on all born on U.S. soil.[181] The Amendment also explicitly referred to national and state citizenship. A citizen was both a U.S. citizen *and* one of the state he resided in. The Amendment forbade states from abridging the rights of citizens though, like the Constitution, refrained from defining the rights - save for life, liberty, property and due process. The wording of the Amendments tried to protect rights but failed to adequately explain these and again another opportunity to expand on the relationship between state and national citizenship was lost.

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[180] Amendment XIV, Section 1, *The Constitution of the United States*, http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html

[181] Indians were still excluded from this and were not considered American citizens. The claim to citizenship based on birthplace is referred to as birthright citizenship or *Jus soli*. *Jus soli* is in contrast to *Jus sanguinis* in which citizenship is dependent on the citizenship of the parents - most often determined by the citizenship of the father.

The issue of rights and the state-national relationship did not remain dormant for long. In 1873 the Slaughterhouse Cases reached the Supreme Court.[182] These cases were bound together to form one decision. The cases were initiated by butchers in New Orleans. The Louisiana state government had passed a law moving all of the city's butcheries into one building downstream on account of the butcheries polluting the Mississippi River. The butchers claimed that their Fourteenth Amendment rights were being violated as Louisiana was attempting to create a monopoly, thereby overriding these. By a vote of 5 to 4 the butchers were defeated. Associate Justice Samuel Miller wrote the opinion. Miller reasoned

> The next observation is more important in view of the arguments of counsel in the present case. It is that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.
>
> It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.[183]

Miller thus confirmed that there was both state and national citizenship and that they were distinct concepts. Miller's logic followed that if there were two separate concepts of citizenship then there must be two separate sets of privileges and immunities attached

> [The clause] speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same. The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States.*" It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and, with a purpose.
>
> Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection

[182] *Slaughterhouse Cases*, 83 U.S. 36. (1872).
[183] Ibid., 73-74.

> by this paragraph of the amendment [….] 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 have mentioned, from the States to the Federal government? And where it is declared that Congress Shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States […] We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them. Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government.[184]

The Court moved on to examine the rights of U.S. citizens which in the Court's opinion were few. U.S. citizenship granted only the right to navigate rivers, protection while outside U.S. jurisdiction and the ability to run for office. Civil rights were not a privilege of U.S. citizenship.[185] The Court decided that the butchers' rights were not infringed upon, firstly because the Fourteenth Amendment had not removed the power of the states to legislate for the rights of their citizens and secondly, their federal rights had not been violated because Louisiana's law had not abridged any federal rights.

The Slaughterhouse Cases had added clarity to the relationship between civil rights and state and national citizenship but came heavily down in favour of the states. The verdict in, supporting states' rights, allowed for the South's black codes, thus undoing the work of the Fifteenth Amendment and the Reconstruction era.[186] The Fifteenth Amendment was supposed to ensure black voting rights by prohibiting government at the federal and state levels from denying citizens' voting rights based on colour or race. Yet the Slaughterhouse verdict allowed the voting rights of African-Americans to be violated both *de jure* and *de facto*. The Fifteenth Amendment, though in practice less effective than it might have been, did make an impact on American citizenship. At first there was hesitancy to pass the Amendment but once passed, it strengthened the link between U.S. citizenship and voting rights.[187] The Amendment *de jure* protected voting rights and can be seen as an effort to better exemplify republican principles.

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[184] *Slaughterhouse Cases*, 83 U.S. 36. (1872), 74, 77-79.
[185] Ibid., 74, 79-82.
[186] Oakes, *The Radical and the Republican*, 282.
[187] The Radical Republicans wanted the Amendment on principle. Moderate Republicans were undecided but voted on strategic grounds. Now that blacks were citizens the South would gain extra seats in the House and the closeness of the Presidential election in 1868 convinced many Republicans that it was in the Party's best interest to embrace the black franchise. See Joseph B. James, *The Framing of the Fourteenth Amendment* (Urbana, IL: University of Illinois, 1965.) chp. 4-6.

Its association with the Fourteenth Amendment along with its wording 'The right of *citizens of the United States* [author's italics] to vote' meant that it was expected that every citizen could vote. It was their right as citizens to do so.[188]

Lincoln's death raises the question - would he have supported the Fourteenth and Fifteenth Amendments? The short answer is yes. Lincoln would have been wary of Southern anger towards these amendments and their effects on national harmony. Lincoln's conciliatory style in government however, meant that he again would have listened to public opinion and the opinion of his Party as he had so many times before. Lincoln in previous times had always acted on these voices despite his own personal feelings. He may have continued to voice his opinions, like those on gradual versus immediate emancipation, but he did not let it dictate policy.[189] Nor could Lincoln allow slavery to continue after witnessing the bravery of the Union's coloured troops. Once, when Lincoln rode past black soldiers, they broke ranks to celebrate him. Lincoln had tears in his eyes.[190] Lincoln's intentions may be revealed by William H. Johnson. Johnson was a black man who worked for Lincoln as a valet. He died from smallpox in January 1864 (a year before the Thirteenth Amendment passed). Lincoln had him buried in Arlington Cemetery with a headstone paid for by Lincoln himself. On it was inscribed "William H. Johnson. Citizen"

[188] Amendment XV, Section 1, *The Constitution of the United States*.
[189] Gabor Boritt, "Did He Dream of a Lily-White America?", in *The Lincoln Enigma: The Changing Faces of an American Icon*, ed. by Gabor Boritt (Oxford: Oxford University Press, 2001), 18-19.
[190] Smith, *Lincoln and the U.S. Colored Troops,* 93-94.; Gabor Boritt, "Did He Dream of a Lily-White America?", 19.

Epilogue

The Jim Crow Era saw the roll back of some of the victories of the Civil War. Black rights were impeded, but no one could deny that blacks were citizens. It would be wrong however, to view the passing of the Reconstruction Amendments as the end of the discussion of American citizenship. At the same time as discussion of African-American citizenship, there had been some about the status of Native-Americans as citizens. The Constitution implicitly thought they were not citizens as they were not counted with respect to representation or taxation. Native-American tribes were considered a separate sovereign people. The Fourteenth Amendment had made citizens of all those born or naturalised in the U.S. but this was widely accepted to exclude Native Americans - a decision confirmed by a Senate committee in 1870. The decision was backed up by *Elk v. Wilkins* (1884). This Supreme Court ruling determined that Indians could not be citizens merely because they lived amongst white people. Native-Americans could still become U.S. citizens by the process of naturalisation. Native-Americans would be given birthright U.S. citizenship in 1924 with the passing of the Indian Citizenship Act. Citizenship was also discussed immediately prior to/after the Civil War with regards to the wave of Chinese immigration to California. The large number of Chinese immigrants frightened white Californians and discrimination drove the Chinese from lucrative mining jobs. Fredrick Douglass himself linked the discrimination of the Chinese to the struggle of African-Americans. Chinese immigration was so feared that in 1882 the Chinese Exclusion Act was passed, banning Chinese labourers from immigrating to the U.S. The Act was not repealed until 1943. The Chinese Exclusion Act led to a number of Supreme Court cases. *United States v. Wong Kim Ark* (1898) heard that Wong Kim Ark was born to Chinese parents who resided in the U.S. Born in San Francisco, he left to visit China in 1890 and was denied re-entry to the U.S on the basis of the Chinese Exclusion Act. The government maintained that because he was born to non-U.S. citizens he was not a citizen. Wong challenged this under the Fourteenth Amendment. The Supreme Court ruled in his favour stating that the first clause of the amendment gave those born in the U.S. who adhered to U.S. jurisdiction (law), automatic qualification for citizenship. The case would become a precedent for the application of the Fourteenth Amendment and would further strengthen the principle of birthright citizenship.

The Supreme Court would deal with a number of cases involving the Fourteenth Amendment following the Civil War. The most important one would be *Plessy v. Ferguson* (1896). Homer Plessy brought a lawsuit on behalf of a black citizens' group in New Orleans. The suit alleged

that a state law creating separate railcars for blacks and whites violated their rights as U.S. citizens. The Supreme Court disagreed. In a seven to one majority it ruled that Louisiana law did not violate the rights of citizens as long as facilities were equal. This ruling ushered in the doctrine of "separate but equal" in which racial segregation was legalised. This decision would not be repudiated until 1954 in *Brown v. Board of Education.* Indeed the end of the 19th Century would not see the end of Fourteenth Amendment cases. In 1967 the issue of dual citizenship was brought up in *Afroyim v Rusk.* The U.S. government sought to revoke the citizenship of Bey Afroyim. Afroyim was a naturalised citizen originating from Poland. He had then moved to Israel. He had voted in an Israeli election, thus the government claimed that he had automatically lost citizenship under the Nationality Act of 1940.[1] The Supreme Court ruled that Congress had no power to remove citizenship. Only if a citizen repudiated his citizenship could U.S. citizenship be removed.[2] This ruling was followed up by *Vance v. Terrazas* (1980). Laurence Terrazas was born in the U.S. His father was Mexican and because of this Laurence was also a Mexican citizen. He attended a Mexican university and while there, obtained a certificate of Mexican nationality. To obtain the certificate, Terrazas signed a statement that he was repudiating his allegiance to any foreign government. When confronted by American officials he insisted that he never intended to give up any rights afforded to him by virtue of his American citizenship. The State Department still took away his citizenship. Terrazas appealed. The Supreme Court reaffirmed that Congress could not revoke citizenship but ruled that Terrazas had voluntarily renounced his U.S. citizenship on the balance of probabilities (preponderance of evidence) and that this was a standard for any future cases.[3]

The above cases are only a handful of Supreme Court decisions regarding citizenship and/or the Fourteenth Amendment. Almost as soon as the Reconstruction Amendments were passed, cases came forth to both dispute the Amendments and seek their protection. The continuing cases show that the concept of citizenship was forever changing. The creation of African-American citizenship did not mean that American citizenship was set in stone. Once the matter of black citizenship was (supposedly) solved, the conversation moved onto other ethnic groups. Technology advanced, the world became smaller and people travelled more. Residence in

[1] The fourth chapter of this Act included a number of ways U.S. citizenship could be lost including foreign military desertion or voluntarily joining another nation's armed forces.
[2] The Expatriation Act (1868) allowed for U.S. citizens to void their citizenship on voluntary grounds. The Afroyim ruling effectively declared the Nationality Act as unconstitutional. The ruling also allowed for multi/dual citizenship to be widely accepted by the U.S.
[3] Terrazas' lawyers argued that Congress and the State Department must prove that Terrazas intended to renounce his citizenship based on irrefutable evidence.

foreign countries became more common and thus the issues surrounding dual citizenship become more apparent. In today's world the conversation continues. As the humanities and the wider world take a more cultural turn, citizenship becomes newly defined. Edward Bates, amongst others, argued that citizenship and political rights are not mutually inclusive but today many people would argue that political rights are an essential part of citizenship. Others would argue that the right to a free education is now part of citizenship. The benefits of citizenship might well be expanding but citizenship itself could be diminished. A Donald Trump presidency could see the end of birthright citizenship and more strident requirements for Muslims applying for U.S. citizenship. The expansion of the rights associated with citizenship could ironically hurt it as people become more worried about the burden new citizens place on the economy. America is not alone in this dilemma. Europe's recent influx of migrants and refugees has called into question its effect on Europe's economy. It has been asked whether these new arrivals can integrate into Europe's liberal culture. Migrants have been asked "can you truly be citizens?" Another side of this question is that of Europeans now forced to wonder what makes them citizens. Who or what are they? This is especially important in France where citizenship is tied closely to Enlightenment and Republican ideals, embodied by the turbulent events in France in the late 18th/early 19th century. French Jews have also begun to question their French citizenship, wondering if it might be better to become Israelis.[4] Given the ever evolving concept of citizenship over a number of cultures and countries, it is wrong to say that this research can completely define American citizenship in the historical sense. It is a mere sliver of a complex issue. Research into citizenship however, remains important to allow us to be better informed, to be better aware of the historical implications of citizenship and how this might inform our conversations tomorrow.

[4] Jeffrey Goldberg, "French Prime Minister warns if the Jews flee France the Republic will be judged a failure," *The Atlantic*, January 10, 2015.

Conclusion

The history of early American citizenship is an underdeveloped area of scholarship. Citizenship is a concept which rarely came under scrutiny unless there were clashes regarding rights or allegiance and other issues associated with citizenship. To solve these issues surrounding citizenship, new discussions of what constituted citizenship and who qualified for it were brought to the fore. In this way, American citizenship was not synthesised out of a constant dialogue of ideas and concepts, but rather coalesced from a range of issues, rulings and challenges.

The early development of American citizenship emerged due to concerns of the Thirteen Colonies regarding the perceived overstep of parliamentary rights to impose law beyond Britain. American polemicists continued to work under the framework of English subjectship, contesting that allegiance to the King did not equate to an allegiance to Parliament. As tensions between the colonists and George III gave way to war, American polemicists began to focus on the principle of volitional allegiance- allegiance that was dependent on the individual - not the Sovereign. War between the Colonies and Britain ceased but the battle over allegiance was not solved and proved problematic twenty years later. In the interim, the American government introduced liberal laws of naturalisation reflecting both the emphasis on freedom in American values and the need to readily admit foreigners to the protections that citizenship afforded. Though America's naturalisation laws were liberal, the Constitution placed restrictions on naturalised citizens from obtaining federal political offices immediately, exemplifying the consensus that naturalised citizens needed time to ensure their love of republican values. The limits placed on political office displayed the Founders' wish that these offices be held by citizens for whom citizenship had not only a legal status but who lived up to an idealised form of republicanism.

The major issue of the post-Revolutionary period was that Congress failed to define two things. Firstly, Congress failed to explicitly define the privileges and immunities of citizenship. Secondly, while creating national citizenship, Congress declined to specify the relationship between national and state citizenship. This caused severe problems in later decades regarding African-American citizenship. Both sides engaged in prolonged debates surrounding the specific privileges and immunities of citizens and whether or not these were either required for citizenship, bestowed by citizenship or had no bearing on citizenship. No sooner had America defined its naturalisation policies, than allegiance once again became an issue of pressing

concern. The British practice of impressment justified by indefeasible allegiance, caused great tension between the two nations. The American government strongly denied that the principle had standing and American jurists continued to build upon theories developed during the Revolution. Allegiance was one of several issues left unresolved between Britain and America following the Revolution. Other issues would be solved at Ghent, but the issue of allegiance remained and, frustratingly, due to the warming of Anglo-American relations it was never fully resolved.

To this point the development of American citizenship had been greatly influenced by external factors - but the next phase required Americans to look inwards. The question of African-American citizenship created confusion over the rights gained by citizenship. Those against African-American citizenship drew from the idea of the perfect "republican citizen." These men argued that because free blacks possessed so few of the citizenship features, most importantly voting rights, that they could not obtain citizenship. Pro African-American citizenship figures pointed to the privileges and immunities of citizenship. These were ill defined but voting rights had never been a test for citizenship, nor had citizenship automatically conferred voting rights. Women and children were citizens but were not allowed to vote until the 1830s and 1840s. The male franchise was greatly restricted by property qualifications - but all white males were citizens. The question of African-American citizenship struggled to find any resolution until the Dred Scott case because issues of citizenship were dealt with internally within the individual states and their courts. The Dred Scott ruling was the first widely disseminated opinion on African-American citizenship from the highest judicial authority in the country. It sought not only to rule on citizenship, but slavery, and the power of Congress to regulate it. Chief Justice Taney had hoped to solve the issue of citizenship and the expansion of slavery westwards but the decisions only inflamed the sectarian divide, eventually leading to the outbreak of the Civil War.

Previous discussions on African-American citizenship were always born of the underlying question, were free blacks suitable or fit for American citizenship? This question was answered decisively by America's black population who served with distinction during the Civil War. Citizenship consists of rights and duties. It is widely perceived that there is no higher duty then serving one's country and no greater sacrifice than dying for it. Given the Emancipation Proclamation greatly increased the number of free blacks in the states and the determination of blacks to prove their love for the Union, it was difficult to continue to deny them citizenship.

Thus the passing of the Fourteenth Amendment secured African-American citizenship and the Fifteenth Amendment secured *de jure* the black franchise.

This thesis has explored the development of America from the Revolution to the passing of the Reconstruction Amendments. It has built on previous scholarship to add to the understanding of the conceptualisation of early American citizenship and has added to scholarship by investigating the continued differences in allegiance between America and Britain which did not cease with the Treaty of Paris, but with the Treaty of Ghent. Even then the clash of volitional and perpetual allegiance was not solved but the Treaty of Ghent did signal the last period in which Anglo-American discord was high. Included in this research is a study into the relationship between rights, free blacks and citizenship which surveys early ideas regarding the suitability of blacks for citizenship and how this delayed African-American citizenship from coming to fruition.

Though this thesis has contributed to the understanding of American citizenship, there remain further avenues along which to investigate citizenship. Linda Kerber in her Presidential Address at the American Historical Association, implored historians to seek out new ways of addressing citizenship and its associated issues, especially statelessness

> Statelessness is a subject that most historians of the United States have treated as belonging to other national histories—Jews, Gypsies, Palestinians. That U.S. history is taken to be innocent of engagement with the subject is yet another example of the habits of American exceptionalism. Since the *meanings* of statelessness have changed over time, the subject is one that should command the attention of historians as well as humanitarians.[1]

Statelessness would be an excellent starting point for new studies into Native Americans and their status within colonial and post-Revolutionary America. As the study of history has turned towards the cultural, new frameworks can be used to investigate citizenship. Jobs, wages, education, immigration, international law, non-state actors and geography are areas of focus which could contribute to the understanding of American citizenship. As groups like the European Union bring countries closer together and break down borders, it is important to preserve an historical understanding of citizenship. Furthermore, understanding historical concepts of citizenship can allow people to shape their understanding of citizenship in the future.

[1] Linda Kerber, "The Stateless as the Citizen's Other: A View from the United States" Presidential address delivered at the 121st annual meeting of the American Historical Association, Atlanta, GA, 2007.

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